COURT FILE NUMBER	2501-06120
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY

Clerk's Stamp

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., and SUNTERRA ENTERPRISES INC.

DOCUMENT

BOOK OF AUTHORITIES
TO THE WRITTEN ARGUMENT OF NATIONAL BANK OF CANADA
FOR THE APPLICATION TO BE HEARD ON DECEMBER 4 AND 5, 2025 AT 10:00 A.M.

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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LIST OF AUTHORITIES

Statutes

1. *Alberta Rules of Court*, AR 124/2010, at section 3.44;
2. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, at sections 2, 135(1.1), and 178(d);
3. *Bills of Exchange Act*, RSC 1985, c B-4, at sections 129, 132, and 165;
4. *Business Corporations Act*, RSA 2000, c B-9, at sections 19, 122, 239(b)(iii)(B), 239(b)(iv), and 242(1);
5. *Canada Evidence Act*, RSC 1985, c C-5; at section 5(2);
6. *Companies Creditors' Arrangement Act*, RSC 1985, c C-36, at sections 19(1) and 20(1);
7. *Contributory Negligence Act*, RSA 2000, c C-27, at sections 1(1), 2(2), and 3.1;
8. *Criminal Code*, RSC 1985, c C-46, at section 380(1);
9. *Negligence Act*, RSO 1990, c N.1;
10. *Tort-Feasors Act*, RSA 2000, c T-5, at section 3(3);

Case Law

11. *369413 Alberta Ltd. v. Pocklington*, 2000 ABCA 307 (CanLII);
12. *Addison & Leyen Ltd. v Fraser Milner Casgrain LLP*, 2013 ABQB 473;
13. *Addison & Leyen Ltd v Fraser Milner Casgrain LLP*, 2014 ABCA 230;
14. *Agribrands Purina Canada Inc v Kasamekas*, 2011 ONCA 460, 106 OR (3d) 427;
15. *Air Canada, Re*, 2004 CanLII 6674 (ON SC);
16. *Air Canada v M & L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 SCR 787;
17. *Auctioneers' Assn of Alberta v. Hunter*, 2002 ABQB 28;
18. *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560;
19. *Bank of Nova Scotia v. Sharp (1975)*, 57. D.L.R. (3d) 260 (B.C.C.A.);
20. *Blackwater v. Plint*, 2005 SCC 58 (CanLII), [2005] 3 SCR 3;
21. *Bonner v. Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161 (C.A.);
22. *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, 1997 CanLII 307 (SCC), [1997] 3 SCR 1210;

23. *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8;

24. *Central R. Co. of Venezuela v. Kisch (1867)*, L.R. 2 H.L. 99;

25. *Century v New World Eng. Corp.*, 2013 ONSC 2140 (CanLII);

26. *Chartered Professional Accountants of Alberta v Neilson*, 2018 ABQB 170;

27. *CIBC v. Millard*, 2001 BCSC 982;

28. *Citadel General Assurance Co v Lloyds Bank Canada*, 1997 CanLII 334 (SCC), [1997] 3 SCR 80;

29. *Colborne Capital Corporation v. 542775 Alberta Ltd.*, 1995 CanLII 9100 (AB KB);

30. *Colborne Capital Corporation v. 542775 Alberta Ltd.*, 1999 ABCA 14;

31. *Condominium Corporation No. 0321365 v MCAP Financial Corporation*, 2012 ABCA 26;

32. *Confederation Treasury Services Ltd. (Re)*, [1997] SCCA No. 229;

33. *Confederation Treasury Services Ltd. (Re) (In Bankruptcy)*, 1997 CanLII 3544 (ONCA);

34. *Conforti Holdings Ltd. (In the matter of the proposal to creditors of)*, 2022 ONSC 3264;

35. *Corporation Agencies, Limited v. Home Bank of Canada*, 1927 CanLII 471 (UK JCPC);

36. *Dean v. Kociniak*, 2001 ABQB 412;

37. *Dhaliwal v Canada (Public Safety and Emergency Preparedness)*, 2025 CanLII 49485 (CA IRB);

38. *Driving Force Inc v I Spy-Eagle Eyes Safety Inc*, 2022 ABCA 25;

39. *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 SCR 41;

40. *FBI Foods Ltd. v. Glassner*, 2001 BCSC 151, 86 B.C.L.R. (3d) 136;

41. *Gardner v. Newton (1916)*, 29 D.L.R. 276, 10 WWR 51 (Man. K.B.);

42. *HSBC Bank Canada v. Fuss*, 2013 ABCA 235 (CanLII);

43. *JBRO Holdings Inc v Dynasty Power Inc*, 2022 ABCA 140 (CanLII);

44. *Location Bristar Idealease Inc. (Syndic de)*, 2012 QCCS 211;

45. *McBride's Limited v. Rooke*, 1941 CanLII 198 (SK KB);

46. *Mennillo v. Intramodal Inc.*, 2016 SCC 51 (CanLII), [2016] 2 SCR 438);

47. *Midwest Amusement Park, LLC v. Cameron Motorsports Inc.*, 2018 ONSC 4549;

48. *Mikealice Management Corp. and Dr. Michael Laiv. De Thomas Financial Corp. et al*, 2003 CanLII 43753 (ON SC);

49. *National Bank of Canada v Merit Energy Ltd.*, 2001 ABQB 583 (CanLII);

50. *National Bank of Canada v Sunterra Food Corporation*, 2025 ABKB 599;

51. *National Bank of Canada v Tanev*, 2004 CanLII 8031 (ONSC);

52. *Peek v. The Queen*, 2007 TCC 152 (CanLII);

53. *Peninsular and Oriental Steam Navigation Company v. Eastern Shipping Company*, 1923 CanLII 676 (UK JCPC);

54. *Peters v Remington*, 2004 ABCA 5;

55. *Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd*, 2017 ABCA 378;

56. *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87;

57. *R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42 (CanLII)*, [2011] 3 SCR 45;

58. *R. v. Kodimyala*, 2020 BCCA 275;

59. *R. v. Olan*, 1978 CanLII 9 (SCC);

60. *R. v Théroux*, [1993] 2 S.C.R. 5;

61. *Re Froment; Alta. Lumber Co. v. Department of Agriculture*,1925 CanLII 313 (AB KB), [1925] 2 W.W.R. 415 (Alta. S.C.);

62. *Re SemCanada Crude Company (Orleans Energy Ltd.)*, 2012 ABQB 495;

63. *Royal Bank of Canada c. Capital Factors Inc.*, 2013 QCCS 2214;

64. *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719 (CanLII);

65. *Ryan v Dew Enterprises Ltd.*, 2014 NLCA 11;

66. *Said v Butt*, [1920] 3 KB 497;

67. *SemCanada Crude Company (Celtic Exploration Ltd. #2, Re)*, 2012 ABQB 489;

68. *Siegel et al v. Hibbert et al*, 2012 ONSC 2767;

69. *Sorrel 1985 Limited Partnership v. Sorrel Resources Ltd.*, 2000 ABCA 256;

70. *Swanby v Tru Square Homes Ltd.*, 2023 ABCA 224;

71. *Wekerle v. Arbour*, 2025 ONSC 1456; and,

Other Authorities

72. M.H. Ogilvie, *Canadian Banking Law*, 2nd ed. (Toronto: Caswell, 1998).

TAB 1



ALBERTA

RULES OF COURT

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(b) neither the defendant nor the co-defendant need file a pleading in respect of a claim or defence under those Acts unless the Court otherwise orders, and

(c) a third party claim need not be filed and served on the co-defendant.

(2) The notice claiming contribution must be filed and served on the co-defendant within 20 days after the date on which the defendant files the statement of defence or demand for notice.

(3) A claim under subrule (1) must be determined at the trial of the plaintiff's claim against the defendant, or if there is no trial, as directed by the Court.

Subdivision 6
Third Party Claims

When third party claim may be filed

3.44 A defendant or third party defendant may file a third party claim against another person who

(a) is or might be liable to the party filing the third party claim for all or part of the claim against that party,

(b) is or might be liable to the party filing the third party claim for an independent claim arising out of

(i) a transaction or occurrence or series of transactions or occurrences involved in the action between the plaintiff and the defendant, or

(ii) a related transaction or occurrence or series of related transactions or occurrences,

or

(c) should be bound by a decision about an issue between the plaintiff and the defendant.

Form of third party claim

3.45 A third party claim must

(a) be in Form 16,

(b) comply with the rules about pleadings in Part 13 *[Technical Rules]*, Division 3 *[Pleadings]*,

(c) be filed and served on the plaintiff and the third party defendant, whether or not the third party defendant is already a party to the action,

(i) within 6 months after the date on which the defendant filed a statement of defence or demand for notice, and

(ii) before judgment is entered against the defendant or the defendant is noted in default,

and

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to September 29, 2025

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À jour au 29 septembre 2025

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bankrupt means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; (*failli*)

bankruptcy means the state of being bankrupt or the fact of becoming bankrupt; (*faillite*)

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a person; (*agent négociateur*)

child [Repealed, 2000, c. 12, s. 8]

claim provable in bankruptcy, ***provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor; (*réclamation prouvable en matière de faillite* ou *réclamation prouvable*)

collective agreement, in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; (*convention collective*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

common-law partnership means the relationship between two persons who are common-law partners of each other; (*union de fait*)

corporation means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; (*personne morale*)

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; (*tribunal*)

creditor means a person having a claim provable as a claim under this Act; (*créancier*)

affidavit Sont assimilées à un affidavit une déclaration et une affirmation solennelles. (*affidavit*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une personne. (*bargaining agent*)

banque

a) Les banques et les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*;

b) les membres de l'Association canadienne des paiements créée par la *Loi canadienne sur les paiements*;

c) les sociétés coopératives de crédit locales définies au paragraphe 2(1) de la loi mentionnée à l'alinéa b) et affiliées à une centrale — au sens du même paragraphe — qui est elle-même membre de cette association. (*bank*)

bien Bien de toute nature, qu'il soit situé au Canada ou ailleurs. Sont compris parmi les biens les biens personnels et réels, en droit ou en equity, les sommes d'argent, marchandises, choses non possessoires et terres, ainsi que les obligations, servitudes et toute espèce de domaines, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, sur des biens, ou en provenant ou s'y rattachant. (*property*)

biens [Abrogée, 2004, ch. 25, art. 7]

biens aéronautiques [Abrogée, 2012, ch. 31, art. 414]

cession Cession déposée chez le séquestre officiel. (*assignment*)

conjoint de fait La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

conseiller juridique Toute personne qualifiée, en vertu du droit de la province, pour donner des avis juridiques. (*legal counsel*)

contrat financier admissible Contrat d'une catégorie prescrite. (*eligible financial contract*)

convention collective S'agissant d'une personne insolvable, s'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre elle et l'agent négociateur. (*collective agreement*)

créancier Personne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi. (*creditor*)

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

R.S., 1985, c. B-3, s. 135; 1992, c. 1, s. 20, c. 27, s. 53; 1997, c. 12, s. 89.

Scheme of Distribution

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the

Réclamations éventuelles et non liquidées

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

Rejet par le syndic

(2) Le syndic peut rejeter, en tout ou en partie, toute réclamation, tout droit à un rang prioritaire dans l'ordre de collocation applicable prévu par la présente loi ou toute garantie.

Avis de la décision

(3) S'il décide qu'une réclamation est prouvable ou s'il rejette, en tout ou en partie, une réclamation, un droit à un rang prioritaire ou une garantie, le syndic en donne sans délai, de la manière prescrite, un avis motivé, en la forme prescrite, à l'intéressé.

Effet de la décision

(4) La décision et le rejet sont définitifs et péremptoires, à moins que, dans les trente jours suivant la signification de l'avis, ou dans tel autre délai que le tribunal peut accorder, sur demande présentée dans les mêmes trente jours, le destinataire de l'avis n'interjette appel devant le tribunal, conformément aux Règles générales, de la décision du syndic.

Rejet total ou partiel d'une preuve

(5) Le tribunal peut rayer ou réduire une preuve de réclamation ou de garantie à la demande d'un créancier ou du débiteur, si le syndic refuse d'intervenir dans l'affaire.

L.R. (1985), ch. B-3, art. 135; 1992, ch. 1, art. 20, ch. 27, art. 53; 1997, ch. 12, art. 89.

Plan de répartition

Priorité des créances

136 (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant :

bankrupt shall, until the terms, conditions or judgment is satisfied,

(a) give the trustee such information as he may require with respect to his earnings and after-acquired property and income, and

(b) not less than once a year, file in the court and with the trustee a statement verified under oath showing the particulars of any property or income he may have acquired subsequent to the order for his discharge,

and the trustee or any creditor may require the bankrupt to attend for examination under oath with respect to the facts contained in the statement or with respect to his earnings, income, after-acquired property or dealings.

Penalty for failure to comply

(2) Where the bankrupt fails to give information or to file a statement as required by subsection (1), to attend for examination when required to do so or to answer all questions fully and accurately with respect to his earnings, income, after-acquired property or dealings, the court may on the application of the trustee or of any creditor revoke the order of discharge.

Trustee to distribute funds payable under conditional discharge

(3) Where a conditional order of discharge of a bankrupt is made providing for payment of a further dividend or sum of money by the bankrupt, all payments on account thereof shall be made to the trustee for distribution to the creditors.

R.S., c. B-3, s. 146.

177 [Repealed, 2000, c. 12, s. 17]

Debts not released by order of discharge

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;

à un jugement, le failli doit, jusqu'à ce qu'il ait rempli ces conditions ou satisfait à ce jugement :

a) fournir au syndic les renseignements que ce dernier peut exiger à l'égard de ses gains et de ses biens et revenus subséquemment acquis;

b) au moins une fois chaque année, produire au tribunal et au syndic une déclaration attestée sous serment indiquant les détails de tous biens ou revenus qu'il peut avoir acquis subséquemment à sa libération.

Le syndic ou tout créancier peut exiger que le failli se présente pour être interrogé sous serment relativement aux faits contenus dans la déclaration, ou à ses gains, son revenu, ses biens postérieurement acquis ou ses opérations.

Peine en cas de manquement

(2) Lorsque le failli ne fournit pas les renseignements ou ne produit pas la déclaration qu'exige le paragraphe (1), ne se présente pas à l'examen lorsqu'il en est requis ou ne répond pas pleinement et exactement à toutes les questions qui se rapportent à ses gains, son revenu, ses biens postérieurement acquis ou ses opérations, le tribunal peut, à la demande du syndic ou d'un créancier, annuler l'ordonnance de libération.

Le syndic doit distribuer les fonds payables aux termes d'une libération conditionnelle

(3) Lorsqu'une ordonnance conditionnelle de libération d'un failli est rendue prescrivant que ce dernier paie un dividende ou une somme d'argent supplémentaire, tout versement à valoir sur ce dividende ou cette somme est fait au syndic pour distribution aux créanciers.

S.R., ch. B-3, art. 146.

177 [Abrogé, 2000, ch. 12, art. 17]

L'ordonnance de libération ne libère pas des dettes

178 (1) Une ordonnance de libération ne libère pas le failli :

a) de toute amende, pénalité, ordonnance de restitution ou toute ordonnance similaire infligée ou rendue par un tribunal, ou de toute autre dette provenant d'un engagement ou d'un cautionnement en matière pénale;

a.1) de toute indemnité accordée en justice dans une affaire civile :

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant de celles-ci;

(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).

b) de toute dette ou obligation pour pension alimentaire;

c) de toute dette ou obligation aux termes de la décision d'un tribunal en matière de filiation ou d'aliments ou aux termes d'une entente alimentaire au profit d'un époux, d'un ex-époux ou ancien conjoint de fait ou d'un enfant vivant séparé du failli;

d) de toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors qu'il agissait, dans la province de Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

e) de 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 qui découle d'une réclamation relative à des capitaux propres;

f) de l'obligation visant le dividende qu'un créancier aurait eu droit de recevoir sur toute réclamation prouvable non révélée au syndic, à moins que ce créancier n'ait été averti ou n'ait eu connaissance de la faillite et n'ait omis de prendre les mesures raisonnables pour prouver sa réclamation;

g) de toute dette ou obligation découlant d'un prêt consenti ou garanti au titre de la *Loi fédérale sur les prêts aux étudiants*, de la *Loi fédérale sur l'aide financière aux étudiants* ou de toute loi provinciale relative aux prêts aux étudiants lorsque la faillite est survenue avant la date à laquelle le failli a cessé d'être un étudiant, à temps plein ou à temps partiel, au regard de la loi applicable, ou dans les sept ans suivant cette date;

g.1) de toute dette ou obligation découlant d'un prêt octroyé au titre de la *Loi sur les prêts aux apprentis* lorsque la faillite est survenue avant la date à laquelle le failli a cessé, au regard de cette loi, d'être un apprenti admissible, au sens de cette loi, ou dans les sept ans suivant cette date;

h) de toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas a) à 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)

Ordonnance de non-application du paragraphe (1)

(1.1) Lorsque le failli qui a une dette visée aux alinéas (1)g) ou g.1) n'est plus un étudiant à temps plein ou à

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Bills of Exchange Act

Loi sur les lettres de change

R.S.C., 1985, c. B-4

L.R.C. (1985), ch. B-4

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same manner and addressed in the same way as is provided by this Part for notice of dishonour.

R.S., c. B-5, s. 126.

Liabilities of Parties

Equitable assignment

126 A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.

R.S., c. B-5, s. 127.

Engagement by acceptance

127 The acceptor of a bill by accepting it engages that he will pay it according to the tenor of his acceptance.

R.S., c. B-5, s. 128.

Estoppel

128 The acceptor of a bill by accepting it is precluded from denying to a holder in due course

(a) the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill;

(b) in the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement; or

(c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse, but not the genuineness or validity of his endorsement.

R.S., c. B-5, s. 129.

Drawer

129 The drawer of a bill by drawing it

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken; and

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

R.S., c. B-5, s. 130.

Liability by signature

130 No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such, but when a person

Obligations des parties

Non-transfert de fonds

126 La lettre n'a pas pour effet de transférer des fonds au tiré pour son paiement, et le tiré qui ne consent pas à l'acceptation prévue par la présente loi n'est pas obligé par l'effet.

S.R., ch. B-5, art. 127.

Engagement par acceptation

127 L'accepteur d'une lettre s'engage à la payer suivant les termes de l'acceptation.

S.R., ch. B-5, art. 128.

Droits refusés à l'accepteur

128 L'accepteur d'une lettre ne peut opposer au détenteur régulier ce qui suit :

a) l'existence du tireur, l'authenticité de sa signature, sa capacité et son autorité de tirer la lettre;

b) dans le cas d'une lettre payable à l'ordre du tireur, la capacité de celui-ci, à ce moment-là, d'endosser, sauf l'authenticité ou la validité de son endossement;

c) dans le cas d'une lettre payable à l'ordre d'un tiers, l'existence du preneur et sa capacité, à ce moment-là, d'endosser, sauf l'authenticité ou la validité de son endossement.

S.R., ch. B-5, art. 129.

Obligations du tireur

129 La personne qui tire une lettre, ce faisant :

a) promet que, sur présentation en bonne et due forme, elle sera acceptée et payée à sa valeur, et s'engage, en cas de refus, à indemniser le détenteur ou tout endosseur forcé de l'acquitter, si les formalités obligatoires à la suite d'un refus ont été dûment remplies;

b) ne peut opposer au détenteur régulier l'existence du preneur et sa capacité, à ce moment-là, d'endosser.

S.R., ch. B-5, art. 130.

Effet de la signature

130 Nul n'est responsable comme tireur, endosseur ou accepteur d'une lettre s'il ne l'a pas signée à ce titre; mais

signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers.

R.S., c. B-5, s. 131.

le signataire d'une lettre à un titre autre que celui de tireur ou d'accepteur contracte les obligations d'un endosseur vis-à-vis d'un détenteur régulier et est considéré comme un endosseur pour l'application de la présente loi.

S.R., ch. B-5, art. 131.

Trade-name or assumed name

131 (1) Where a person signs a bill in a trade-name or assumed name, he is liable thereon as if he had signed it in his own name.

Firm name

(2) The signature of the name of a firm is equivalent to the signature, by the person so signing, of the names of all persons liable as partners in that firm.

R.S., c. B-5, s. 132.

Nom commercial ou d'emprunt

131 (1) La personne qui signe une lettre d'un nom commercial ou d'emprunt contracte les mêmes obligations que si elle l'avait signée de son propre nom.

Raison sociale

(2) La signature au moyen d'une raison sociale équivaut à la signature, par le signataire, des noms de toutes les personnes responsables à titre d'associés de la société de personnes.

S.R., ch. B-5, art. 132.

Endorser

132 The endorser of a bill by endorsing it, subject to the effect of any express stipulation authorized by this Act,

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken;

(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements; and

(c) is precluded from denying to his immediate or a subsequent endorsee that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto.

R.S., c. B-5, s. 133.

Obligations de l'endosseur

132 Sous réserve des stipulations expresses autorisées par la présente loi, la personne qui endosse une lettre :

a) promet que, sur présentation en bonne et due forme, elle sera acceptée et payée à sa valeur, et s'engage, en cas de refus, à indemniser le détenteur ou l'endosseur postérieur forcé de l'acquitter, si les formalités obligatoires à la suite d'un refus ont été dûment remplies;

b) ne peut opposer au détenteur régulier l'authenticité et la régularité, à tous égards, de la signature du tireur et de tous les endossements antérieurs;

c) ne peut opposer à son endossataire immédiat ou à un endossataire postérieur le fait que la lettre, au moment de son endossement, était valide et avait une existence légale, et qu'il avait alors un titre valable.

S.R., ch. B-5, art. 133.

Measure of damages

133 Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, are

(a) the amount of the bill;

(b) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case; and

(c) the expenses of noting and protesting.

R.S., c. B-5, s. 134.

Montant des dommages-intérêts

133 En cas de refus d'une lettre, la somme des éléments suivants est réputée constituer le montant des dommages-intérêts :

a) le montant de la lettre;

b) les intérêts sur ce montant à compter du jour de la présentation au paiement, si la lettre est payable sur demande, ou du jour de l'échéance, dans tout autre cas;

c) les frais du protêt, y compris de la notation.

S.R., ch. B-5, art. 134.

Effect of destruction

163.5 If an eligible bill is destroyed in accordance with by-laws, rules or standards made under the *Canadian Payments Act* and there is an official image of the bill,

(a) a person's rights and powers in relation to the eligible bill are not affected by reason only that the person does not possess it;

(b) the destruction does not affect any person's rights, powers, duties and liabilities in relation to the eligible bill; and

(c) the eligible bill is not considered to be lost or to have been materially altered or intentionally cancelled.

2007, c. 6, s. 398.

Effet de la destruction

163.5 Si la lettre admissible est détruite en conformité avec les règlements administratifs, règles ou normes pris sous le régime de la *Loi canadienne sur les paiements* et qu'il en existe une image officielle :

a) les droits et pouvoirs conférés à toute personne relativement à la lettre ne sont pas touchés du seul fait qu'elle n'est pas en possession de la lettre;

b) les droits et pouvoirs conférés et les obligations imposées à toute personne relativement à la lettre ne sont pas touchés du seul fait de sa destruction;

c) la lettre ne doit pas être considérée perdue, intentionnellement annulée ou altérée de façon substantielle.

2007, ch. 6, art. 398.

Warranty

163.6 (1) A bank that creates or purports to create an official image of an eligible bill, or on whose behalf an official image of an eligible bill is created or purported to be created, warrants that the official image or the purported official image, as the case may be, was created in accordance with by-laws, rules or standards made under the *Canadian Payments Act* and that it accurately represents the eligible bill.

Garantie

163.6 (1) La banque qui a créé ou qui paraît avoir créé une image officielle d'une lettre admissible, ou au nom de laquelle l'image officielle est créée ou paraît avoir été créée, garantit qu'elle a été créée en conformité avec les règlements administratifs, règles ou normes pris sous le régime de la *Loi canadienne sur les paiements* et qu'elle représente avec exactitude la lettre admissible.

Damages

(2) Any person who has suffered damages as a result of a breach of the warranty has a cause of action for damages against the bank.

2007, c. 6, s. 398.

Dommages-intérêts

(2) Quiconque a subi des dommages causés par tout manquement de la banque à l'égard de la garantie est fondé à intenter une action en dommages-intérêts contre la banque.

2007, ch. 6, art. 398.

PART III

Cheques on a Bank

Definition of "bank"

164 In this Part, ***bank*** includes every member of the Canadian Payments Association established under the *Canadian Payments Act* and every local cooperative credit society, as defined in that Act, that is a member of a central, as defined in that Act, that is a member of the Canadian Payments Association.

R.S., 1985, c. B-4, s. 164; 2001, c. 9, s. 586.

PARTIE III

Chèques sur une banque

Définition de « banque »

164 Dans la présente partie, ***banque*** s'entend des membres de l'Association canadienne des paiements créée par la *Loi canadienne sur les paiements*, ainsi que des sociétés coopératives de crédit locales définies par cette loi et affiliées à une centrale — toujours au sens de cette loi — qui est elle-même membre de cette association.

L.R. (1985), ch. B-4, art. 164; 2001, ch. 9, art. 586.

Cheque

165 (1) A cheque is a bill drawn on a bank, payable on demand.

Définition de « chèque »

165 (1) Le chèque est une lettre tirée sur une banque et payable sur demande.

Provisions as to bills apply

(2) Except as otherwise provided in this Part, the provisions of this Act applicable to a bill payable on demand apply to a cheque.

Cheque for deposit to account

(3) Where a cheque is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque.

R.S., c. B-5, s. 165.

Presentment for payment

166 (1) Subject to this Act,

(a) where a cheque is not presented for payment within a reasonable time of its issue and the drawer or the person on whose account it is drawn had the right at the time of presentment, as between him and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of the damage, that is to say, to the extent to which the drawer or person is a creditor of the bank to a larger amount than he would have been had the cheque been paid; and

(b) the holder of the cheque, with respect to which the drawer or person is discharged, shall be a creditor, in lieu of the drawer or person, of the bank to the extent of the discharge, and entitled to recover the amount from it.

Reasonable time

(2) In determining what is a reasonable time, within this section, regard shall be had to the nature of the instrument, the usage of trade and of banks and the facts of the particular case.

R.S., c. B-5, s. 166.

Authority to pay

167 The duty and authority of a bank to pay a cheque drawn on it by its customer are determined by

(a) countermand of payment; or

(b) notice of the customer's death.

R.S., c. B-5, s. 167.

Crossed Cheques

Crossed generally

168 (1) Where a cheque bears across its face an addition of

Applicabilité des dispositions relatives aux lettres

(2) Sauf prescription contraire de la présente partie, les dispositions de la présente loi visant la lettre payable sur demande s'appliquent au chèque.

Chèques destinés à être déposés

(3) Lorsqu'un chèque est livré à une banque en vue de son dépôt au compte d'une personne et que la banque porte au crédit de celle-ci le montant du chèque, la banque acquiert tous les droits et pouvoirs du détenteur régulier du chèque.

S.R., ch. B-5, art. 165.

Présentation au paiement

166 (1) Sous réserve des autres dispositions de la présente loi :

a) quand le chèque n'est pas présenté au paiement dans un délai raisonnable après son émission, le tireur — ou celui sur le compte de qui il est tiré — se trouve être, s'il avait le droit, au moment de la présentation, de faire payer le chèque par la banque et subit un préjudice réel par suite de ce retard, libéré jusqu'à concurrence de ce préjudice, c'est-à-dire dans la mesure où il est créancier de la banque d'un montant plus élevé que si le chèque avait été encaissé;

b) le détenteur du chèque à l'égard duquel le tireur ou une autre personne est libéré est subrogé à ceux-ci comme créancier de la banque jusqu'à concurrence du montant de cette libération et a le droit de recouvrer cette somme de la banque.

Délai raisonnable

(2) Pour la détermination du délai raisonnable mentionné au présent article, il est tenu compte de la nature de l'effet, des usages du commerce et des banques et des circonstances particulières.

S.R., ch. B-5, art. 166.

Autorisation de payer

167 L'obligation et le pouvoir d'une banque de payer un chèque tiré sur elle par son client prennent fin lors de :

a) l'annulation de l'ordre de paiement;

b) la notification de la mort du client.

S.R., ch. B-5, art. 167.

Chèques barrés

Barrement général

168 (1) Est à barrement général le chèque dont le recto est traversé obliquement par :

TAB 4



Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of December 7, 2023

Office Consolidation

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Amendments Not in Force

This consolidation incorporates only those amendments in force on the consolidation date shown on the cover. It does not include the following amendments:

2023 c3 s5 amends ss156 and 159(1).

Regulations

The following is a list of the regulations made under the *Business Corporations Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Business Corporations Act		
Business Corporations	118/2000	*231/2000, 191/2001, 206/2001, 251/2001, 83/2005, 218/2005, 35/2007, 68/2008, 104/2009, 31/2012, 105/2012, 170/2012, 125/2013, 146/2015, 115/2017, 10/2019, 128/2019, 86/2022, 216/2022, 98/2023, 101/2024*

(2) A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Alberta to the extent that the laws of that jurisdiction permit.

1981 cB-15 s15

Waiver of business interests

16.1(1) Subject to the regulations, a corporation may waive any interest or expectancy of the corporation in or to, or in being offered an opportunity to participate in, a specified business opportunity or specified classes or categories of business opportunities that are offered or presented to the corporation or one or more of its officers, directors or shareholders.

(2) Subject to the regulations, a waiver referred to in subsection (1) may only be made if the corporation's articles of incorporation or a unanimous shareholder agreement enables the ability to so waive, or in any other manner set out in the regulations.

(3) Subject to the regulations, a waiver may be modified or revoked.

2021 c18 s5

Restriction on powers

17(1) It is not necessary for a bylaw to be passed in order to confer any particular power on the corporation or its directors.

(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles.

(3) No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.

1981 cB-15 s16

No constructive notice

18 No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Registrar or is available for inspection at an office of the corporation.

1981 cB-15 s17

Authority of directors, officers and agents

19 A corporation, a guarantor of an obligation of the corporation or a person claiming through the corporation may not assert against a person dealing with the corporation or dealing with any person who has acquired rights from the corporation

(a) that the articles, bylaws or any unanimous shareholder agreement have not been complied with,

(b) that the persons named in the most recent notice filed by the Registrar under section 106 or 113 are not the directors of the corporation,

(c) that the place named as the registered office in the most recent notice filed by the Registrar under section 20 is not the registered office of the corporation,

(d) that the post office box designated as the address for service by mail in the most recent notice filed by the Registrar under section 20 is not the address for service by mail of the corporation,

(e) that a person held out by the corporation as a director, an officer or an agent of the corporation

(i) has not been duly appointed, or

(ii) has no authority to exercise a power or perform a duty that the director, officer or agent might reasonably be expected to exercise or perform,

(f) that a document issued by any director, officer or agent of the corporation with actual or usual authority to issue the document is not valid or not genuine, or

(g) that financial assistance referred to in section 45 or a sale, lease or exchange of property referred to in section 190 was not authorized,

unless the person has, or by virtue of the person's position with or relationship to the corporation ought to have, knowledge of those facts at the relevant time.

1981 cB-15 s18

Part 4
Registered Office, Agent for Service, Records and Seal

Registered office, records office, address for service by mail

20(1) A corporation shall at all times have a registered office within Alberta.

(2) A notice of

(a) the registered office,

Officers

121 Subject to the articles, the bylaws or any unanimous shareholder agreement,

(a) the directors may designate the offices of the corporation, appoint as officers individuals of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in section 115(3),

(b) a director may be appointed to any office of the corporation, and

(c) 2 or more offices of the corporation may be held by the same person.

1981 cB-15 s116

Duty of care of directors and officers

122(1) Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties to the corporation shall

(a) act honestly and in good faith with a view to the best interests of the corporation, and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, bylaws and any unanimous shareholder agreement.

(3) Subject to section 146(7), no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty.

(4) In determining whether a particular transaction or course of action is in the best interests of the corporation, a director, if the director is elected or appointed by the holders of a class or series of shares or by employees or creditors or a class of employees or creditors, may give special, but not exclusive, consideration to the interests of those who elected or appointed the director.

RSA 2000 cB-9 s122;2021 c18 s23

(3) An inspector shall on request produce to an interested person a copy of any order made under section 231 or 232(1).

1981 cB-15 s225

Hearings by inspector

234(1) A hearing conducted by an inspector shall be heard in camera unless the Court otherwise orders.

(2) An individual who is being examined at a hearing conducted by an inspector under this Part has a right to be represented by counsel during the examination.

1981 cB-15 s226

Compelling evidence

235 A person shall not be excused from attending and giving evidence and producing books, papers, documents or records to an inspector under this Part on the grounds that the oral evidence or documents required of the person may tend to incriminate the person or subject the person to any proceeding or penalty, but no oral evidence so required shall be used or is receivable against the person in any proceedings thereafter instituted against the person under any Act of Alberta.

1981 cB-15 s227

Absolute privilege

236 Any oral or written statement or report made by an inspector or any other person in an investigation under this Part has absolute privilege.

1981 cB-15 s228

Solicitor-client privilege

237 Nothing in this Part affects the privilege that exists in respect of a solicitor and the solicitor's client.

1981 cB-15 s229

Inspector's report as evidence

238 A copy of the report of an inspector under section 232, certified as a true copy by the inspector, is admissible as evidence of the facts stated in it without proof of the appointment or signature of the inspector.

1981 cB-15 s230;1983 c20 s17

Part 19
Remedies, Offences and Penalties

Definitions

239 In this Part,

(a) "action" means an action under this Act or any other law;

(b) "complainant" means

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

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

(iii) a creditor

(A) in respect of an application under section 240, or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

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

1981 cB-15 s231;2000 c10 s3

Commencing derivative action

240(1) Subject to subsection (2), a complainant may apply to the Court for permission to

(a) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or

(b) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.

(2) No permission may be granted under subsection (1) unless the Court is satisfied that

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,

(b) the complainant is acting in good faith, and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

(3) Notwithstanding subsection (2), when all the directors of the corporation or its subsidiary have been named as defendants, notice to the directors under subsection (2)(a) of the complainant's intention to apply to the Court is not required.

RSA 2000 cB-9 s240;2005 c8 s54;2014 c13 s49

Powers of the Court

241 In connection with an action brought or intervened in under section 240 or 242(3)(q), the Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order authorizing the complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;

(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

1981 cB-15 s233

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

TAB 5



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 September 29, 2025

Last amended on August 19, 2024

À jour au 29 septembre 2025

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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 6

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 September 29, 2025

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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.

(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.

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

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

under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie sous le régime de l'une ou l'autre de ces lois, selon le cas, et, s'il s'agit de toute autre compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier.

Admission of claims

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

Admission des réclamations

(2) Malgré le paragraphe (1), la compagnie peut admettre le montant d'une réclamation aux fins de votation sous réserve du droit de contester la responsabilité quant à la réclamation pour d'autres objets, et la présente loi, la *Loi sur les liquidations et les restructurations* et la *Loi sur la faillite et l'insolvabilité* n'ont pas pour effet d'empêcher un créancier garanti de voter à une assemblée de créanciers garantis ou d'une catégorie de ces derniers à l'égard du montant total d'une réclamation ainsi admis.

L.R. (1985), ch. C-36, art. 20; 2005, ch. 47, art. 131; 2007, ch. 36, art. 70.

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.

1997, c. 12, s. 126; 2005, c. 47, s. 131.

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.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131.

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

Catégories de créanciers

Établissement des catégories de créanciers

22 (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

a) la nature des créances et obligations donnant lieu à leurs réclamations;

b) la nature et le rang de toute garantie qui s'y rattache;

c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

TAB 7



Province of Alberta

CONTRIBUTORY NEGLIGENCE ACT

Revised Statutes of Alberta 2000
Chapter C-27

Current as of January 1, 2002

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

CONTRIBUTORY NEGLIGENCE ACT

Chapter C-27

Table of Contents

1 Apportionment of liability
2 Determination of degree of fault
3 Questions of fact
3.1 Last clear chance rule not applicable
6 Adding party defendant

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Apportionment of liability

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.

RSA 1980 cC-23 s1

Determination of degree of fault

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.

RSA 1980 cC-23 s2

Questions of fact

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.

RSA 1980 cC-23 s5

Last clear chance rule not applicable

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.

RSA 2000 c16(Supp) s70

4, 5 Repealed RSA 2000 c16(Supp) s70.

Adding party defendant

6 When it appears that a person not already party to an action is or may be wholly or partly responsible for the damages claimed, that person may be added as a party defendant on such terms as are considered just.

RSA 1980 cC-23 s8

TAB 8

CANADA

CONSOLIDATION

CODIFICATION

Criminal Code

Code criminel

R.S.C., 1985, c. C-46

L.R.C. (1985), ch. C-46

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(b) not being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, fraudulently makes or issues a copy, extract or certificate that purports to be certified as authorized or required by law, or

(c) being authorized or required by law to make a certificate or declaration concerning any particular required for the purpose of making entries in a register, record or document, knowingly and falsely makes the certificate or declaration.

R.S., 1985, c. C-46, s. 378; 2019, c. 25, s. 136.

b) n'ayant, d'après la loi, ni l'autorisation ni l'obligation de faire ou d'émettre une copie ou un extrait d'un registre, dossier ou document, ou un certificat y relatif, attestés conformes, frauduleusement fait ou émet une copie, un extrait ou certificat donné comme étant attesté selon une autorisation ou une prescription de la loi;

c) ayant, d'après la loi, l'autorisation ou l'obligation de faire un certificat ou une déclaration concernant tout détail requis pour permettre d'opérer des inscriptions dans un registre, dossier ou document, sciemment et faussement fait le certificat ou la déclaration.

L.R. (1985), ch. C-46, art. 378; 2019, ch. 25, art. 136.

PART X

Fraudulent Transactions Relating to Contracts and Trade

Interpretation

Definition of *goods*

379 In this Part, ***goods*** means anything that is the subject of trade or commerce.

R.S., 1985, c. C-46, s. 379; 2018, c. 29, s. 43.1.

Fraud

Fraud

380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

PARTIE X

Opérations frauduleuses en matière de contrats et de commerce

Définitions

Définition de *marchandises*

379 Dans la présente partie, ***marchandises*** s'entend de toute chose qui fait l'objet d'un commerce.

L.R. (1985), ch. C-46, art. 379; 2018, ch. 29, art. 43.1.

Fraude

Fraude

380 (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :

a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;

b) est coupable :

(i) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans,

(ii) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire,

si la valeur de l'objet de l'infraction ne dépasse pas cinq mille dollars.

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Minimum punishment

(1.1) When a person is prosecuted on indictment and convicted of one or more offences referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.

Affecting public market

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., 1985, c. C-46, s. 380; R.S., 1985, c. 27 (1st Supp.), s. 54; 1994, c. 44, s. 25; 1997, c. 18, s. 26; 2004, c. 3, s. 2; 2011, c. 6, s. 2.

Sentencing — aggravating circumstances

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall consider the following as aggravating circumstances:

(a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;

(b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;

(c) the offence involved a large number of victims;

(c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;

(d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;

(e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and

(f) the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

Peine minimale

(1.1) Le tribunal qui détermine la peine à infliger à une personne qui, après avoir été poursuivie par acte d'accusation, est déclarée coupable d'une ou de plusieurs infractions prévues au paragraphe (1) est tenu de lui infliger une peine minimale d'emprisonnement de deux ans si la valeur totale de l'objet des infractions en cause dépasse un million de dollars.

Influence sur le marché public

(2) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, avec l'intention de frauder, influe sur la cote publique des stocks, actions, marchandises ou toute chose offerte en vente au public.

L.R. (1985), ch. C-46, art. 380; L.R. (1985), ch. 27 (1er suppl.), art. 54; 1994, ch. 44, art. 25; 1997, ch. 18, art. 26; 2004, ch. 3, art. 2; 2011, ch. 6, art. 2.

Détermination de la peine : circonstances aggravantes

380.1 (1) Sans que soit limitée la portée générale de l'article 718.2, lorsque le tribunal détermine la peine à infliger à l'égard d'une infraction prévue aux articles 380, 382, 382.1 ou 400, les faits ci-après constituent des circonstances aggravantes :

a) l'ampleur, la complexité, la durée ou le niveau de planification de la fraude commise est important;

b) l'infraction a nui — ou pouvait nuire — à la stabilité de l'économie canadienne, du système financier canadien ou des marchés financiers au Canada ou à la confiance des investisseurs dans un marché financier au Canada;

c) l'infraction a causé des dommages à un nombre élevé de victimes;

c.1) l'infraction a entraîné des conséquences importantes pour les victimes étant donné la situation personnelle de celles-ci, notamment leur âge, leur état de santé et leur situation financière;

d) le délinquant a indûment tiré parti de la réputation d'intégrité dont il jouissait dans la collectivité;

e) il n'a pas satisfait à une exigence d'un permis ou d'une licence, ou à une norme de conduite professionnelle, qui est habituellement applicable à l'activité ou à la conduite qui est à l'origine de la fraude;

TAB 9

Français

Negligence Act

R.S.O. 1990, CHAPTER N.1

Consolidation Period: From January 1, 2004 to the e-Laws currency date.

Last amendment: 2002, c.24, Sched.B, s.25.

Extent of liability, remedy over

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. R.S.O. 1990, c. N.1, s. 1.

Recovery as between tortfeasors

2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled. R.S.O. 1990, c. N.1, s. 2.

Plaintiff guilty of contributory negligence

3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. R.S.O. 1990, c. N.1, s. 3.

Where parties to be deemed equally at fault

4. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent. R.S.O. 1990, c. N.1, s. 4.

Adding parties

5. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties. R.S.O. 1990, c. N.1, s. 5.

Jury to determine degrees of negligence of parties

6. In any action tried with a jury, the degree of fault or negligence of the respective parties is a question of fact for the jury. R.S.O. 1990, c. N.1, s. 6.

When plaintiff may be liable for costs

7. Where the damages are occasioned by the fault or negligence of more than one party, the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just. R.S.O. 1990, c. N.1, s. 7.

8. REPEALED: 2002, c. 24, Sched. B, s. 25.

Français

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TAB 10



Province of Alberta

TORT-FEASORS ACT

Revised Statutes of Alberta 2000
Chapter T-5

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Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

(2) The right of a spouse to bring the action referred to in subsection (1) is in addition to, and independent of, any right of action that the married person has, or any action that the spouse in the name of the married person has, for injury inflicted on the married person.

2003 cF-4.5 s125

Damage suffered as result of tort

3(1) When damage is suffered by any person as a result of a tort, whether a crime or not,

(a) a judgment recovered against any tort-feasor liable in respect of that damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,

(b) if more than one action is brought in respect of that damage

(i) by or on behalf of the person by whom it was suffered, or

(ii) for the benefit of the estate, or of the spouse or adult interdependent partner, parent or child of that person,

against tort-feasors liable in respect of the damage, whether as joint tort-feasors or otherwise, the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions, other than that in which judgment is first given, the plaintiff is not entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action, and

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from any person entitled to be indemnified by the person first mentioned in respect of the liability regarding which the contribution is sought.

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be an amount that the court finds to be just and equitable having regard to the extent of that person's responsibility for the damage.

(3) The court has power

(a) to exempt any person from liability to make contribution, or

(b) to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

RSA 2000 cT-5 s3;2002 cA-4.5 s77

TAB 11

369413 Alberta Ltd. v. Pocklington, 2000 ABCA 307

Date: 20001121
Docket: 9603-0215-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE FRUMAN
THE HONOURABLE MR. JUSTICE ROOKE

BETWEEN:

369413 ALBERTA LTD. and HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF ALBERTA
AS REPRESENTED BY THE PROVINCIAL TREASURER OF ALBERTA

Plaintiffs / Defendants by Counterclaim
(Appellants)

- and -

PETER H. POCKLINGTON

Defendant / Plaintiff by Counterclaim
(Respondent)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE CLARKE
DATED THE 7TH DAY OF DECEMBER, 1995
AND THE 9TH DAY OF FEBRUARY, 1996
FILED THE 9TH DAY OF APRIL, 1996

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE FRUMAN

2000 ABCA 307 (CanLII)

CONCURRED IN BY THE HONOURABLE MR. JUSTICE CÔTÉ
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE ROOKE

2000 ABCA 307 (CanLII)

COUNSEL:

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For the Respondent / Defendant

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REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE FRUMAN

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[1] Gainers was in deep financial trouble. Negotiations with the province of Alberta, its largest creditor, had collapsed. The day before Alberta called Gainers' loans and began to seize its assets, Peter Pocklington, the sole director and beneficial shareholder of Gainers, transferred a valuable asset from Gainers to a company he owned. The transfer, made without Alberta's knowledge or consent, placed the asset beyond Alberta's reach. Complaining that the transaction breached its loan agreement with Gainers, Alberta sued Pocklington for intentionally inducing Gainers to breach that contract. The trial judge decided that the transfer did not breach the loan agreement and dismissed the action. I would allow the appeal.

FACTS

[2] Pocklington purchased Gainers, a meat-packing company, in 1978. His personal corporate empire consisted of several companies, including Pocklington Financial Corporation, Pocklington Holdings Inc. and Pocklington Foods Inc. In September 1985, Pocklington Foods acquired the shares of Gainers, and was Gainers' sole shareholder until October 6, 1989, when Alberta seized the shares. Pocklington also owned Gainers Properties Inc., which owned all Gainers' land, plants, machinery and equipment. After September 1987, Pocklington was the sole director of both Gainers companies.

[3] Gainers' union began a long and bitter strike in 1986. Gainers then began to experience substantial losses: more than $10 million in 1986, $14 million in 1987 and $17 million in 1989. Pocklington and Alberta negotiated a $67 million bail-out consisting of a $55 million loan guarantee in favour of another Gainers' creditor, Lloyds Bank, and a $12 million term loan. In return, Alberta was granted a secured charge against all Gainers' and Gainers Properties' assets, both existing and after-acquired. In addition, all Gainers' shares were escrowed in favour of Alberta. The terms of this arrangement were documented in a lengthy Master Agreement and scheduled collateral security documents, effective September 25, 1987.

[4] By the end of May 1989, Gainers had defaulted on both the Master Agreement and its loan agreement with Lloyds Bank. After another round of negotiations, the parties hammered out a 90-day standstill arrangement. Under this agreement, Lloyds Bank and Alberta agreed not to realize on their security if a complicated chain of conditions were met. Essentially, Alberta agreed to give up $5 million of security it held on Gainers Properties' assets, in favour of Lloyds Bank. Pocklington would make up this $5 million by a guarantee to Alberta for that amount, secured by a $5 million first mortgage on lands in Calgary and Edmonton, known as the Carma Lands.

[5] It is the last step, the $5 million mortgage on the Carma Lands, that forms the backdrop for this action. At the time the deal was negotiated, the Carma Lands were owned by another Pocklington company, Hartford Properties Inc. That company would have had to guarantee

Gainers' loan and grant the mortgage to Alberta. However, s. 42 of the Alberta *Business Corporations Act*, S.A. 1981, c. B-15 ("*ABCA*") restricted the ability of companies to provide financial assistance to related companies, and the parties were concerned that Hartford Properties would be unable to meet the statutory requirements. The transaction was therefore structured using a shell company, 350151 Alberta Ltd. Gainers acquired the shares of 350151; 350151 acquired the Carma Lands from Hartford Properties for $1.9 million; 350151 issued a promissory note to Hartford Properties for that amount; 350151 then granted a guarantee to Alberta; and finally, 350151 secured the guarantee by a $5 million mortgage in Alberta's favour registered against the Carma Lands. These arrangements were documented in a Standstill Agreement and accompanying collateral security documents, effective August 8, 1989.

[6] Further defaults occurred; further attempts to negotiate proved fruitless. On October 4, 1989, one day before Alberta gave notice of its intention to exercise its rights under its various security agreements, Pocklington signed a Gainers director's resolution transferring the 350151 shares from Gainers to his own company, Pocklington Holdings, for $100. The $100 payment for the shares was not tendered until November 13, 1989, and was never accepted by Gainers. On October 6, 1989, Alberta exercised its rights under its various security documents, began to realize on Gainers' assets, and became the sole shareholder of Gainers. Because Pocklington Holdings had not guaranteed Gainers' debts, Pocklington Holdings' assets, including the newly acquired 350151 shares, could not be seized by Alberta.

[7] Alberta contends that the transfer of the 350151 shares from Gainers to Pocklington Holdings breached its original loan agreement with Gainers, the Master Agreement. Under s. 13.03(l), Gainers agreed not to sell or otherwise dispose of its assets without the prior written consent of Alberta, except in the ordinary course of business. Alberta was neither informed of the share transfer before it took place, nor was its written consent to the transfer requested. It sued Pocklington for intentionally inducing Gainers to breach the loan agreement, asking for the return of the 350151 shares to Gainers or, alternatively, for monetary damages.

TRIAL JUDGMENT

[8] The trial judge decided that the Master Agreement had not been breached. He began his analysis by considering the Standstill Agreement. Noting that Alberta was granted a mortgage and charge which it still had at the time of the trial, he concluded that Alberta "got what it was entitled to under the Agreement, it still has what it was entitled to under the Standstill Agreement and it is not entitled to the return of the lands or the shares of 350151" (AB I at 1269-70). Although he found the terms of the Standstill Agreement to be clear and unambiguous, he considered evidence concerning "the genesis of the transaction, the background and its context", which he determined supported his interpretation of the Master Agreement (AB I at 1271-72).

[9] The trial judge then turned to the specific provisions of the Master Agreement. In order to decide whether a breach had occurred, it was his view that he had to decide whether the "assets"

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which were subject to the disposition restriction in s. 13.03(l) included the 350151 shares. In order to do so, the trial judge also considered s. 12.02(r) of the Master Agreement, which required Gainers to advise Alberta of any change in the ownership of any subsidiary.

[10] Noting that "assets" was not a defined term in the Master Agreement, the trial judge decided that if "assets" in s. 13.03(l) were defined to include shares in a subsidiary, s. 12.02(r) would be meaningless: Alberta would not need to be given notice of a change in ownership of a subsidiary under s. 12.02(r) because its consent would already have been elicited under s. 13.03(l). Therefore, in order to give full force and effect to both sections, the 350151 shares could not be considered assets, and the 350151 share transfer should fall under s. 12.02(r) alone, requiring notice to Alberta, but not its consent (AB I at 1274-75). The trial judge decided there had been no breach of contract, but did not specifically address whether the notice requirement had been met.

[11] Finally, the trial judge determined that even if the 350151 shares were "assets", the share transfer fell within the "ordinary course of business" exception found in s. 13.03(l). He decided that in August of 1989, one of the normal activities being carried out by Gainers, through Pocklington, "was continuing attempts to secure the necessary financing to permit Gainers to continue to operate" (AB I at 1275). Because the trial judge found that obtaining financing was in the ordinary course of Gainers' business, and the acquisition of the 350151 shares and grant of the mortgage on the Carma Lands were necessary to obtain financing, he concluded that the movement of the shares out of Gainers was also in the ordinary course of its business (AB I at 1276).

[12] Having determined there was no breach, the trial judge did not consider the other elements required to prove the tort of inducing breach of contract, and dismissed Alberta's claim. Pocklington filed a counter-claim to the original action. The dismissal of his counter-claim was not appealed.

ELEMENTS OF INDUCING BREACH OF CONTRACT

[13] In order to find that a defendant intentionally induced a breach of contract, seven elements must be established:

i) the existence of a contract;
ii) knowledge or awareness by the defendant of the contract;
iii) a breach of the contract by a contracting party;
iv) the defendant induced the breach;
v) the defendant, by his conduct, intended to cause the breach;
vi) the defendant acted without justification; and
vii) the plaintiff suffered damages.

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See ***Ed Miller Sales & Rentals Ltd.*** **v.** ***Caterpillar Tractor Co.*** (1996), 41 Alta. L.R. (3d) 217 (C.A.); and ***Jackson*** **v.** ***Trimac Industries Ltd.*** (1993), 6 Alta. L.R. (3d) 225 (Q.B.), varied on other grounds (1994), 20 Alta. L.R. (3d) 117.

[14] The first two elements were admitted. In fact, Pocklington was a party to the Master Agreement and had signed it both in his personal and corporate capacities. As Pocklington was the sole director of Gainers, and signed the director's resolution which transferred the shares, the fourth element was also not contentious. The other four elements were, and are, in issue.

BREACH OF THE MASTER AGREEMENT

Are the 350151 shares "assets"?

[15] Loan agreements are comprehensive documents designed to protect lenders. In addition to setting out the terms of advances, use of proceeds, security, and repayment, they frequently restrict the debtor company's operations. Typically this is done with positive covenants, which obligate a company to do things, and negative covenants, which prohibit a company from engaging in certain activities. Loan agreements are not noted for their brevity. Because the lender attempts to contemplate and deal with possible future situations, they are often "over-drafted". It is therefore not unusual to find broad, repetitive and overlapping positive and negative covenants, as well as clauses that tend to be somewhat generic. It is in this light that loan agreements must be interpreted.

[16] Article XII of the Master Agreement contained a long list of positive covenants, including s. 12.02(r) which required Gainers to advise Alberta "of any change in the ownership of any subsidiary, affiliate or related company of [Gainers ...], or of the change in the composition of any joint venture or partnership in which [Gainers ...] has been involved [...]" (AB XIII at 2590-91). Negative covenants were included in Article XIII, including s. 13.03(l) which provided that Gainers, without the prior written consent of Alberta, would not "sell or otherwise dispose of [its] assets [...] by conveyance, transfer [...] or otherwise, except in the ordinary course of business" (AB XIII at 2600).

[17] It is not correct to say that interpreting s. 13.03(l) to include shares of a subsidiary would make s. 12.02(r) meaningless. In fact, the two sections address different factual situations, which comfortably co-exist in the corporate world. Section 13.03(l) required Alberta's consent for the sale or disposition of any of Gainers' assets, which would cover the disposition of shares it actually owned in any company, whether or not it was a subsidiary. By contrast, s. 12.02(r) required Gainers to give notice of any change in the ownership structure of a subsidiary, affiliate or related company, which would primarily address ownership changes by shareholders other than Gainers.

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[18] Under the *ABCA*, a subsidiary company is one that is "controlled by [an]other [body corporate ...]" (s. 2(4)). Control does not require ownership of 100% of the shares. In fact, all that is needed is enough voting shares to elect directors, 50% + 1 share (s. 2(2)(a)). Therefore, a company could be controlled by Gainers, and be its subsidiary, even though the other 50% - 1 share were owned by someone else. It is changes in the ownership of shares belonging to these other shareholders that s. 12.02(r) was primarily intended to address. This interpretation is reinforced by the words which followed, requiring notice of any "change in the composition of any joint venture or partnership in which [Gainers ...] has been involved".

[19] Although ss. 12.02(r) and 13.03(l) applied to different situations, the sections narrowly overlapped when Gainers disposed of shares it owned in a subsidiary company. A court must strive to harmonize apparently conflicting terms in a contract: ***Cotter* v. *General Petroleums Ltd.***, [1951] S.C.R. 154 at 158. But whenever possible, effect is to be given to all the terms of contracts and none are to be rejected as having no meaning: ***Scanlon* v. *Castlepoint Development Corp.***, [1993] 11 O.R. (3d) 744 at 770, 776 (C.A.); leave to appeal refused [1993] 2 S.C.R. x. In this case there is no direct or indirect conflict between the two sections which would permit a court to qualify their meaning; instead the sections complement each other. Dispositions of Gainers' own shares in its subsidiaries, like the disposition of any other asset, would be subject to the consent requirement in s. 13.03(l). By obtaining Alberta's consent under that section, Gainers would coincidentally satisfy the requirement for giving notice under s. 12.02(r).

[20] As the two sections apply to different situations and do not conflict, there is no reason to restrict the meaning of the word "assets" from its normal dictionary sense, "a thing [...] of use or value": *The New Shorter Oxford English Dictionary*, 4th ed., *s.v.* "asset". Accordingly, the 350151 shares were "assets" whose transfer was subject to the negative covenant in s. 13.03(l). Because Gainers did not obtain Alberta's consent to the transfer, as the section required, Gainers breached s. 13.03(l) unless the sale of the shares was in the ordinary course of its business.

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"*Ordinary Course of Business*"

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[21] Courts are required to undertake a broad and case-specific analysis of the ordinary course of a particular company's business, for it is considered unwise to attempt a comprehensive definition: ***Robitaille* v. *American Biltrite (Canada)***, [1985] 1 S.C.R. 290 at 291. The analysis is to be achieved through an objective examination of the usual type of activity in which the business is engaged, followed by a comparison of that general activity to the specific activity in question. The transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation": ***Aubrett Holdings Ltd.* v. *Canada*** [1998], G.S.T.C. 17 (T.C.C.).

[22] In order to determine whether a transaction was in the ordinary course of a company's business, a court must consider all the circumstances which were known, or ought reasonably to have been known, by the parties at the time: ***Ford Motor Credit Co. of Canada Ltd.* v. *Centre Motors of Brampton Ltd.***, [1983] 38 O.R. (2d) 516 (H.C.J.). Courts have identified a number of factors which may be taken into account:

(i) The nature and significance of the transaction: it ought to be one that a manager might reasonably be expected to carry out on the manager's own initiative without making prior reference back or subsequent report to superior authorities, such as the board of directors or the shareholders: ***Roynat Inc.* v. *Ron Clark Motors Ltd.*** (1991), 1 P.P.S.A.C. (2d) 191 at 197 (Ont. Gen. Div.); and ***85956 Holdings Ltd.* v. *Fayerman Brothers Limited***, [1986] 2 W.W.R. 754 (Sask. C.A.);

(ii) The value of any asset sold: the disposition should have been made with proper regard to its value: ***Estevan Credit Union Ltd.* v. *Dyer***, [1997] 8 W.W.R. 49 (Sask. Q.B.); and ***Ford***, *supra*;

(iii) The quantity of assets sold: the transaction ought not to resemble a liquidation of assets: ***Fayerman***, *supra*;

(iv) The reason for the transaction: it ought not to have occurred as a response to financial difficulties or in suspicious circumstances: ***Ford***, *supra*, and ***Countrywide Banking Corpn. Ltd.* v. *Dean***, [1998] A.C. 338 (P.C.); and

(v) The intent of the transaction: neither its intent nor its effect should have been to undermine bank security: ***Ford***, *supra*.

To this list I would add:

(vi) The frequency of the type of transaction: an unusual or isolated transaction might be viewed differently from a routine one; and

(vii) The arm's length nature of the transaction: a transaction between a company and a party with whom it is related should receive careful scrutiny.

[23] While a reviewing court will defer to a trial judge's fact findings, a determination that a transaction was in the ordinary course of a company's business is a mixed question of fact and law. A failure to consider the appropriate factors constitutes reviewable error. In this case a consideration of the evidence in the context of the relevant factors leads to the conclusion that the 350151 share transfer was not in the ordinary course of Gainers' business.

[24] The parties agreed that Gainers' ordinary business was "the slaughter of cattle and hogs, the processing and sale of beef and pork products, and other food products": Agreed Statement of Facts, para. 34 (AB XX at 4187). Pocklington also acknowledged that Gainers was not in the business of holding or developing land or trading in the shares of corporations that did so (AB 739:4-10). It follows that Gainers originally acquired the 350151 shares to permit it to continue to operate its livestock slaughtering and meat processing business, not because it was in the financing, land development or share trading business.

[25] The shares of 350151 were a significant asset. The transfer was a material transaction requiring authorization from the board of directors and was not one that a manager had the authority to conduct. The shares were sold for a nominal sum, $100, which not only was less than their market value, but was not tendered until more than a month later. Although characterized by the trial judge as part of a financing arrangement, the disposition appears to be quite the opposite.

[26] While money frequently flowed between Gainers and various Pocklington companies, a transfer of assets was rare. The 350151 share transfer was unusual. It was also a non-arm's length transaction because the assets were transferred to a company owned by Pocklington, Gainers' sole director and beneficial shareholder. Pocklington signed the transfer agreement, share certificates and the Gainers, Pocklington Holdings and 350151 board resolutions authorizing the transfer, in his capacity as sole director of all three companies.

[27] The disposition involved an asset transfer which was restricted by the Master Agreement. Although Alberta had previously been advised of and its prior consent sought for asset dispositions involving the sale of land (AB 1097:24-36; 860), the transfer of shares (AB XVI at 3187, para. 4) and the potential sale of assets of a division of Gainers (AB 810:6-9; 843:12-16), Alberta knew nothing about this transaction before it was completed. Even the possibility of such a transfer had never been discussed with Alberta (AB 1089:39-40).

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[28] Finally, the transaction occurred when Gainers was in fatal financial difficulty. The timing of the transaction was suspicious and not a mere coincidence, as Pocklington originally implied (AB 1053:39-1054:2). Pocklington had notice in late September 1989 that Alberta intended to act on its security (AB 1087:44-1088:23; 740:6-13). He admitted that negotiations with Alberta actually collapsed on October 3 or 4, 1989, the same day the shares were transferred (AB 1092:29-1093:11).

[29] This leads to the irresistible conclusion that the transfer of the 350151 shares was not in the ordinary course of Gainers' livestock slaughtering and meat processing business. There is also a practical business reason for this conclusion. Lenders rely on covenants which restrict the disposition of assets outside the ordinary course of a company's business, to preserve the assets for the benefit of the creditors. That reliance is especially heavy when a debtor company teeters on the brink of insolvency and the temptation to divest looms large. Yet, according to the interpretation Pocklington advances, as a company's financial woes deepen and it redoubles its efforts to find financing, the ordinary course of its business magically expands to include financing transactions and everything connected to them. As a result, seriously troubled companies are permitted to shed significant assets without their creditor's consent, although solvent companies are not. This has a paradoxical effect: just when the creditor's reliance on the negative covenant is strongest, the restriction on the company's ability to dispose of its assets disappears. Such an interpretation of "ordinary course of business" makes little commercial sense.

The Standstill Agreement and Parol Evidence

[30] Pocklington contends that, regardless of the interpretation of s. 13.03(l), the transfer ought not to be considered a breach because all the parties knew Alberta was to obtain only a mortgage, the 350151 shares were to be transferred back and therefore, the transfer formed part of the overall agreement between the parties. Both Pocklington and Robert Lloyd testified on this point (AB 1051:29-43; 812:42-813:22; 813:38-41; 814:34-44; 815:23-24). Lloyd, a lawyer with 20 years' experience, originally practised with the Ogilvie and Company law firm, Pocklington's lawyers, but in 1984 began to work for Pocklington and had an office in the Pocklington Financial offices (AB 776:29-777:2).

[31] The Master Agreement was a lengthy and comprehensive document, containing 70 pages of finely-printed clauses and 23 schedules. Attempting to reduce the parties' deal to writing, the Master Agreement provided that "[t]his Agreement [...] constitutes the entire agreement amongst the parties hereto and cancels and supersedes all prior agreements, undertakings, declarations or representations, written or verbal, in respect thereof" (AB XIII at 2615, s. 21.09). It established a hierarchy in the case of conflicts, stating that "[i]n case of any conflict between the provisions of the Security or any other agreements made pursuant hereto and this Agreement, the provisions of this Agreement shall govern [...]" (AB XIII at 2614, s. 21.04). Anticipating possible amendments

it stipulated that "[n]o amendment or modification of this Agreement shall be effective unless the same shall be in writing and signed by each of the parties hereto" (AB XIII at 2614, s. 21.06).

[32] Section 13.03(l) of the Master Agreement restricted dispositions of assets, requiring Alberta's consent. If Pocklington's contention is correct, one might have expected the Standstill Agreement to have expressly permitted the transfer of the 350151 shares to Pocklington after the mortgage was granted.

[33] The Standstill Agreement did nothing of the kind. While it clearly contemplated that 350151, a subsidiary of Gainers, would own the Carma Lands and grant a mortgage on them collateral to its guarantee of Gainers' obligations to Alberta (AB XVI at 3185), it made no provision for the transfer-back of the 350151 shares after the mortgage was granted. By contrast, the Standstill Agreement made express provision for Pocklington to transfer his shares in Gainers Property to Pocklington Foods and stated: "Alberta hereby consents, pursuant to the Master Agreement, to the transfer of shares [...]" (AB XVI at 3187, s. 4). The Standstill Agreement went on to confirm the applicability of the covenants contained in the Master Agreement, by acknowledging that "the Master Agreement is not amended, modified or altered in any manner except as expressly set forth herein" (AB XVI at 3190, s. 13).

[34] Given these clear provisions, in order to find that the transfer of the 350151 shares to Pocklington was permitted, the court would have to consider parol evidence. The trial judge partly based his interpretation of the Master Agreement on the genesis, background and context of the Standstill Agreement. He decided that interpreting "assets" to include the 350151 shares was "completely contrary to what was intended by the Standstill Agreement" (AB I at 1275). The trial judge also based his conclusion, in part, on his finding that Alberta was entitled to a mortgage under the Standstill Agreement, and that is what it received. The issue, however, is not whether Alberta received what it was entitled to under the Standstill Agreement, but whether the Master Agreement was breached. It was.

[35] In this case the Standstill Agreement, by its express terms, confirmed the Master Agreement. There was no ambiguity, absurdity, contradiction, or significant lack of clarity in the relevant parts of the written agreements, nor did the factual matrix indicate that the written documents did not embody all the terms of the agreement. The parol evidence rule therefore precluded the admission of evidence of intention to contradict the terms of the Master Agreement: ***Hawrish* v. *Bank of Montreal***, [1969] S.C.R. 515 at 518; ***Gainers Inc.* v. *Pocklington Holdings Inc.*** (2000), 255 A.R. 373 at 376-78 (C.A.); and ***Gallen et al.* v. *Allstate Grain Co. Ltd.*** (1984), 9 D.L.R. (4th) 496 at 506-507 (B.C. C.A.); leave to appeal refused: ***Allstate Grain Co. Ltd.* v. *Guichon et al.***, [1984] 1 S.C.R. v.

[36] Even if parol evidence were admissible in this case, Pocklington faces an insurmountable obstacle: the evidence does not support his contention that the parties agreed that the shares would be transferred back. The so-called plan to transfer the shares was not a certainty:

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Pocklington "presumed" (AB 1051:42) and Lloyd, "belie[ved]" (AB 812:46) that it was. Lloyd could not recall whether this "understanding" had ever been verbally communicated (AB 814:38-39). He was merely "under the impression" that this plan had been the "object of the exercise" (AB 814:39-41). Pocklington provided even clearer testimony when he admitted that Alberta had never known anything about this transfer: "[i]t was never discussed going in. It was never discussed going out" (AB 1089:39-40). As the planned transfer-back was never given voice, the so-called evidence is silent parol, and perhaps wishful parol at that.

[37] The transfer of the 350151 shares to Pocklington without Alberta's consent breached s. 13.03(l) of the Master Agreement.

INTENT

The Law

[38] In order to find liability, a plaintiff must demonstrate that the defendant had an "intent" to induce the breach of contract. The intent component of the tort is the most difficult to understand. Malicious motive, unlawful conduct, hatred or intention to harm are not required elements of intent: ***Allen* v. *Flood***, [1898] A.C. 1 (H.L.(E.)); ***Parks West Mall Ltd.* v. *Jennett*** (1996), 36 Alta. L.R. (3d) 44 at 49 (C.A.); and ***Atcheson* v. *College of Physicians and Surgeons (Alberta)***, [1994] 6 W.W.R. 239 at 246 (Alta. Q.B.). However, what is required is less clear. The requisite intent has been described with "loose, vague and conflicting statements" that sometime appear to be irreconcilable: ***Ed Miller Sales***, *supra,* at 230.

[39] Originally, the tort required the breach to be the result of wilful, deliberate and direct conduct which the defendant knew or hoped would result in a violation of the plaintiff's contractual rights. See for example, ***Lumley* v. *Gye*** (1853), 118 E.R. 749; 2 El. & Bl. 216 (Q.B.); and ***Quinn* v. *Leathem***, [1901] A.C. 495 (H.L.(I.)).

[40] However, courts soon recognized that intent can also be inferred when the consequences of the conduct were a necessary or reasonably foreseeable result, because "people are presumed to intend the reasonable consequences of their acts": ***South Wales Miners' Federation* v. *Glamorgan Coal Company, Limited***, [1905] A.C. 239 at 244 (H.L.(E.)). In ***Posluns* v. *Toronto Stock Exchange and Gardiner*** (1965), 46 D.L.R. (2d) 210 at 267 (Ont. H.C.); affirmed (1966), 53 D.L.R. (2d) 193 (C.A.); affirmed [1968] S.C.R. 330, the court held that liability would attach if the defendant's conduct resulted in the breach of a contract "of which it was or ought to have been aware". The intention to bring about a breach of contract need not be the primary object; it is sufficient if the interference is necessarily incidental to attaining the defendant's primary objective: ***Fraser* v. *Board of Trustees of Central United Church***, [1983] 38 O.R. (2d) 97 at 103 (H.C.J.); and ***Bank of Nova Scotia* v. *Gaudreau***, [1985] 48 O.R. (2d) 478 (H.C.J.).

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[41] Intention can also be established when the defendant was reckless or wilfully blind to a breach. The defendant need not have actually known the precise terms of the contract or that his object only could be accomplished through breach of the contract. "If – turning a blind eye – he went about it regardless of whether it would involve a breach, he will be treated just as if he had knowingly procured it": J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book Co., 1992) at 694.

[42] Turning a blind eye may include situations in which the defendant failed to seek advice or employ the means available to obtain the necessary knowledge. For example, in ***Royal Bank of Canada* v. *Wilton*** (1995), 165 A.R. 261 (C.A.), the defendant was uncertain about the enforceability of a contract, had the "means of knowledge" to determine if a legitimate contract existed, but made no efforts to seek advice. This court found the defendant liable because he deliberately chose not to acquire the information, but proceeded on the basis that the contract was unenforceable. Similarly, when there are competing legal interpretations and the defendant adopts an interpretation which will interfere with the plaintiff's rights, the defendant "must at least show that he was advised and honestly believed that he was legally entitled to take that course": ***Swiss Bank* v. *Lloyds Bank***, [1979] Ch. 548 at 580 (Ch.D.); reversed on other grounds [1982] A.C. 584 (C.A.); affirmed [1982] A.C. 604 (H.L.(E.)).

[43] If the defendant acted under a *bona fide* belief that contractual rights would not be infringed, liability will not be found even though the belief turned out to be mistaken. But for a mistaken belief to be *bona fide*, rather than the result of recklessness or wilful blindness, some basis for the belief must exist, and some reasonable effort must have been made by the defendant to learn the truth. In ***British Industrial Plastics Ltd.* v. *Ferguson***, [1940] 1 All E.R. 479 (H.L.(E.)), defendants who had made the effort to seek advice were not found liable even though their belief was described as "illogical". In ***Z-Mark International Inc.* v. *Leng Novak Blais Inc.*** (1996), 12 O.T.C. 33 (Gen. Div.), appeal dismissed (1999), 122 O.A.C. 341, a defendant made enquiries and obtained assurances and a warranty. The court found that the defendant had no reason to doubt the assurance or the warranty and therefore the defendant was not knowingly or recklessly indifferent to a breach of contract.

[44] In some cases a distinction is drawn between direct interference, for which the breach must be a foreseeable or reasonable consequence of the conduct, and indirect interference, for which the breach must be a necessary or substantially certain consequence. See, for example, L.N. Klar, *Tort Law*, 2nd ed. (Scarborough: Carswell, 1996) at 498 and 507; Fleming, *supra*, at 694; ***D.C. Thomson & Co. Ltd.* v. *Deakin***, [1952] Ch. 646 (C.A.); ***Bank of Nova Scotia,*** *supra;* ***Garry* v. *Sherritt Gordon Mines Ltd.***, [1988] 1 W.W.R. 289 (Sask. C.A.); and ***Atcheson***, *supra*.

[45] As this case involves direct interference, this distinction does not arise. Pocklington, as the director of Gainers, executed the documents to complete the transfer of the 350151 shares to his own company. The transfer caused Gainers to breach s. 13.03(l) of the Master Agreement, which prohibited dispositions of assets without Alberta's consent. Therefore, if the breach was a

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reasonable or foreseeable consequence of that transfer, or alternatively, if Pocklington completed the transfer recklessly, was wilfully blind to its consequences, or was indifferent as to whether or not it caused a breach, the necessary intent element for the tort will be met.

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The Evidence

[46] The trial judge did not consider the intent component of the tort and did not assess the trial evidence in that light. The parties were aware of the intent element, pleaded it, adduced evidence of intent at trial, and argued it, both before the trial judge and extensively at the appeal hearing. This court has the alternative of reviewing the evidence and making a determination whether the intent component is met, which was the parties' clear preference, or sending the case back to the trial court. An appellate court is in no position to weigh competing evidence, or assess credibility. However, in this case it is possible to make a determination about intent by considering and accepting the evidence adduced by Pocklington.

[47] Pocklington insisted that he continued to own the Carma Lands (AB 1051:19-23; 1093:17-20), that he was entitled to get back his mortgage at the end of the 90-day standstill period (AB 1089:31-33; 1094:6-11), and that the Master Agreement was irrelevant to the share transfer (AB 1089:40-41; 1097:43-46). Although he personally signed the Gainers' director's resolution transferring the shares, as well as the 350151 share certificates, he denied knowing whether he was getting the shares or the land back: " [...] the only thing I realized at the time was that I was getting back my mortgage that I had put up for the 90-day standstill" (AB 1095:4-6). It is clear from Pocklington's evidence that he entertained a flawed view of the financing arrangements with Alberta.

[48] Any businessman with Pocklington's experience should know that commercial lenders do not extend credit to companies in dire financial straits on the security of a mortgage, then, when the borrower defaults, hand back the mortgage and willingly accept any loss. Pocklington's assertions are plainly wrong. Further, his contention that the transaction was all part of the deal he negotiated with Alberta was contradicted by his own admission that he "never discussed taking back the shares in 350151 or the Carma Lands with anyone from the Crown" (AB 1089:43-45). Pocklington cannot sidestep the intent component of the tort by adopting an untenable and unrealistic view of the transaction, and an unreasonable interpretation of the agreements.

[49] Pocklington's evidence demonstrates he did not care whether his actions constituted a breach. He admitted that he was acting in his own interests and that he had no loyalty to Gainers (AB 742:17-37). His acknowledged that he was trying to defeat the entirety of the mortgage (AB 1094:5-11; 1095:4-6; 1052:46-1053:10; 1096:29-30). It is not much of a defence to a charge of intentionally breaching the Master Agreement to show that Pocklington intended to breach the Standstill Agreement instead.

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[50] Nevertheless, intent to breach the Master Agreement must be proven. The Master Agreement is a lengthy and complicated document, bristling with covenants and replete with schedules. It is by no means an easy document to analyze or interpret. It would have been possible for the trial judge to conclude that a breach of s. 13.03(l) of the Master Agreement was a reasonably foreseeable consequence of the transfer of the 350151 shares. Because of the manner in which the case was presented at trial, such a conclusion would involve findings of credibility. This court, however, is in no position to make those findings, and intent cannot be found on that basis.

[51] But that does not end the inquiry. Prudent business people, concerned about honouring contractual commitments, make appropriate inquiries before embarking on transactions that involve complex legal documents. Consulting legal counsel may not be necessary in every case, but the circumstances here cry out for legal advice: negotiations with Alberta had collapsed and Pocklington knew that realization of the loan was imminent; Gainers was insolvent with no equity left in the company; Gainers' assets and shares were secured and its business activities were restricted by binders full of loan and security agreements; and Gainers' sole beneficial shareholder proposed to transfer a valuable asset to himself for nominal consideration, signing the resolutions as sole director. Pocklington, both personally and in his capacity as a director of Gainers, had an obligation to obtain legal advice about the propriety of the transaction. If he failed to do so, or ignored the legal advice he received, he proceeded at his peril.

[52] The record contains statements by Pocklington that he would have relied on Lloyd (AB 1052:11-13), and by Lloyd that he never told Pocklington that the transaction could not be done (AB 875:3-5). But absent from the record is any evidence that Lloyd was asked by Pocklington or volunteered to give a solid legal opinion or obtain independent legal advice that the transfer of the 350151 shares would not violate the Master Agreement. Although at trial Lloyd testified to his view that the share transfer did not violate the agreement (AB 814:31-32; 875:23-28), there is no suggestion that, at the time of the transfer, he objectively assessed the risks of proceeding and fairly communicated his observations to Pocklington. Instead, the record shows that Pocklington demanded that Lloyd do what was necessary to get the land back (AB 1052:32-34; 1093:18-20), and that Lloyd did as he was directed (AB 874:39-875:1).

[53] The share transfer documents were prepared by Ogilvie and Company, "on instructions received from Gainers Inc. on the 3rd day of October, 1989" (AB XVIII at 3606), just as negotiations with Alberta collapsed. They were signed the next day. Lloyd was uncertain whether Ogilvie and Company brought s. 13.03(l) to Pocklington's attention. At first he acknowledged this had occurred:

> Q [...] And, sir, I take it that you're also aware that your firm drew Article 13.03(l) to Mr. Pocklington's attention at the time the shares were transferred from Gainers to Pocklington Holdings Inc.?

> A I think that's correct. I think that there was -- these -- these sections were -- now, I think that's correct.
>
> (AB 862:24-31)

Later, he changed his mind:

> A I think that there were discussions with respect to the people at Ogilvie about them and I'd -- I'm not certain -- I'm not that certain in fact -- I can't recall whether or not Mr. Pocklington was specifically directed to the sections or not.
>
> (AB 874:23-28)

[54] Correspondence from Ogilvie and Company provides some clarification. On November 15, 1989, after Alberta got wind that the shares had been transferred, its counsel wrote Ogilvie and Company asking for details. Alberta's counsel referred to a possible breach of s. 13.03(l) of the Master Agreement, noting that Alberta's consent had not been obtained, and that the transfer was not in the ordinary course of Gainers' business (AB XVIII at 3586-87).

[55] Ogilvie and Company responded by letter dated November 16, 1989, which stated:

> We are also able to advise you that our firm raised with our client the exact provision of the Master Agreement which your letter raises [s. 13.03(l)], however our client takes the view that the transaction is not off side the terms of the Master Agreement.
>
> (AB XVIII at 3606, para. 3) [Emphasis added.]

[56] The clear implication of Ogilvie and Company's carefully worded letter is that either the lawyers did not share their clients' views, or they were invited to keep their legal advice to themselves. Pocklington nevertheless signed the documents to give effect to the share transfer, and retained the shares despite Alberta's early protests and Ogilvie and Company's apparent reservations. He had the means of knowledge, but chose to act without legal advice. Pocklingon was wilfully blind to the consequences of his actions and showed clear indifference to the breach. The intent component of the tort is satisfied.

JUSTIFICATION

[57] In some situations, a defendant's plea of justification may avoid liability: ***South Wales Miners' Federation***, *supra,* and ***Quinn***, *supra.* The defence of justification is available when the defendant caused the breach while acting under a duty imposed by law. The issue in each case is whether, upon consideration of the relative significance of all the factors, the defendant's conduct should be tolerated despite its detrimental effect on the interests of others: Fleming, *supra*, at 657.

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[58] Directors of companies owe duties to the corporation; they are obliged both at common law and under statute to act in the best interests of the company: ***Re Cawley & Co.*** (1889), 42 Ch. 209 at 233 (C.A.). For example, s. 117(1)(a) of the *ABCA* provides: "Every director and officer of a corporation in exercising his powers and discharging his duties shall act honestly and in good faith with a view to the best interests of the corporation [...] ".

[59] Therefore, when the interests of the company are best served by breaking its contractual commitments, the director's act of inducement is justified because it is "taken as a duty": ***De Jetley Marks* v. *Greenwood (Lord)***, [1936] 1 All E.R. 863 (K.B.) at 873; and ***Imperial Oil Ltd.* v. *C & G Holdings Ltd.*** (1990), 62 D.L.R. (4th) 261 (Nfld. C.A.). The rationale for this defence is that a director acting in compliance with a duty imposed by law should not be personally liable because the director's act induced a breach of the company's contract.

[60] But if the director is not complying with that duty, the rationale for relieving personal liability disappears. Although the director may have acted in the name of the company, justification is not available as a defence. See W.A. Richardson, "Making an End Run Around the Corporate Veil: The Tort of Inducing Breach of Contract" (1984) 5 Advocates' Q. 103.

[61] For example, in ***McFadden* v. *481782 Ontario Ltd. et al.***, [1984] 47 O.R. (2d) 134 at 146-47 (H.C.J.), the court found that the defendant directors were liable when "[t]hey sought to feather their own nest, rather than that of the company they were under a duty to serve." In transferring corporate funds to themselves, they were acting with a view to their own best interests rather than the corporation's. Therefore, they were not acting "under a compulsion of a duty", justification was not available as a defence, and the directors were personally liable for inducing a breach of contract. Similarly, immunity did not extend to directors who took advantage of their office to commit a tort for their own ends: ***Jackson***, *supra*.

[62] But who bears what burden of proof? The Newfoundland Court of Appeal cautioned against unduly limiting the justification defence available to directors in ***Imperial Oil***, *supra*. Marshall J.A. observed that requiring directors to justify their corporate actions to third parties in order to obtain immunity from personal suit would open the corporate affairs of a company to third party scrutiny, erode established concepts of separate corporate status and impair the efficiency of the corporate entity. He stated that "[e]ven when a director has not acted *bona fide*, therefore, there must exist some factor additional to the knowledge upon which he or she acts to justify a finding of wrongful inducement." He went on to suggest that liability may depend on proof by the plaintiff "that the dominating purpose of the director's act was aimed at depriving the aggrieved party of the benefits of the contract": at 266.

[63] In order to succeed under the ***Imperial Oil*** test, a plaintiff must prove that the director knew the legal rights of others would be jeopardized by the director's actions, and intended to deprive the aggrieved party of contractual benefits. Although proof of malice is not required, the

Imperial Oil test ratchets up the intent element, making it closer to the formulation of the tort that existed more than a century ago, at the time of ***Lumley***, *supra,* and ***Quinn***, *supra*. Rigorously applied in direct interference cases, proof that the breach was a necessary or foreseeable result of the director's conduct seems to be insufficient to establish liability. Similarly, the ***Imperial Oil*** test appears to preclude liability for a director who acted recklessly or was wilfully blind to a breach.

[64] The concerns expressed in ***Imperial Oil*** are not misplaced. In order to protect the fine fabric of the corporate veil, courts should refrain from requiring directors to prove the legitimate corporate purpose motivating their actions. However, courts also should not condone inappropriate conduct by automatically placing a difficult onus on a plaintiff, by reason only that the defendant director owed legal duties to the company whose contract he had a hand in breaching. Some balance is required.

[65] Although justification is a defence to the tort, the burden is fairly placed on the plaintiff to prove the director was not acting in the best interest of the corporation, and therefore stepped out from under the protective umbrella of the director's corporate duties. If a director wishes the plaintiff to prove more, in my view the director must at least demonstrate that some legitimate interest of the corporation could have been served by the conduct. This information is well within the director's knowledge and a requirement to demonstrate it on a *prima facie* basis, rather than to prove it on a balance of probabilities, does not unduly open the company's business to third party scrutiny.

[66] If the court concludes the director's conduct is capable both of serving the interests of the corporation and of achieving some less worthy purpose, the court should go on to consider whether the plaintiff has proven that the director's act was aimed at depriving the aggrieved party of the benefits of the contract. But where, as in ***McFadden***, *supra*, it is readily apparent that the conduct could only be intended for the director's own benefit and not the company's, the court need not address the director's dominating concern. In such direct interference cases, proof of intent as it has developed through the case law, and proof that the director was not acting in the best interests of the corporation, will be sufficient to ground liability.

[67] In this case Pocklington acquired a valuable asset for nominal consideration at the expense of Gainers' creditors. Since Gainers was insolvent at that time, its creditors' interests were the interests of the company: L.C.B. Gower, *Gower's Principles of Modern Company Law*, 6th ed. (London: Sweet & Maxwell, 1997) at 603; and ***Levy-Russell Ltd.* v. *Tecmotiv Inc.*** (1994), 13 B.L.R. (2d) 1 (Ont. Gen. Div.) at 189-90. Promoting the interests of one shareholder at the expense of the creditors is not in the best interests of the company: ***Levy-Russell*** at 169. A director who pursues these objectives is not acting in furtherance of his corporate duty, and there is no justification for his deeds.

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[68] Pocklington has not demonstrated any legitimate business interest of Gainers that could have been served by the 350151 share transfer. In fact, he candidly admitted he was acting only in his own interests, with no benefit to Gainers (AB 742:16-37):

> Q I am talking about on October the 4th when Gainers sold the shares --
> A To me?
>
> Q -- in the numbered company to Pocklington Holdings Inc.?
> A Right.
>
> Q Was there any benefit to Gainers in that transaction?
> A I guess I was more interested in my own personal well-being than Gainers' well-being at that particular date. I felt, as I said, by that time a lot of my trust had left my partners called the government.
>
> Q All right, so you were acting --
> A In short, I realized that I was getting screwed by them.
>
> Q You were acting to further the interests of PHI and yourself and you weren't too concerned with Gainers at that time?
> A My loyalty to Gainers had been squeezed at that time.

[69] By transferring the 350151 shares to his own company, Pocklington was not discharging his legal duty to act honestly and in good faith with a view to the best interests of Gainers; he was acting solely in his own interests. As no legitimate interest of Gainers could possibly be served by the transaction, the court need not go on to consider whether Pocklington's act was aimed at depriving Alberta of the benefits of its contract. Pocklington's position as director cannot provide justification for his actions.

DAMAGES

The Damage Element

[70] In order to find liability for the tort of inducing breach of contract, Alberta must show that it suffered damages. Proof of damages is an element of the tort. Once all the elements have been found, and liability has been established, the court goes on to calculate the quantum of damages.

[71] Pocklington contends that Alberta suffered no damages, because at the time the shares were transferred, 350151's liabilities exceeded the value of its assets, making the shares worthless. Pocklington's argument ignores the fact that most of 350151's debt was owed to Alberta or to Lloyds Bank, whose interest Alberta acquired. But even if there had been no equity

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in the 350151 shares, Gainers' ownership of the shares would have been of considerable value to Alberta. Since Alberta came to own all Gainers' shares, it also would have controlled 350151, Gainers' subsidiary. Alberta could therefore have consented to the foreclosure against the Carma Lands on behalf of 350151, saving considerable time and litigation expense. These damages are not theoretical. At the appeal hearing, Alberta indicated that it had not realized on the Carma Lands mortgage and the litigation is ongoing.

[72] The damage element of the tort is met.

Quantum of Damages

[73] Having established liability, the quantum of damages must be assessed.

[74] Pocklington contends that damages must be confined to losses which existed on the date of the breach. In fact, damages are to be assessed "at large": ***Exchange Telegraph Co. Ltd.* v. *Gregory & Co.***, [1896] 1 Q.B. 147 at 153 (C.A.). A court can award the damages it deems appropriate, which are a matter of impression, not addition, and can be inferred from the circumstances: ***Goldsoll* v. *Goldman***, [1914] 2 Ch. 603 (Ch.D.); affirmed [1915] 1 Ch. 292 (C.A.); and ***Vale* v. *International Longshoremen's & Warehousemen's Union, Local 508*** (1979), 9 C.C.L.T. 262 at 271 (B.C. C.A.). The court must assess a global figure approximating the harm it thinks the plaintiff has suffered: ***Simpson* v. *Consumers' Assn. of Canada*** (1999), 41 C.C.E.L. (2d) 179 at 260 (Ont. Gen. Div.).

[75] Given this broad latitude, it is not surprising that the date for establishing damages remains flexible. While a court may choose to assess damages that existed on the date of the breach, it instead may elect to compensate the plaintiff for losses that occurred in the years following the breach: ***Unilux Manufacturing Co.* v. *Prime Boilers Inc.***, [1990] 74 O.R. (2d) 270 (H.C.J.); and ***Clarke* v. *Rossburger*** (2000), 50 B.L.R. (2d) 73 (Alta. Q.B.).

[76] When Alberta started this action it sought the return of the 350151 shares to Gainers or, alternatively, monetary damages. Returning the shares would have been simplest and would have undone the breach of contract. That remedy was possible at the time of the trial, but the parties indicated at the appeal hearing that this was no longer the case. Damages equivalent to the value of the shares must therefore be awarded.

[77] Establishing the date for the calculation of damages involves judicial discretion, based on the facts and circumstances. Pocklington has wrongfully withheld and had the benefit of the 350151 shares since 1989. In the last decade, the value of 350151's primary asset, the Carma Lands, has increased. It would be inequitable to value the damages at the date of the breach, allowing all the post-breach gain to accrue to Pocklington. The quantum of damages must therefore be calculated as the value of the 350151 shares at the time of the trial.

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[78] Because 350151 had only one asset, the Carma Lands, assessment of the value of the 350151 shares is relatively simple. The calculation begins with the fair market value of the Carma Lands, from which are deducted any liabilities owed by 350151 in respect of the Carma Lands. The starting point is the trial judge's finding that the Carma Lands were worth $6.6 million (AB I at 1264).

[79] At the time of the trial, a number of encumbrances were registered against the Carma Lands. Alberta Treasury Branches had registered a mortgage in the face amount of $1.6 million to secure a personal obligation of Pocklington. The agreement by which 350151 acquired the Carma Lands from Hartford Properties provided that 350151 "has not assumed any liability under or with respect to the ATB Mortgage [...]" and that if 350151 were required to make payment, any amounts paid would be set off against the balance owing to Hartford Properties for the purchase price of the Carma Lands (AB XVIII at 3604, s. 2). Since 350151 is not responsible for paying the ATB mortgage, it may be ignored.

[80] The other mortgages registered against the Carma Lands consisted of a financial guarantee in favour of Lloyds Bank for $1.5 million, which Alberta has acquired, and the $5 million mortgage in favour of Alberta. Alberta indicated at the appeal hearing that to date nothing has been realized on the mortgages registered against the Carma Lands, and provided an undertaking that it would not pursue Pocklington personally for any amounts realized on the mortgages. While Alberta's ability to collect against Pocklington must be restricted to avoid double recovery, for the purpose of calculating damages the amount of these mortgages may also be ignored.

[81] The remaining liability is the amount owing to Hartford Properties for the purchase of the Carma Lands. 350151 acquired the Carma Lands from Hartford Properties on August 10, 1989 for $1.9 million, payable by a promissory note (AB XVIII 3604, s. 1) which, at the time of trial, had not been paid. On September 27, 1989, Pocklington, in his capacity as director of 350151 and Hartford Properties, signed a second agreement which added a price adjustment clause to the original purchase agreement (AB XVII 3469-70). The clause provided:

> 6. It is the intention of the parties that the Lands be transferred at their fair market value. Should, however, any competent taxing authority at any time issue or propose to issue any assessment or assessments that impose or would impose any liability for tax on the basis that the fair market value of the Lands is other than the amount set forth herein and if the directors of the parties or a competent court or tribunal agree with such a revaluation and all appeal rights have been exhausted or times for appeal have expired without appeals having been taken or should the directors of the parties otherwise determine that the fair market value is other than the amount set forth herein, the purchase price shall be adjusted nunc pro tunc pursuant to the provisions of this paragraph to reflect the agreed upon fair market value and all necessary adjustments, amendments to the Note,

> payments and repayments as may be required shall forthwith be made between the parties.
>
> [Emphasis added.]

[82] The purchase price of the Carma Lands was subsequently adjusted to $3.2 million by a price adjustment agreement between Hartford Properties and 350151 dated February 23, 1993, which Pocklington signed as director of both companies. The preamble to the agreement read: "The Directors of the parties hereto have determined that the fair market value of the lands sold thereunder is other than the amount set forth in the Agreement": (AB XVIII 3684-85, clause C). There was no reference in the agreement to a tax assessment, nor was any evidence of an actual or proposed assessment adduced at trial.

[83] Pocklington contends that the emphasized words in clause 6 gave him authority to change the purchase price if he, as a director of 350151, agreed with himself, as a director of Hartford Properties, that the fair market value of the Carma Lands was something other than $1.9 million. Clause 6 does not support this interpretation. It provided that the actual or proposed issuance of a tax assessment was the precondition for a price adjustment. If this clause had given the companies an unrestricted license to change the purchase price, it would not have been prefaced by the requirement of a tax authority assessment. Alternatively, the blanket provision would have appeared in a separate clause, or at least been separated by a comma. As Pocklington led no evidence to show that any tax authority issued or proposed to issue an assessment with respect to the Carma Lands, the threshold requirement for a readjustment of the purchase price was not met, and the price adjustment was invalid.

[84] Even if the price adjustment clause could be interpreted to give the directors free reign to adjust the purchase price, as Pocklington argues, the second sentence of clause 6 must nevertheless be read with the first. The directors' ability to adjust the purchase price was circumscribed by the requirement that the Carma Lands be transferred at their fair market value. "Fair market value" is usually defined as "the highest price that would be obtainable (a) in an open and unrestricted market, (b) in a transaction between informed, prudent parties acting at arm's length from one another, and under no compulsion to act [...]": ***MacKenzie Financial Corp.* v. *McRae*** (1998), 81 O.T.C. 321 (Gen. Div.). Pocklington bore the burden of establishing that the fair market value of the Carma Lands on August 10, 1989, the date of the transfer, was $3.2 million rather than the sale price of $1.9 million. He did not present evidence at trial, such as an arm's length offer to purchase or an independent appraisal, which would meet the requirements of the fair market value definition and support the higher value. When asked about the price change, Pocklington stated he knew little about it (AB 1053:35-37). Lloyd mentioned an appraisal showing a higher value (AB 815:4-10), but no such appraisal was entered in evidence. Alberta, however, called an expert assessor as a witness, who testified that the fair market value of the Carma Lands on October 4, 1989, approximately two months after the transfer, was $2.2 million (AB 615-24). As the weight of evidence does not support a finding

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that the fair market value of the Carma Lands was $3.2 million, the alleged price adjustment is invalid, and the balance owing in respect of the purchase price is $1.9 million.

[85] Other factors must be considered in assessing damages. These also involve the exercise of judicial discretion. Although the August 10, 1989 promissory note issued by 350151 to Hartford Properties provided for interest at a rate of 12% per annum to be payable on the principal amount of the note after August 10, 1991 (AB XVIII 3604, s. 1), no interest was paid. It is not appropriate that the accrued interest be calculated and treated as a liability, to be deducted from the damages payable by Pocklington. Pocklington has had the use and control of the Carma Lands; Alberta has not. Pocklington was in a position to repay the note when it came due and avoid the interest; Alberta was not. It would be inequitable to charge Alberta for the accrued interest. However, equity also dictates that Pocklington should be given credit for any amounts spent between 1989 and the time of trial to improve the Carma Lands, thereby contributing to their increase in value. No evidence of any such expenditures was adduced at trial.

[86] Damages therefore are assessed at the $6.6 million value of the Carma Lands, less the $1.9 million balance owing, for a total of $4.7 million. Because the 350151 shares were valued at the date of the trial, it is not appropriate to order prejudgment interest on this amount.

SUMMARY

[87] The appeal is allowed.

[88] Pocklington intentionally induced Gainers to breach s. 13.03(l) of the Master Agreement. He is personally liable to pay $4.7 million to Alberta as damages. To avoid double recovery, and in accordance with representations made by Alberta at the appeal hearing, any amount Alberta recovers by successfully realizing on the mortgages registered against the Carma Lands must be deducted from the amount owed by Pocklington in respect of damages. Similarly, any amounts recovered against Pocklington in respect of this damage award will reduce the amount that Alberta may realize on the mortgages registered against the Carma Lands.

[89] Alberta is entitled to its costs, both for the trial and the appeal.

APPEAL HEARD on MAY 2, 2000

REASONS FILED at Edmonton, Alberta,
this 21st day of NOVEMBER, 2000

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FRUMAN J.A.

I concur: _____
CÔTÉ J.A.

I concur: _____
ROOKE J.

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TAB 12

Court of Queen's Bench of Alberta

Citation: Addison & Leyen Ltd. v Fraser Milner Casgrain LLP, 2013 ABQB 473

Date: 20130819
Docket: 1101 13007
Registry: Calgary

2013 ABQB 473 (CanLII)

Between:

Addison & Leyen Ltd., John Joseph Dietrich, Jeannette Marie Dietrich, Wilfrid Daniel Roach and Helen Roach

Plaintiffs / Applicants

- and -

Fraser Milner Casgrain LLP and Wallace Y. Shaw

Defendants / Respondents

Reasons for Judgment
of the
Honourable Mr. Justice J.T. McCarthy

I. Introduction

[1] The Plaintiffs seek contribution and indemnity from the Defendants for tax liability and expenses they incurred in October 2010 in the amount of $1.75 million. The Plaintiffs allege this tax liability arose as a result of a negligent legal opinion provided by the Defendants in late 1989 relating to a share purchase agreement. The Defendants deny liability and argue that the Plaintiffs' claim is statute-barred, as the limitation period has expired.

[2] This is an application brought by the Plaintiffs for the determination of the following question of law:

> Is the Plaintiffs' claim barred by the operation of the 10-year limitation period in the *Limitations Act*, RSA 2000, c L-12 (the "*Limitations Act*"), s 3(1)(b)?

II. Facts

[3] The application proceeded on the basis of an Agreed Statement of Facts, agreed to for the limited purpose of this application (Exhibit #1). The facts, briefly stated, are as follows.

[4] The Plaintiff, Addison & Leyen Ltd. ("Addison"), is an Alberta corporation. At all relevant times, the Plaintiff, John Joseph Dietrich, was a director and 40% shareholder of Addison. The Plaintiff, Jeannette Dietrich, was a 10% shareholder of Addison and is Mr. Dietrich's spouse. The Plaintiff, Wilfrid Daniel Roach, was also a director and 40% shareholder of Addison at all relevant times. The Plaintiff, Helen Roach, was a 10% shareholder of Addison and is Mr. Roach's spouse. Mr. Dietrich, Mrs. Dietrich, Mr. Roach and Mrs. Roach are together referred to as the "Individual Plaintiffs".

[5] The Defendant, Fraser Milner Casgrain LLP ("FMC"), is a law firm with offices in numerous Canadian cities, including Calgary. FMC is a successor of Fenerty, Robertson, Fraser & Hatch ("Fenerty"), a former Calgary-based law firm where, at the relevant time, the Defendant, Wallace Y. Shaw, practiced as a tax lawyer. Mr. Shaw is now retired.

[6] York Beverages (1968) Ltd. was a Saskatchewan corporation that carried on a soft drink bottling business in Regina, Saskatchewan until around October 1988. On September 26, 1989, it changed its name to 309093 Saskatchewan Ltd. It continued into Alberta and changed its name to 475320 Alberta Ltd. on November 19, 1990. This entity is referred to as "York".

[7] The Individual Plaintiffs each held an ownership interest in York, either directly as shareholders or indirectly through their ownership of Addison. Until September 1989, all of the Individual Plaintiffs were directors of York.

[8] York's taxation year was October 1 to September 30. On October 1, 1988, York sold the assets of its bottling business for approximately $10 million cash and $3 million in assumed indebtedness. York intended to cease carrying on business and distribute the proceeds of the asset sale by the end of its taxation year, namely September 30, 1989. Approximately $6.2 million was distributed to the shareholders in dividends. After other payments were made, York's sole remaining asset was $2.8 million cash, which was retained to pay York's estimated income tax liability for the 1989 tax year.

[9] In September 1989, the Plaintiffs agreed to sell their shares in York to 388777 Alberta Ltd. (the "Purchaser") for $1,115,000 (the "Share Purchase Transaction"). Fenerty acted for the

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Purchaser in connection with the Share Purchase Transaction. Mr. Shaw was one of the lawyers with carriage of the matter at Fenerty.

[10] The Purchaser intended to use York's available cash to purchase seismic data, which would enable it to claim a tax deduction of approximately $6.5 million. The Purchaser valued the seismic data at $6,295,000, based on three independent appraisals. The Purchaser expected that, as a result of the seismic data purchase, York would have no income tax liability for the 1989 tax year. The Plaintiffs did not have knowledge of, or involvement in, the seismic data purchase until years after the transactions were completed. They resigned as directors of York on September 26, 1989, and the Share Purchase Transaction closed on September 28, 1989. It was the Purchaser's representatives on York's Board of Directors, not the Plaintiffs, who entered into the transactions involving the seismic data purchase.

[11] One of the conditions of closing the Share Purchase Transaction was that the Purchaser would provide a legal opinion to the Plaintiffs regarding their potential tax liability. Mr. Shaw delivered a tax opinion stating, among other things, that it was reasonable to conclude that York would be able to pay its income tax liabilities for the 1989 tax year, and that the Plaintiffs would not be liable for any income tax liability in respect of York for matters arising after the Plaintiffs resigned as directors of York (the "Tax Opinion").

[12] On December 29, 1992, the Minister of National Revenue (the "Minister") reassessed York for the 1989 tax year on the basis of the valuation of the seismic data. The Minister determined it was worth only $1,696,500, and that, as a result, York owed $3,247,074 in taxes, penalties and interest. York was not able to pay this tax liability.

[13] In around February 2001, the Minister issued notices of assessment to the Plaintiffs and others for York's income tax liability for the 1989 tax year (the "Assessments"). At that time, York's tax liability was $6.7 million as a result of interest accruing. The Minister took the position that the Plaintiffs were statutorily liable for York's income tax debt, and that the Plaintiffs were each liable for this debt up to the amount they received from York. The Plaintiffs' exposure to this income tax liability was not due to any fault, wrongful act or misconduct on their part.

[14] The Plaintiffs opposed the Minister's Assessments: they filed notices of objection, sought judicial review, and actively litigated their notices of objection. In October 2010, the Plaintiffs entered into a settlement with the Minister whereby the Minister agreed to increase the valuation of the seismic data from approximately $1.7 million to approximately $5.15 million. This left York with a tax liability from the 1989 tax year of $492,676 (the "Tax Liability"). As part of the settlement, the parties were responsible for their own costs.

[15] Addison paid the Tax Liability due of $492,676. In addition, the Plaintiffs incurred approximately $1.25 million in legal fees, disbursements and other expenses in their opposition and settlement of the Assessments ("Assessment Expenses").

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[16] The Statement of Claim was filed in this action on September 21, 2011. The Plaintiffs bring this action for contribution and indemnity from the Defendants, based on the common law implied right to indemnity. They seek payment of the Tax Liability and their Assessment Expenses in the amount of $1.75 million. There is an agreement in place between the parties to suspend the running of any applicable unexpired limitation period between February 2003 and September 2011 (the "Standstill Agreement").

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III. Issues and Analysis

[17] For the purpose of this application, the parties have agreed to the above facts. They have also agreed that the terms of settlement of the Assessments were reasonable, and that the Plaintiffs would not have incurred the Tax Liability or the Assessment Expenses but for their reliance on the Defendants' Tax Opinion.

[18] The parties have agreed, by way of Consent Order filed January 23, 2013, that the question of law to be determined is as follows:

> Is the Plaintiffs' claim barred by the operation of the 10-year limitation period in the *Limitations Act*, s 3(1)(b)?

[19] The Plaintiffs' position is that their cause of action against the Defendants only arose once they incurred liability through the settlement of the Minister's tax claim in October 2010, or alternatively, when they first learned of the Assessments in February 2001. Because of the Standstill Agreement in place, the limitation period had not expired in either case by the time the Statement of Claim was filed and, as a result, the Plaintiffs' claim is not statute-barred.

[20] The Defendants take the position that the Plaintiffs' claim is improperly characterized as a claim for contribution based on a common law implied right to indemnity; rather, it is a straightforward negligence claim. The Plaintiffs' cause of action arose when the Defendants' alleged act or omission occurred in providing the Tax Opinion in the Share Purchase Transaction in September 1989. Accordingly, it is statute-barred because the Plaintiffs did not commence the action within 10 years after their claim arose, as required by section 3(1)(b) of the *Limitations Act*.

[21] In order to answer the above question of law, it is necessary to determine whether the Plaintiffs' action is properly framed as a breach of an implied contract of indemnity at common law. For the reasons that follow, I conclude that the Plaintiffs' cause of action against the Defendants is properly a negligence claim, not a claim for contribution based on an implied right to indemnity. As a result of this conclusion, the Plaintiffs' claim is barred by the operation of the 10-year limitation period in section 3(1)(b) of the *Limitations Act*.

A. Policy Considerations and the *Limitations Act*

[22] The Plaintiffs obtained a Tax Opinion from the Defendants as a condition of closing for the Share Purchase Transaction in 1989, wherein the Defendants opined that it was reasonable to conclude that York would be able to pay its income tax liabilities for the 1989 tax year, and that the Plaintiffs would not be liable for any income tax liability in respect of York for matters arising after the Plaintiffs resigned as directors of York. The Plaintiffs relied on the Tax Opinion in order to complete the Share Purchase Transaction and would not have proceeded without it. The Plaintiffs plead that the Defendants were negligent in providing the Tax Opinion. As a result, they suffered loss through no fault of their own. For the purpose of this application, the parties agree that the Defendants are liable to the Plaintiffs for the Tax Opinion, subject to the operation of any limitation period.

[23] I have some sympathy for the Plaintiffs' position in this case. The Defendants provided them with a Tax Opinion in September 1989, and they relied upon it in completing the Share Purchase Transaction to sell their ownership interests in York. York was reassessed by the Minister in December 1992, and the Plaintiffs received Assessments in February 2001. They were not aware of any tax consequences impacting them for nearly 11.5 years after the Tax Opinion was given.

[24] Section 3(1) of the *Limitations Act* provides:

> (3)(1) Subject to section 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.

[25] The 10-year period in section 3(1)(b) is often referred to as the "ultimate limitation period", and imposes a limit on indeterminate liability. The section is clear that the absolute limitation period starts to run from the negligent or wrongful act or omission itself, and does not depend on when the claimant first knew, or ought to have known, about the claim: *Bowes v Edmonton (City)*, 2007 ABCA 347, 425 AR 123 at para 151. As a result, the Plaintiffs' cause of

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action against the Defendants in negligence was statute-barred before they were even aware it existed.

[26] The present situation is similar to *Bowes*, where Côté J.A. noted at para 116:

> Now the big complaint of the plaintiffs is that the time for them to sue expired before they knew that they had a claim, indeed maybe even before they *had* a claim which the law would act upon. They say that is unjust. Their statement is correct in fact. And if one looks only at the plaintiffs, it is unfair.

[27] In *Bowes*, Côté J.A. analyzed the law regarding the ultimate limitation period, and outlined the conflicting policy considerations. Although Côté J.A. dissented, the majority agreed with his analysis, disagreeing with his conclusion based on the facts of the case: para 208. He discussed the important purpose served by limitation periods, noting at paras 118-122:

> 118 We must start by recalling the main purpose of limitations legislation. It is enacted to prevent certain plaintiffs from suing on good causes of action. If pressed to trial, poor causes of action will not likely succeed on the merits; they will be dismissed.
>
> 119 What is the policy reason for barring such suits? To eliminate the harm to defendants of very belated litigation. Most of that harm divides into two categories.
>
> 120 First, people and businesses have to get on with their lives. They should not have to store bulky or fragile records forever, even for decades. Their savings and futures should not be founded on fading memories, or the hazard of whose witness first dies or disappears. The social cost of all that is high. People and businesses must be able to plan their affairs without keeping idle huge reserves against the possibility of ancient claims arising. No one would buy a construction business or a professional practice if it might drag with it claims over 30 years old. Indeed, Canadians daily use buildings, bridges, dams, roads, and railways a century or more old. Companies depend on constituting documents drafted by long-forgotten solicitors. Wills and trusts generations old govern pensions plans and other vast sums. Many Canadians were delivered by obstetricians over 65 years ago; and got medical advice over 60 years ago.
>
> 121 With no limitation periods, much of the country's assets, infrastructure, and capital would be sterilized by the dead hand of history. See Alberta Law Reform Institute, *Limitations* 1-2, 70 (Report #55, December 1989).
>
> ...
>
> 122 The second aspect of the harm is that trying to find and test evidence about events decades old is usually roulette, not a serious exploration of the truth. After

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> some years, a defendant cannot prove a proper defence, or even disprove the plaintiff's allegations.

[28] It is difficult to balance these competing policy concerns. However, the Legislature was clear in enacting the ultimate limitation period in section 3(1)(b) of the *Limitations Act*. The conclusion reached by Justice Côté in *Bowes* is applicable to the present case (at paras 156-157):

> 156 I appreciate two of the plaintiffs' arguments. First, that they should not be deemed to have lost their right to sue before they learned of it. And second that even if that were wrong, they should not lose a right to sue before it arose, i.e. if the harm occurred more than 10 years after the wrongful act or omission. From their point of view alone, that can seem unfair, even capricious.
>
> 157 But this is not constitutional legislation, and no constitutional argument was put to us. The Legislature is sovereign on this topic, and in my view, it has spoken deliberately and clearly in this area. We cannot amend the *Act*, nor can we ignore its history or its scheme. See *Zaidan Group Ltd. v. London (City)* (1990), 36 O.A.C. 384, 71 O.R. (2d) 65 (Ont. C.A.) (para. 11), *affd.*, [1991] 3 S.C.R. 593, 129 N.R. 227 (S.C.C.). Furthermore, when one considers the policy dilemma set out in Part I above, the unfairness largely disappears. The danger of long-hidden losses must land on someone's shoulders. We cannot legislate it away.

[29] Unfair though it may seem, the 10-year ultimate limitation period applies to a right to sue for negligence before the Plaintiffs have even learned of their cause of action.

[30] I will now consider whether the Plaintiffs can advance a cause of action for contribution for breach of a common law implied contract of indemnity. Because of the Standstill Agreement between the parties, that cause of action is not statute-barred by operation of the *Limitations Act*.

B. Common law implied contract of indemnity

[31] The Plaintiffs have a claim against the Defendants in negligence, but acknowledge that the limitation period has passed and that the negligence claim is statute-barred. The Plaintiffs instead seek to advance a claim for contribution for breach of a common law implied contract of indemnity, and argue that this claim and a claim for negligence are not mutually exclusive; one or both claims can be advanced independently of each other.

[32] I accept that a claim for contribution and indemnity may be advanced on its own, or as an additional or alternative cause of action. I agree with the Plaintiffs that having a cause of action in negligence does not detract from their ability to advance a claim for contribution and indemnity. However, it must be a valid claim for contribution and indemnity, and not a claim improperly characterized as such for another purpose, such as to avoid the operation of a statutory limitation period. I must determine whether the Plaintiffs in this case have a proper cause of action for breach of an implied contract of indemnity.

[33] The *Limitations Act*, section 3(3)(e) provides:

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> a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs...

[34] A claim for contribution may be established by statute, such as under the *Tort-Feasors Act*, RSA 2000, c T-5, where a defendant may seek contribution from a third party in any amount that the plaintiff could have sought from the third party: *Tort-Feasors Act*, s 3(1); *Canada Deposit Insurance Corp. v Prisco* (1996), 181 AR 161 (CA) at para 10. Claims under the *Tort-Feasors Act* are derivative in nature, in that the defendant's claim against a third party is derivative of the plaintiff's claim against that third party: *Dean v Kociniak*, 2001 ABQB 412, 289 AR 201 at para 19.

[35] A claim for contribution may also be established under the common law in "circumstances where one of the potential defendants owes a duty recognized by the common law to identify *[sic]* or contribute to the other potential defendants": *Dean* at para 18. For example, such a duty may arise in a contract situation where one party expressly or impliedly agrees to indemnify another party, or may arise in an agency relationship where the principal seeks contribution for liability from its agent. Circumstances giving rise to a right to indemnity were summarized by the Privy Counsel in *Eastern Shipping Company, Limited v Quah Beng Kee*, [1924] AC 177 (PC) at 182-183:

> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in Waring v. Ward 9; a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation" of the vendor. ...

[36] In this case, the Plaintiffs do not rely on a statutory right or an express contract. Rather, the Plaintiffs allege that there was an implied contract of indemnity between them and the Defendants entitling them to contribution for the Tax Liability and their Assessment Expenses. The Plaintiffs state that an implied contract arose because the Defendants owed a duty of care to the Plaintiffs in preparing the Tax Opinion, the Defendants were negligent in its preparation, and it was foreseeable to the Defendants that the Plaintiffs could incur liability if the Defendants

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were negligent in preparing the Tax Opinion. The Defendants respond that this is not an implied contract of indemnity, but a straightforward negligence claim.

[37] The parties both refer to *McFee v Joss*, [1925] 2 D.L.R. 1059 (Ont SC (AD)), a 1925 decision of the Ontario Supreme Court – Appellate Division involving a motor vehicle accident. One of the defendants leased an automobile from the plaintiff for the purpose of the other defendant's business and, while driving, was in a motor vehicle accident with a non-party, Watson. Watson successfully sought damages from the plaintiff, as owner of the motor vehicle. The plaintiff then commenced a separate action for indemnity from the defendants for the amount paid to Watson as a result of the motor vehicle accident. The Court held that the plaintiff was entitled to indemnity from the defendants, and set out the requirements for an implied contract of indemnity at para 24:

> ...an implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tort-feasors in such a sense as to prevent recovery; that is, where the act done is not clearly illegal in itself. This right of indemnity is based upon the principle that every one is responsible for his own negligence, and if another is, by a judgment of a court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer.

[38] Based on *McFee*, the Plaintiffs argue that it is not necessary for the Canada Revenue Agency or the Minister to have a claim against the Defendants in order for there to be a common law right to indemnification. What matters is that the Plaintiffs were not personally at fault for the tax liability they incurred, and that they were exposed to this liability as a result of the Defendants' negligence.

[39] The Defendants dispute the Plaintiffs' interpretation of *McFee* on the basis that the Plaintiffs' position fails to recognize the specific requirements for a common law right to indemnification. In particular, the Defendants submit that *McFee* allows for indemnity at common law only where the Plaintiffs, without fault, are compelled to pay damages which ought to have been paid by the Defendants. In *McFee*, a claim for indemnity was asserted against another who could independently be liable to the plaintiff in the first instance.

[40] *McFee* was referred to by this Court in the decision of *Edmonton (City) v Lovat Tunnel Equipment Inc.*, 2000 ABQB 882, 279 AR 1 at paras 382-386. The City of Edmonton purchased from Lovat Tunnel Equipment Inc. ("Lovat") a tunnel boring machine in 1976 and spare bearing part for the machine in 1978. In 1986, the spare bearing was installed and failed. Edmonton commenced an action against Lovat and the manufacturer, Rotek Incorporated ("Rotek"). A partial settlement was reached between Lovat and Edmonton during trial. Lovat pursued a third party claim against Rotek for indemnity at common law.

[41] In *Lovat Tunnel*, this Court held that Edmonton's claim against Lovat was statute-barred, as the limitation period had expired. The limitation period began to run when the cause of action

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arose (at delivery of the spare bearing), not on discovery of the breach. Further, Edmonton's claim against Rotek for damages for pure economic loss arising from Rotek's negligence also failed. While Rotek owed Edmonton a *prima facie* duty of care in the manufacture of the bearing, this duty was negated for public policy reasons:

> 249 In *Blacklaws v. 470433 Alberta Ltd., supra* the Court of Appeal appears to have accepted that there are valid policy reasons for excluding liability for the manufacture of shoddy but non-dangerous articles. Given the conclusion of the majority in *Blacklaws v. 470433 Alberta Ltd., ibid.* and the lack of any allegation or evidence that a defect in the Replacement Bearing posed a danger to persons or property, I am unable to find that Rotek was under a duty of care in the present case to manufacture the Replacement Bearing in such a fashion so as to avoid pure economic loss on the part of the City of Edmonton.
>
> 250 With the greatest of respect, in the absence of a duty of care, there is no negligence: paras 249-250.

[42] Justice Lee concluded that, had he held that there was a duty of care, he "would have found Rotek negligent in its manufacture of the Replacement Bearing": para 544. There was no liability finding against Lovat. Notwithstanding that Rotek did not owe a duty of care to Edmonton, Lee J. concluded that Lovat would have a common law right of indemnity against Rotek for any damages for which Lovat may be held liable, had Edmonton's claim against Lovat not been statute-barred: para 385.

[43] In *Lovat Tunnel*, a common law right of indemnity would have been found if a party who is not at fault (Lovat) had been held liable for the acts of another party (Rotek). Rotek manufactured a defective bearing that Lovat sold to Edmonton. This is distinguishable from the present case, where the Plaintiffs were not held liable for the negligent acts of the Defendants in providing the Tax Opinion; rather, they incurred the Tax Liability and their Assessment Expenses as a result of their receipt of funds in the Share Purchase Transaction and the position taken by the Minister that the Plaintiffs were statutorily liable for York's unpaid Tax Liability. While it is accepted for the purpose of this application that they would not have entered into the Share Purchase Transaction but for the Defendants' negligent Tax Opinion, that is not the basis for the Tax Liability.

[44] Relying on *Dean*, the Plaintiffs submit that the factual basis upon which a party seeks indemnification does not have to be the same as the factual basis upon which that party incurred liability. That may be true, but there must be a connection between the actions of the party from whom indemnity is sought and the cause of liability in the first place. In *Dean*, the plaintiff was injured while entering a taxi cab owned by one of the defendants. That defendant sought leave to issue a Third Party Notice against the designer of the taxi cab after the expiry of a limitation period. Justice Slatter of this Court (as he then was) discussed claims for contribution and the operation of the *Limitations Act*. He concluded the Third Party Notice should issue. While the factual basis upon which indemnification is claimed (design of the taxi cab) differs from the facts

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underlying the main action (injury while entering the taxi cab), it is noteworthy that the plaintiff in *Dean* could have asserted a claim directly against the designer of the taxi cab, as a negligent design could arguably have caused her injury. In the present case, the Tax Opinion did not cause the Tax Liability; rather, it admittedly (for the purpose of this application) caused the Plaintiffs to take certain actions (complete the Share Purchase Transaction) that led to the Tax Liability.

[45] Common in the *McFee, Lovat Tunnel* and *Dean* cases is that a claim for contribution and indemnity was permitted, or would have been permitted, only where the party against whom indemnification was sought could independently be found liable for the damages suffered by the plaintiff. The requirement is summarized by Langston J. in *Doucette v Hasegawa and Associates Ltd.*, 2009 ABQB 502, 486 AR 124 at para 27:

> A claim is one for contribution when one tort-feasor has the right to claim against another, or an entity has a duty to indemnify one of the defendants. If the defendant in a Third Party Notice is one, or one of many, that may be found ultimately liable for the damages suffered by the plaintiff, then the claim against that third party defendant is one for contribution.

[46] Although the Plaintiffs claim (and it is accepted as a fact for the purpose of this application) that they would not have entered into the Share Purchase Transaction or consequently incurred the Tax Liability or the Assessment Expenses but for the actions of the Defendants, the Defendants could never have been found liable to the Minister for the Tax Liability or the Assessment Expenses. This is not a claim for contribution and indemnity from a party who caused a plaintiff to suffer loss. In this case, the Plaintiffs were pursued by the Minister for the Tax Liability pursuant to statute for funds they received from York in the Share Purchase Transaction because York could not pay its Tax Liability. While they may have suffered a loss as a result of their reliance on a negligent Tax Opinion, the Plaintiffs' claim against the Defendants is for negligence, and is not properly a claim for contribution and indemnity.

IV. Conclusion

[47] The Plaintiffs' claim against the Defendants is properly a negligence claim, not a claim for contribution based on an implied contract of indemnity. In the result, the Plaintiffs' claim is barred by the operation of the 10-year limitation period in the *Limitations Act*.

[48] If the parties are unable to agree on costs, they may make an appointment to speak to costs.

Heard on the 31st day of May, 2013.
Dated at the City of Calgary, Alberta this 19th day of August, 2013.

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J.T. McCarthy
J.C.Q.B.A.

Appearances:

Daniel J. McDonald, Q.C. / Andrew F. Sunter
Burnet, Duckworth & Palmer LLP
for the Plaintiffs / Applicants

J. Patrick Peacock, Q.C. / Matthew Vernon
Peacock Linder & Halt LLP
for the Defendants / Respondents

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TAB 13

In the Court of Appeal of Alberta

Citation: Addison & Leyen Ltd v Fraser Milner Casgrain LLP, 2014 ABCA 230

Date: 20140710
Docket: 1301-0291-AC
Registry: Calgary

2014 ABCA 230 (CanLII)

Between:

Addison & Leyen Ltd., John Joseph Dietrich, Jeanette Marie Dietrich, Wilfrid Daniel Roach and Helen Roach

Appellants (Plaintiffs)

- and -

Fraser Milner Casgrain LLP and Wallace Y. Shaw

Respondents (Defendants)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Russell Brown

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice J.T. McCarthy
Dated the 19th day of August, 2013
Filed on the 3rd day of October, 2014
(2013 ABQB 473, Docket: 1101 13007)

Memorandum of Judgment

The Court:

I. Introduction

[1] The narrow issue on appeal is whether the appellants' claim is one of contribution and indemnity, rather than a claim in negligence. If the former, the limitation period has not expired. If the latter, the claim is out of time.

[2] In 1989, the respondents prepared a legal opinion advising that the appellants, as shareholders and directors, would not incur income tax liability as a result of the sale of shares in a company. Twelve years later, the appellants were reassessed for the company's outstanding income tax liability for the 1989 tax year. The appellants ultimately incurred approximately $490,000 in tax liability and $1.25 million in additional expenses. The appellants commenced this action in September 2011.

[3] For the purposes of this appeal only, the respondents acknowledge that the opinion was negligently prepared and that the appellants relied upon the opinion. However, the ultimate limitation period for an action in negligence expired in 1999, before the appellants were even aware that they had incurred any tax liability from the 1989 sale. The appellants now seek compensation from the respondents pursuant to a claim of implied indemnity.

[4] On summary application, the trial judge concluded that the action could not be characterized as a claim for contribution and indemnity. It was a claim in negligence and was time-barred. For the reasons which follow, the appeal is dismissed.

II. Background

[5] The appellant Addison & Leyen Ltd. ("Addison") is an Alberta corporation. The other individual appellants are former directors and/or shareholders of Addison. Until September 1989, the appellants were all owners and/or directors of a Saskatchewan company called York Beverages (1968) Ltd. ("York"). In 1988, York sold the assets of its bottling business for about $10 million cash and $3 million in assumed indebtedness. After dividends were distributed and other payments made, York's only remaining asset was $2.8 million cash, which was retained to pay York's estimated income tax liability for the 1989 taxation year ending September 30, 1989.

[6] In September 1989, the appellants sold their shares in York for $1,115,000.00 and resigned positions on the Board of Directors. Unbeknownst to the appellants, the purchaser wanted to acquire these shares because it intended to use York's available cash to buy seismic data, which it believed would enable it to claim a tax deduction of approximately $6.5 million, sufficient to offset the company's remaining income tax liability for the 1989 tax year.

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[7] As a condition of closing the share purchase transaction, the purchaser was required to provide a legal opinion to the appellants concerning their potential tax liability as former directors and/or shareholders of York. The purchaser retained the law firm Fenerty, Robertson, Fraser & Hatch, a predecessor to the respondent Fraser Milner Casgrain LLP, and Mr. Wallace Shaw to provide this legal opinion. The retainer agreement did not provide any express indemnity. The tax opinion stated:

> It is reasonable to conclude, having regard to the Sellers Warranties and the Transactions that the Corporation will be able to pay its liabilities, if any, for income tax under the Income Tax Act (Canada) and any provincial income tax statute in respect of the taxation year ending immediately prior to the Closing Date [that is, the 1989 Tax Year].
>
> Neither the Sellers nor the Old Directors [that is, all of the Plaintiffs] will be liable for any income, sales or other tax, withholdings, remittances, interest, penalties or fines under the Income Tax Act (Canada), any provincial taxing statute (whether of an income, sales or other nature), […] arising out of the Transactions or (except as a direct result of any gains of the Sellers arising on the sale of their shares) arising in respect of the Corporation and which are attributable to any act or omission occurring or omitted after the Financial Statement Date [that is, 11:00 pm on September 26, 1989] other than any liability which may arise by reason of a breach of a Seller Warranty.

[8] The individual appellants completed the share purchase transaction as planned.

[9] Unknown to the appellants, in December 1992, the Minister of National Revenue reassessed York for the 1989 tax year in the amount of $3,247,074, including penalties and interest, based on the purchaser's over-valuation of the seismic data it had acquired. Contrary to the purchaser's estimate, the Minister found that the seismic data was worth only $1,696,500 and, as a result, did not offset York's remaining tax liability during that period.

[10] By 1998, the purchaser remained unable to pay the reassessed taxes on behalf of York, and the Minister began to look for others to satisfy this liability. Finally, in February 2001, the Minister issued notices of assessment to the appellants and others regarding York's outstanding tax liability, pursuant to section 160 of the *Income Tax Act,* RSC 1985, c 1 (5th Supp). By this time, with the accrual of interest and penalties, York's tax liability had increased to $6.7 million.

[11] The Minister took the position that the appellants were statutorily liable for York's income tax debt, up to the amount that each of the appellants had received from York. The appellants opposed the Minister's assessments and commenced litigation. In February 2003, in light of the Minister's assessments and the appellants' objections, the appellants and the respondents agreed to suspend the running of any applicable unexpired limitation period in the event of a further claim regarding the tax opinion.

[12] In October 2010, the appellants and the Minister entered into a settlement agreement whereby the Minister agreed to increase the valuation of the seismic data to about $5.15 million. York was left with a reduced tax liability of $492,676, which was paid by the appellant Addison.

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The costs and legal expenses incurred during the litigation and negotiation with the Minister amounted to approximately $1.25 million.

[13] In September 2011, the appellants commenced this action against the respondents seeking $1.75 million for recovery of the amount of the settlement and the costs they had incurred. The material facts alleged by the appellants support a claim in negligence against the respondents in their preparation of the tax opinion. However, by this time, even with the benefit of the 2003 agreement to suspend any unexpired limitation period, the 10-year ultimate limitations period had expired. As a result, the appellants frame their action based on a common law implied contract of indemnity.

[14] Under their theory of liability, the appellants argue that the claim is one for indemnity and contribution within the meaning of section 3(3)(b) of the *Limitations Act*, RSA 2000, c L-12. As a result, the 10-year ultimate limitation period in section 3(1)(b) is extended because time did not begin to run until the appellants incurred liability through their settlement agreement with the Minister in October 2010, or alternatively, when they learned of the Minister's assessments in February 2001.

[15] The respondents argue that the appellants have improperly characterized their claim as a claim for indemnity when their cause of action is only in negligence. For the purposes of the *Limitations Act*, the respondents submit that the appellants' cause of action arose when the respondents' alleged act or omission occurred, in providing the tax opinion in September 1989. The 10-year limitation period having long expired on this allegedly negligent act, the appellants' action is statute-barred.

[16] The parties agreed to have the matter determined by summary application on a single question of law: Is the Plaintiffs' claim barred by the operation of the 10-year limitation period in section 3(1)(b) of the *Limitations Act*? The application proceeded on the basis of an Agreed Statement of Facts and with the admission that the appellants would not have incurred the tax liability or the additional expenses, but for their reliance on the respondents' negligent tax opinion.

III. Decision Below *Addison & Leyen Ltd v Fraser Milner Casgrain LLP*, 2013 ABQB 473

[17] The trial judge recognized that a claim for contribution and indemnity may be established under the common law in circumstances where one of the potential defendants owes a duty recognized by the common law to indemnify or contribute to other potential defendants. However, based on his reading of the jurisprudence, the trial judge found that a claim for implied indemnity at common law can exist only where the party against whom indemnification was sought could independently be found liable for the damages suffered by the third party. As the respondents could have never been found liable to the Minister for the tax liability or for the appellants' subsequent expenses, the respondents could have no common law obligation to contribute to or indemnify the appellants.

[18] Moreover, the trial judge noted that the respondents did not cause the appellants' liability to the Minister. For the purposes of an implied indemnity, the trial judge held that there must be some connection between the actions of the party from whom the indemnity is sought and the

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cause of the liability to the third party. While the appellants admittedly relied on the tax opinion in taking steps that led to the tax liability, the allegedly negligent opinion did not cause the liability pursued by the Minister. Therefore, while the appellants did suffer a significant loss, their action was one in negligence for damages and was time-barred by operation of the 10-year limitation period.

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IV. Grounds of Appeal

[19] The appellants submit that the trial judge erred in law by incorrectly concluding that the common law doctrine of implied indemnity required that (1) the party against whom indemnity is sought caused the liability of the party seeking the indemnity; and (2) the party against whom indemnity is sought must be independently liable for the amounts sought by the complainant in the first instance.

V. Standard of Review

[20] The grounds of appeal raise both questions of law and fact relating to the recognition of a common law right of implied indemnity in favour of the appellants.

[21] Extricable questions of law are reviewed on a standard of correctness, meaning the appellate court can replace the trial judge's view with its own: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 8. In applying a legal test or standard to a set of facts, the applicable standard of review is palpable and overriding error: *Housen* at para 36. Finding palpable and overriding error is equivalent to finding that factual findings or inferences are "clearly wrong", "unreasonable", or "unsupported by the evidence": *HL v Canada (A-G)*, 2005 SCC 25, [2005] 1 SCR 401, 333 NR 1 at paras 55-56.

VI. Analysis

[22] The leading authority on the common law of contribution and indemnity is *Birmingham and District Land Co v London and Northwestern Railway Co* (1886), 34 Ch D 261 (CA). In that early decision, the English Court of Appeal broadly defined the right to indemnity under the common law as a direct right to reimbursement which may arise: (1) by express contract, if provided in the terms of a contract between the parties; (2) by implied contract, if the parties intended such indemnity; or (3) by implication, if the circumstances demand a legal or equitable duty to indemnify, by which the law recognizes an assumed promise by a person to do what, under the circumstances, he ought to do (at 274). The court identified certain circumstances where the law may imply a contract to indemnify, such as relationships of principal and agent and of co- trustees.

[23] However, a right to indemnity, recognized at law or in equity, must be distinguished from the common law right to "damages" for breach of contract or tort. Bowen L.J. explained (at 274-275):

> But it is quite clear to my mind that a right to damages, which is all that the Defendants have here if they are entitled to anything, is not a right to indemnity as

> such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.

[24] In concurring reasons, Fry L.J. further noted (at 276):

> In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do a wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everybody has to damages for a wrong which has been done to him.

[25] In *Eastern Shipping Company Limited v Quah Beng Kee*, [1924] AC 177 (PC), the Privy Council adopted these principles and held that a common law indemnity may be implied "where the relation between the parties is such that either in law or in equity, [express or implied], there is an obligation on one party to indemnify the other" (at 182).

[26] The common law right of indemnity has long been recognized in Alberta and across Canada (see: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45; *Trans-Canada Forest Products Ltd v Heaps, Waterous Ltd*, [1954] SCR 240, [1954] 2 DLR 545; *McFee v Joss* (1925), 56 OLR 578, [1925] 2 DLR 1059 (Ont CA); *Ryan v Dew Enterprises Ltd*, 2014 NLCA 11, 28 CLR (4th) 1; *Dilcon Constructors Ltd v ANC Developments Inc* (1994), 155 AR 314, 117 DLR (4th) 156 (CA); *Fidelity Trust Company v 98956 Investments Ltd*, 1988 ABCA 267, 89 AR 151; *Dean v Kociniak*, 2001 ABQB 412, 289 AR 201; *Doucette v Hasegawa and Associates Ltd*, 2009 ABQB 502, 486 AR 124).

[27] Both parties highlight *McFee v Joss*, a decision of the Court of Appeal for Ontario, as an early statement of the law in Canada (at para 24):

> …[A]n implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tort-feasors in such a sense as to prevent recover; that is where the act is not clearly illegal itself. This right of indemnity is based upon the principle that everyone is responsible for his own negligence, and if another is by a judgment of a Court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer. I am also of the opinion that such right of indemnity exists independently of the statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular duty not to be negligent.

[28] More recently, in *Ryan v Dew Enterprises Ltd*, the Newfoundland Court of Appeal summarized the applicable legal principles in implying a right of indemnity at common law (at para 54):

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> A claim for indemnity is a claim that another party save the indemnity-claimant harmless against loss or damage which the indemnity-claimant has incurred or suffered or will incur or suffer at the hands of another, and to reimburse the claimant in respect of such loss or damage. The claim may arise from an express contract, by implication of law or from statute. An example of a claim to indemnity arising from implication of law is where an act is done at the request of another, the act turns out to be injurious to a third party and in consequence of doing the act the doer incurs liability to the third party (*Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261 (C.A.)). Other diverse examples include: (i) where an agent incurs loss while lawfully carrying out the mandate of his or her principal; (ii) where a principal suffers loss by incurring liability to a third party as a result of the wrongful actions of his or her agent or employee; (iii) where a trustee causes a co-trustee to incur costs through the trustee's negligent management of the trust; and (iv) where an obligation arises in equity from the relationship between the parties, such as between trustee and beneficiary.

[29] While these cases provide diverse factual examples giving rise to a right of implied indemnity, courts have cautioned against the unprincipled expansion of these claims. In *R v Imperial Tobacco Canada Ltd*, the Supreme Court of Canada stated (at para 147):

> Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.)

[30] A narrow approach was also encouraged in *Ryan v Dew Enterprises Ltd*, where the court noted (at para 54):

> While the circumstances where an obligation to indemnify arises by implication of law are diverse, they are not open-ended. The obligation cannot be imposed simply by the exercise of *ad hoc* discretion. As noted by Goodridge J. in *Collavino*, at paragraphs 18-21, just because a party may have a claim for damages over against a third party does not entitle him or her to a claim in indemnity or contribution. This was the traditional English position as enunciated in *Birmingham and District Land Co. v. London and North Western Railway Co*, *supra.*, at pages 272 and 274-275, which was cited and relied on by Goodridge J. in *Collavino* at paragraphs 15-16 and *Lundrigan* at paragraphs 18-19.

[31] The trial judge reviewed these cases and concluded that the appellants' claim did not fall within the circumstances necessary to imply a promise to indemnify, principally because the party against whom the indemnification was sought, (the respondents), could not have been responsible in law to the Minister for the appellant's tax liability. Rather, given that the

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respondents' alleged negligence had only caused damage to the appellants, and not the Minister, the appropriate cause of action was in negligence alone, and was time-barred.

[32] The appellants submit that the case law supports the recognition of a common law right of indemnity in any case where a party, without fault of its own, is exposed to liability or loss for the wrongful act of another. They propose a three-part test:

a) An act done by B at the request of A;
b) Without any fault of A, A is exposed to liability to a third party, C; and
c) The liability of A to C arises in connection with the negligence of B.

[33] According to the appellants, their claim satisfied this test: (a) there was a request made by Addison to the respondents to prepare the tax opinion; (b) Addison, without any fault of its own, was exposed to liability to the Minister; and (c) the liability of Addison to the Minister arose in connection with its reliance on the negligent opinion.

[34] There are several problems with the appellants' approach. First, the common law of implied indemnity is rooted in the principles of restitution and unjust enrichment. An indemnity permits the reimbursement of damages paid by an innocent party to a third party on behalf of the true wrongdoer, where that wrongdoer should otherwise have been liable to pay. A right to reimbursement through an implied indemnity does not arise in every situation in which A becomes liable to C in connection with the negligence of B. That connection must be supported by a theory of legal or equitable liability between the third party and the party against whom the indemnity is sought (*Ryan v Dew Enterprises Ltd* at para 54).

[35] A simple statement of this requirement is provided by Professor Charles Mitchell in his text, *The Law of Contribution and Reimbursement* (New York: Oxford University Press, 2003) at 5: "Claims for contribution and reimbursement lie between two parties who *both* initially owe legal liabilities to a third party" (emphasis added). Put another way, the circumstances must be such that the putative party against whom the indemnity was sought could have been liable to the third party for all or part of the claim against the party seeking the indemnity.

[36] The point is best illustrated by the circumstances which led to recognition of an implied indemnity in *McFee*. The defendant leased the plaintiff's car and negligently crashed into another vehicle owned and driven by a third party. By operation of the relevant statute, the plaintiff owner was liable to pay damages to the third party. The court applied *Eastern Shipping* and held that the plaintiff was entitled to claim an indemnity from the defendant for the damages paid to the injured third party.

[37] If, by contrast, the defendant in *McFee* had borrowed the plaintiff's car and negligently injured the plaintiff in an accident, the plaintiff could not generally rely on a common law right of implied indemnity against the defendant for reimbursement of his out-of-pocket expenses. Although those expenses may have been incurred by the plaintiff as a liability to a third party (for example, payment to a health care provider) and were as a result of the defendant's negligence, without more, the defendant is not initially liable to the third party for that cost. Rather, the basis for the plaintiff's claim for compensation is a claim in negligence for damages.

[38] The circumstances of the appellants' claim are analogous to the latter example. The amounts paid by the appellants to the Minister, and their associated expenses, were never

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amounts paid by the appellants on behalf of the respondents as the negligent party. Under no circumstances could the respondents have been liable to the Minister for any part of York's tax liability. Therefore, there is no basis on which to require restitution of the appellants' loss through an implied indemnity.

[39] Secondly, the appellants' approach does not distinguish between the availability of a claim for implied indemnity and a claim for damages in tort or contract. A common law right to damages for a wrong is not an implied contract that the defendant will indemnify the plaintiff in connection with the wrongdoing (*Birmingham* at 276; *Ryan v Dew Enterprises Ltd* at para 54). The trial judge recognized this issue as a question of causation and the relationships among the parties.

[40] An implied indemnity may arise where the wrongdoer's negligence causes damage to a third party for which the party seeking the indemnity is held liable. However, there must be a connection between the wrongdoer, the third party, and the damage.

[41] For example, in *Edmonton (City) v Lovat Tunnel Equipment Inc,* 2000 ABQB 882, 279 AR 1, the court concluded that a right of indemnity could have been implied had the party who was not at fault (the seller of defective equipment) been held liable for damage suffered by the City of Edmonton as a result of using the defective equipment manufactured by the negligent party (at para 385). By contrast, where a plaintiff is liable for damages or expenses to a third party, and that liability is, at law, independent of the wrongdoer and his negligent act, no implied indemnity can follow. The plaintiff's common law right is only in damages.

[42] In this case, the appellants have admittedly suffered losses as a result of relying on the respondents' tax opinion. The respondents' negligent act, however, had no impact on the Minister as the third party to which the tax liability was owed. That liability flowed from the Minister's assessment of the appellants for York's outstanding tax liability and the appellants' obligations under the *Income Tax Act*.

[43] Finally, the policy implications of such an extension of the common law are significant. Anyone who gives advice could be considered to provide an implied indemnity to their clients, covering any loss incurred in relying on that advice. Under the *Limitations Act*, those professionals would be subject to indeterminate litigation under a never-ending limitations period. It is, of course, open to the parties to negotiate for and include a specific promise of indemnity in a retainer agreement. The agreement at issue in this case did not include a specific indemnity clause.

[44] We acknowledge the unfortunate position in which the appellants find themselves in this case. The Minister was not precluded from assessing the appellants years after the transaction; yet the appellants have no claim against the respondents due to the expiration of the ultimate limitation period. However, in our view, for the reasons we have expressed, the implied right to indemnity does not arise in this case.

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VII. Conclusion

[45] The trial judge identified the appropriate concerns and correctly applied the law in finding that the appellants were not entitled to claim a right of implied indemnity against the respondents. Their claim is solely in negligence and the limitation period has expired. The appeal is dismissed.

Appeal heard on June 11, 2014

Memorandum filed at Calgary, Alberta
this 10th day of July, 2014

_____
Authorized to sign for: Paperny J.A.

_____
Rowbotham J.A.

_____
Authorized to sign for: Brown J.A.

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Appearances:

D. J. McDonald Q.C.
A.F. Sunter
for the Appellants

J.P. Peacock Q.C.
M.L. Vernon
for the Respondents

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TAB 14

Agribrands Purina Canada Inc. v. Kasamekas et al.

Kasamekas et al. v. Agribrands Purina Canada Inc. et al.

[Indexed as: Agribrands Purina Canada Inc. v. Kasamekas]

106 O.R. (3d) 427

2011 ONCA 460

Court of Appeal for Ontario,
Goudge, Gillese and Juriansz JJ.A.
June 20, 2011

Civil procedure -- Prejudgment interest -- Action commenced in last quarter of 1992 -- Trial judge erring in awarding prejudgment interest based on average rate applicable for entire 1992 calendar year rather than applying rate specified by Rules of Civil Procedure for proceedings commenced in last quarter of 1992.

Contracts -- Damages -- Where contract sets out several modes of performance, damages for breach of contract generally assessed on basis of mode that is least profitable to plaintiff and least burdensome to defendant -- Trial judge erring in finding that that principle applies only where parties acted honestly and in good faith -- Agreement giving either party unconditional right to cancel contract at any time on 60 days' notice -- Trial judge erring in not calculating damages on that basis -- Trial judge erring in finding that defendant could not rely on 60-day notice clause as it had breached implied duty of good faith and in basing quantification on finding that contract would have continued indefinitely had defendant not breached its contractual obligation.

2011 ONCA 460 (CanLII)

Damages -- Punitive damages -- Defendant entering into feed dealership agreement with plaintiffs and then undermining plaintiffs' business by surreptitiously supplying another dealer in plaintiffs' territory -- Plaintiffs' business failing -- Trial judge finding that defendant breached dealership agreement and breached implied duty of good faith toward plaintiffs -- Trial judge not erring in awarding punitive damages -- Breach of implied duty of good faith constituting separate actionable wrong -- Defendant's conduct constituting marked departure from ordinary standards of decency.

Torts -- Conspiracy -- Unlawful conduct conspiracy -- "Unlawful conduct" element of unlawful conduct conspiracy not encompassing conduct that defendant is "not at liberty" or "not authorized" to engage in as result of convention or understanding -- Conduct "unlawful" only if it is wrong in law.

The appellant Purina terminated the appellant Ren's feed dealership in July 1990 and entered into a dealership agreement for Ren's former territory with the respondent Raywalt in February 1991. Ren's arranged to have the appellant M, the Purina dealer in a neighbouring territory, supply it with Purina feed at dealer prices, which enabled Ren's to continue to sell Purina feed in Raywalt's territory. Purina approved of that arrangement and provided M with feed for resale to Ren's. As a result, Raywalt's business was not as profitable as projected and it ceased business at the end of January 1992. The trial judge found the appellants liable to the respondents for the tort of unlawful conduct conspiracy and found Purina liable for breach of its contract with Raywalt. The dealership agreement was for two years, with automatic renewal if neither party gave notice of cancellation. Either party had the right to cancel the contract at any time by giving [page428] 60 days' notice. The trial judge found that, had it not been for Purina's breach, the contract would have continued indefinitely and based his quantification of damages for breach of contract on that finding. He awarded general damages and prejudgment interest in the amount of $2,096,406 and punitive damages against Purina in the amount of $30,000. The appellants appealed the finding of unlawful conduct conspiracy. Purina

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appealed the method used to calculate damages for breach of contract and the award of punitive damages.

Held, the appeal should be allowed in part.

The trial judge erred in finding that "unlawful conduct" includes conduct that the defendants were "not at liberty" or "not authorized" to engage in, not only as a result of law or a contract, but also as a result of a convention or an understanding. What is required is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort. While Purina's breach of its contract with Raywalt was sufficient to qualify as "unlawful conduct", neither Ren's nor M did anything that would do so. The finding of unlawful conduct conspiracy and the damages flowing from it should be set aside.

Where there are several ways in which a contract might be performed, for the purposes of assessing damages, the mode that is the least profitable to the plaintiff and the least burdensome to the defendant should be adopted. The trial judge erred in finding that that principle applies only where the parties acted honestly and in good faith and that Purina had not done so. The contract provided that Purina had the unconditional right to cancel the contract at any time on 60 days' notice. That was the least burdensome mode of performance for Purina and should have been used as the basis for calculating the damages for breach of contract. Moreover, by finding an implied duty of good faith on Purina not to act in a way that defeated the very purpose of the contract and then finding that Purina could not rely on the 60-day notice clause because it breached that implied duty, the trial judge erred by using the implied duty of good faith to alter the express terms of the contract, including the right to terminate on notice. Finally, the trial judge erred in suggesting that it would be unconscionable to allow Purina to rely on the 60-day notice clause in calculating damages for breach of contract. The doctrine of unconscionability is applicable to determine

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whether the contract itself is unconscionable, and is not applicable to determine how damages should be assessed in light of the circumstances of a particular breach.

The action was commenced in the last quarter of 1992. The trial judge erred in applying a prejudgment interest rate of 6.65 per cent, the average rate applicable for the entire 1992 calendar year, to his assessment of damages for breach of contract and unlawful conduct conspiracy. The prejudgment rate specified in the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 for proceedings commenced in the last quarter of 1992 was 5.1 per cent. The trial judge offered no special circumstances for exercising his discretion to deviate from that rate.

Purina's breach of the implied duty of good faith amounted to an independent actionable wrong, one of the requirements for an award of punitive damages for breach of contract. The trial judge erred in awarding punitive damages solely on that basis without considering the other requirement, that the impugned conduct must depart markedly from ordinary standards of decency. However, in the circumstances of this case, that requirement was also met. Purina's conduct was reprehensible and deserving of sanction. The punitive damages award was affirmed. [page429]

Cases referred to

Fidler v. Sun Life Assurance Co. of Canada, [2006] 2 S.C.R. 3, [2006] S.C.J. No. 30, 2006 SCC 30, 271 D.L.R. (4th) 1, 350 N.R. 40, [2006] 8 W.W.R. 1, J.E. 2006-1316, 227 B.C.A.C. 39, 57 B.C.L.R. (4th) 1, [2006] R.R.A. 525, 53 C.C.E.L. (3d) 1, 39 C.C.L.I. (4th) 1, [2007] CLLC 210-015, [2006] I.L.R. 4521, 148 A.C.W.S. (3d) 902, EYB 2006-107056; Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC 210-025, 128 A.C.W.S. (3d) 1111; Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, 209 D.L.R. (4th) 257, 283 N.R. 1, J.E. 2002-405, 156 O.A.C. 201, 20 B.L.R. (3d) 165, 35 C.C.L.I. (3d) 1, [2002] I.L.R. I-4048, REJB 2002-28036, 111 A.C.W.S. (3d) 935, apld

Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, [1983] S.C.J. No. 33,

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145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 19 A.C.W.S. (2d) 352; Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062, 227 D.L.R. (4th) 458, 172 O.A.C. 202, 17 C.C.L.T. (3d) 149, 25 C.P.R. (4th) 417, 123 A.C.W.S. (3d) 411 (C.A.), consd

Other cases referred to

Agribrands Purina Canada v. Kasamekas, [2010] O.J. No. 1796, 2010 ONSC 2597; Alleslev-Krofchak v. Valcom Ltd., [2010] O.J. No. 3548, 2010 ONCA 557, 266 O.A.C. 356, 322 D.L.R. (4th) 193, 76 C.C.L.T. (3d) 163; Bank of Montreal v. Tortora, [2010] B.C.J. No. 466, 2010 BCCA 139, 287 B.C.A.C. 14, 3 B.C.L.R. (5th) 39, 80 C.C.E.L. (3d) 161; Cockburn v. Alexander (1848), 6 C.B. 791; Correia v. Canac Kitchens, a division of Kohler Ltd. (2008), 91 O.R. (3d) 353, [2008] O.J. No. 2497, 2008 ONCA 506, 294 D.L.R. (4th) 525, 58 C.C.L.T. (3d) 29, 167 A.C.W.S. (3d) 422, 67 C.C.E.L. (3d) 1, 240 O.A.C. 153, [2009] CLLC 210-001; Drouillard v. Cogeco Cable Inc. (2007), 86 O.R. (3d) 431, [2007] O.J. No. 1664, 2007 ONCA 322, 282 D.L.R. (4th) 644, 223 O.A.C. 350, 57 C.C.E.L. (3d) 14, 48 C.C.L.T. (3d) 119, [2007] CLLC 210-034, 157 A.C.W.S. (3d) 213; OBG Ltd. v. Allen; Douglas v. Hello! Ltd.; Mainstream Properties Ltd. v. Young, [2008] A.C. 1, [2007] UKHL 21 (H.L.); Revenue and Customs Commissioners v. Total Network S.L., [2008] 2 W.L.R. 711, [2008] UKHL 19 (H.L.); Torquay Hotel Co. Ltd. v. Cousins, [1969] 2 Ch. 106, [1969] 1 All E.R. 522, [1969] 2 W.L.R. 289, 6 K.I.R. 15 (C.A.); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656, 234 D.L.R. (4th) 367, 41 B.L.R. (3d) 1, [2004] I.L.R. I-4258, 127 A.C.W.S. (3d) 235 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 130(2)

Criminal Code, R.S.C. 1985, c. C-46 [as am.]

Rules and regulations referred to

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

Authorities referred to

Burns, Peter T., and Joost Blom, Economic Interests in Canadian Tort Law (Markham, Ont.: LexisNexis, 2009)

2011 ONCA 460 (CanLII)

APPEAL from the judgment of M.G. Quigley J., [2010] O.J. No. 84, 2010 ONSC 166 for the plaintiffs. [page430]

Kirk F. Stevens and Gerard V. Thompson, for appellants.

W. Graydon Sheppard and Marc Munro, for respondents.

The judgment of the court was delivered by

GOUDGE J.A.: --

Introduction

[1] After an 11-day trial, the respondents, Walter Kasamekas ("Kasamekas"), Raymond Jackson ("Jackson") and Raywalt Feed Sales Ltd. ("Raywalt"), recovered judgment for general damages and prejudgment interest in the amount of $2,096,406 against the appellants Agribrands Purina Canada Inc. ("Purina"), Ren's Feed and Supplies Ltd. ("Ren's"), Walter Rendell Job ("Job") and the estate of Edwards James McGrath ("McGrath"). The respondents also recovered punitive damages of $30,000 against Purina. Finally, they were awarded costs of $175,000.

[2] The trial judge found the appellants liable to the respondents for the tort of unlawful conduct conspiracy. He also found Purina in breach of its contract with Raywalt. He assessed damages on the same basis for both causes of action.

[3] The appellants appeal the finding of unlawful conduct conspiracy. They also say that the trial judge made errors in calculating damages for that tort and in the rate he applied for prejudgment interest. While Purina does not contest the breach of contract finding against it, it does contest the method the trial judge used to calculate the damages for that breach. Finally, Purina appeals the finding of punitive damages against it.

[4] For the reasons that follow, I would allow the appeal on each of these issues except punitive damages and the alleged

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errors in calculating the tort damages. I would therefore amend the trial judgment to provide that Raywalt recover damages for breach of contract by Purina on the basis described below, with prejudgment interest calculated on the basis described below. The respondents' claims for conspiracy must be dismissed.

The Trial Judgment

[5] The basic facts are not in dispute. Ren's was a well-established dealer of Purina livestock feed and pet food. However, in 1990 Purina discovered that Ren's was also purchasing feed from one of its competitors and selling it as feed for laboratory animals in breach of its dealership agreement with Purina. As a consequence, Purina terminated Ren's dealership in July 1990.

[6] Walter Kasamekas, who was a Purina employee, and his brother Raymond Jackson saw an opportunity to set up Raywalt [page431] as a Purina dealership to take over Ren's territory. Raywalt and Purina concluded a dealership agreement in February 1991, pursuant to which Purina agreed not to appoint any other dealer in Raywalt's territory, previously Ren's territory.

[7] Raywalt opened for business in mid-March 1991. However, despite giving Raywalt territorial exclusivity, Purina continued to supply feed to Ren's until the end of April 1991. This enabled Ren's to sell to its former customers in what was now Raywalt's territory. When Purina finally ended this practice, Ren's got McGrath, who was a friend and the Purina dealer in a neighbouring territory, to supply Ren's with Purina feed at dealer prices. This allowed Ren's to continue to sell Purina feed in Raywalt's territory. Purina knew of, condoned and indeed approved of this arrangement. Purina provided McGrath with feed for resale to Ren's. As a result, Raywalt's business was not nearly as profitable as projected and its cash flow problems caused it to cease business at the end of January 1992.

[8] After setting this factual scene, the trial judge turned first to Purina's liability for breach of its contract with Raywalt. He concluded that, by supplying McGrath with feed

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knowing that McGrath would sell it to Ren's at dealer prices for sale in Raywalt's territory and by approving this arrangement, Purina breached its contract with Raywalt. Purina does not appeal this finding.

[9] He then addressed the method of calculating damages for that breach, in particular whether the damages were time limited by the terms of the contract. Two of its provisions were relevant. The first provided that the dealership agreement was for two years but would automatically renew unless either party gave notice of cancellation. The second allowed either party to cancel the contract at any time by giving 60 days' notice.

[10] The trial judge concluded that there was an implied duty of good faith on Purina in its contract with Raywalt, that Purina had acted in bad faith and that it could therefore not rely on the provision allowing it to terminate the contract on 60 days' notice. On this basis, the trial judge distinguished Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72. In considering Hamilton, he said, at para. 100, "[T]he trial judge specifically found that the defendant had acted in good faith at all material times" (emphasis in original). At para. 108, he concluded, "The case has no application here because the foundation of good faith that was present in that case is evidently absent in this case."

[11] Instead of applying Hamilton, the trial judge engaged in an inquiry into what would have happened if Purina had not [page432] breached its contractual obligation. He found that the only reasonable conclusion available on the evidence was that the contract would have continued indefinitely. He found that Purina dealerships were typically of long duration. In this case, it would have been because no steps would have been taken to terminate it. By its terms, the dealership agreement would therefore have continued automatically.

[12] In addition, he concluded that, because of Purina's conduct, the doctrine of unconscionability applied to prevent Purina from relying on the time limiting provisions in the

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dealership agreement.

[13] For these reasons, the trial judge based his quantification of damages for breach of contract on the premise that Purina's contract with Raywalt would have continued indefinitely.

[14] He then moved to the civil conspiracy issue. The respondents did not advance the branch of this tort that requires the plaintiff to demonstrate that the defendants' primary purpose was to cause injury to the plaintiff, whether by lawful or unlawful means. Rather, the respondents' argument was that the appellants engaged in the tort of unlawful conduct conspiracy, that is, their conduct, done in concert, was unlawful and they knew or should have known that injury to the respondents was likely to result.

[15] The trial judge found that the appellants acted in concert, and while their predominant purpose was not to injure the respondents, their conduct was directed at the respondents, and it was reasonably foreseeable that serious economic injury to the respondents would and did result.

[16] The central issue was whether their conduct was "unlawful". The trial judge found that the appellants did not appear to have committed a crime, or any other tort than unlawful conduct conspiracy. Nor had they infringed a guaranteed constitutional right. Relying primarily on Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062 (C.A.), he found that the ambit of unlawful conduct required by this tort extends beyond strict illegality. He put it this way, at para. 127:

> The newer decisions confirm that the ambit of "illegal conduct" extends beyond strict illegality for the purposes of proving the existence of tortious conduct. It includes conduct that the defendant "is not at liberty" or "not authorized" to engage in, whether as a result of law, a contract, a convention or an understanding.

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[17] His assessment of the appellants' conduct against this standard was as follows, at paras. 132-34: [page433]

> It was unlawful and unauthorized conduct from Purina's perspective because Purina had a commercial obligation of good faith and was contractually bound to support Raywalt as its dealer. More importantly, Purina had no authority or entitlement to permit Purina feed products to continue to be sold by Ren's at dealer pricing just to ensure that its decision to terminate the Ren's dealership would not result in a reduction of its market share. It effectively licensed Ren's through McGrath to sell products in a geographic area that was reserved to another dealer, both as de facto dealers of Purina horse feeds.
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> It was unlawful and unauthorized conduct from McGrath's perspective because he had no authority under his Dealership Agreement with Purina to establish a sub-dealership and to receive dealer rebates that reduced the product cost to dealer level "white list" pricing where his sub-dealer was selling Purina feed products in territory that had been assigned to another dealer.
>
> It was unlawful and unauthorized conduct from Walter Rendell Job's and Ren's Feeds perspective because Ren's was not entitled to be able to obtain Purina feed products for resale at the advantageous pricing available only to authorized Purina dealers. The illegality lies in Purina and McGrath effectively licensing Ren's to deal in the Raywalt territory.

[18] The next issue was the assessment of damages. The trial judge concluded that there was no material difference in the damages to which the respondents were entitled, whether assessed for Purina's breach of contract or for the tort of unlawful conduct conspiracy. He said this, at para. 158:

> To my mind, as will be evident from the foregoing, in the absence of effective contractual language limiting liability, the assessment of damages in both tort and contract in this case should be and is essentially the same. Any loss suffered

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by the plaintiffs that was reasonably foreseeable at the time of the breach is properly compensable.

[19] The trial judge found that the appellants' actions caused the respondents to lose their business. He determined that damages should reflect the going concern value of Raywalt at the time, which he calculated by assessing what the net profit of the business would have been in its second year of operation had it continued beyond January 1992. He then applied a three times earnings multiple. The result was a damage award of $954,213 for Purina's breach of contract and the appellants' conspiracy.

[20] The trial judge applied a prejudgment interest rate of 6.65 per cent to this amount. Because 18 years had passed since the cause of action arose in 1992, this added an additional $1,142,193. In supplementary reasons released on May 3, 2010 [[2010] O.J. No. 1796, 2010 ONSC 2597], the trial judge noted [at para. 8] that he selected that rate because it was "the average rate applicable for the entire 1992 calendar year". He declined to use the rate of 5.1 per cent, which was the bank rate [page434] at the start of the third quarter of 1992, the quarter in which the respondents filed their claim.

[21] Finally, the trial judge dealt with punitive damages. He reiterated that Purina's breach of its exclusivity contract with Raywalt was also answerable in the tort of conspiracy. He found that, if Purina's participation in that tort was not enough to justify the imposition of punitive damages, the breach of its implied duty of good faith to Raywalt was the second respect in which its conduct constituted an actionable wrong. Having found this precondition to be met, the trial judge based his justification for punitive damages on Purina's conduct. He found [at para. 237] it was "the very antithesis of acting in good faith".

[22] In the result, the trial judge ordered that the respondents recover $2,096,406 jointly and severally from the appellants, inclusive of prejudgment interest, that Purina pay punitive damages of $30,000 and that the respondents receive trial costs fixed at $175,000.

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Analysis

[23] The appellants raise five issues. I will deal with each in turn.

First issue -- The unlawful conduct conspiracy

[24] The seminal case in Canada on the tort of civil conspiracy is Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, [1983] S.C.J. No. 33. Speaking for the court, Estey J. described, at pp. 471-72 S.C.R., two categories of conspiracy recognized by Canadian law:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [page435]

[25] This case deals with the second category, namely, unlawful conduct conspiracy. The first does not apply because

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there was no finding that the predominant purpose of the appellants' conduct was to cause injury to the respondents. The respondents did not advance that proposition at trial.

[26] For the appellants to be liable for the tort of unlawful conduct conspiracy, the following elements must therefore be present:

(a) they act in combination, that is, in concert, by agreement or with a common design;

(b) their conduct is unlawful;

(c) their conduct is directed towards the respondents;

(d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and

(e) their conduct causes injury to the respondents.

[27] In this court, the appellants challenge only the finding that their conduct was unlawful. In particular, while they acknowledge that Purina's breach of its contract with Raywalt was unlawful, they say that the conduct of Ren's and McGrath was in no sense unlawful, and that therefore this element of the tort was not made out. Civil conspiracy cannot be established if only one conspirator acts unlawfully.

[28] What, then, are the requirements for unlawful conduct for the purposes of this tort? Most obviously, it must be unlawful conduct by each conspirator: see Bank of Montreal v. Tortora, [2010] B.C.J. No. 466, 3 B.C.L.R. (5th) 39 (C.A.). There is no basis for finding an individual liable for unlawful conduct conspiracy if his or her conduct is lawful or, alternatively, if he or she is the only one of those acting in concert to act unlawfully. The tort is designed to catch unlawful conduct done in concert, not to turn lawful conduct into tortious conduct. The trial judge applied this requirement and found that each of the appellants had committed an unlawful act.

[29] To determine what sort of conduct qualifies as "unlawful" the trial judge looked to the jurisprudence dealing with the tort of intentional interference with economic relations.

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[30] The trial judge concluded from the intentional interference cases that "unlawful conduct" includes conduct that the defendant "is not at liberty" or "not authorized" to engage in, whether as a result of law, a contract, a convention or an understanding. [page436]

[31] With respect, I do not think the jurisprudence goes that far. In Reach, this court found the tort of intentional interference with economic relations to be made out because actions by the defendant, a voluntary association, that caused its members to stop advertising with the plaintiff, constituted unlawful means directed at third parties, which then caused them to injure the plaintiff. The court was clear that these actions were beyond the lawful authority that the defendant had under its constitution, and were therefore actions beyond the defendants powers and done without jurisdiction. They could be set aside by the court at the behest of the third parties, its members. While the court made reference to the judgment of Lord Denning in Torquay Hotel Co. Ltd. v. Cousins, [1969] 2 Ch. 106, [1969] 1 All E.R. 522 (C.A.), it explicitly declined to decide how far Lord Denning's concept of "unlawful conduct" as "an act which [the defendant] is not at liberty to commit" might extend. Reach was a case of conduct that was wrong in law. I do not think that it provides a basis for the expansive interpretation used by the trial judge [at para. 127] as any "conduct that the defendant 'is not at liberty' or 'not authorized' to engage in, whether as a result of law, a contract, a convention or an understanding".

[32] Since Reach, this court's jurisprudence on the tort of intentional interference with economic relations has, if anything, tightened the scope of conduct considered unlawful. In Drouillard v. Cogeco Cable Inc. (2007), 86 O.R. (3d) 431, [2007] O.J. No. 1664 (C.A.), the defendant's conduct in not following its internal corporate policy but instead acting in bad faith did not amount to unlawful means. In Correia v. Canac Kitchens, a division of Kohler Ltd. (2008), 91 O.R. (3d) 353, [2008] O.J. No. 2497 (C.A.), this court approved of Lord Hoffman's majority reasons in OBG Ltd. v. Allen; Douglas v. Hello! Ltd.; Mainstream Properties Ltd. v. Young, [2008] A.C. 1, [2007] UKHL 21 (H.L.), in which he required unlawful conduct

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against a third party to be conduct that is actionable by the third party for the purposes of the tort of intentional interference with economic relations. This court reiterated this principle in Alleslev-Krofchak v. Valcom Ltd., [2010] O.J. No. 3548, 2010 ONCA 557, while recognizing that the delineation of actionability remained to be fully defined. It was unnecessary to do so in that case because the unlawful conduct relied on was clearly actionable as a matter of private law.

[33] What is clear from this jurisprudence is that, to constitute unlawful conduct for the purposes of the tort of intentional interference, the conduct must be actionable. It must be wrong in law. Conduct that is merely not authorized by a convention or an [page437] understanding is not enough. On this standard, the approach used by the trial judge was simply too broad.

[34] Moreover, reliance on the tort of intentional interference to supply the definition of "unlawful conduct" for the tort of civil conspiracy does not recognize that these two economic torts have evolved separately, and thus each have developed their own concept of unlawful conduct.

[35] The court should therefore be cautious of turning away from the history of this separate evolution simply to achieve a unified theory for the economic torts. Indeed, in Revenue and Customs Commissioners v. Total Network S.L., [2008] 2 W.L.R. 711, [2008] UKHL 19 (H.L.), the House of Lords went further, and said explicitly that, as the torts of intentional interference with economic relations and unlawful conduct conspiracy have developed over time, the concept of unlawful conduct has a different meaning in one tort than in the other: see, for example, the speech of Lord Walker of Gestingthorpe, at para. 100.

[36] It is not necessary that we go that far in this case. However, rather than automatically adopting the meaning of unlawful conduct given in the intentional interference tort cases, I think the better course is to use those cases as a guide, but also consider the kind of conduct that the jurisprudence has found to be unlawful conduct for the purposes

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of the conspiracy tort.

[37] It is clear from that jurisprudence that quasi-criminal conduct, when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party. The seminal case of Canada Cement LaFarge is an example. So too is conduct that is in breach of the Criminal Code, R.S.C. 1985, c. C-46. These examples of "unlawful conduct" are not actionable in themselves, but they have been held to constitute conduct that is wrongful in law and therefore sufficient to be considered "unlawful conduct" within the meaning of civil conspiracy. There are also many examples of conduct found to be unlawful for the purposes of this tort simply because the conduct is actionable as a matter of private law. In Peter T. Burns and Joost Blom, Economic Interests in Canadian Tort Law (Markham, Ont.: LexisNexis, 2009), the authors say this, at pp. 167-68:

> There are two distinct categories of conduct that can be described as comprising "unlawful means": conduct amounting to an independent tort or other actionable wrong, and conduct not actionable in itself.
>
> . . . . .
>
> Examples of conspiracies involving tortious conduct include inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, [page438] and defamation. Of course, a breach of contract itself will support an action in civil conspiracy and, as one Australian court has held, the categories of "unlawful means" are not closed.
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> The second category of unlawful means is conduct comprising unlawful means not actionable in itself.
>
> . . . . .
>
> The first class of unlawful means not actionable in themselves, but which nevertheless supports a conspiracy action, is breach of a statute which does not grant a private right of action, the very instance rejected in Lonrho (1981)

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by the House of Lords. A common case is a breach of labour relations legislation, and another is the breach of a criminal statute such as the Canadian Criminal Code.

[38] What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort.

[39] The appellants submit that while Purina's breach of its contract with Raywalt was sufficient to qualify as "unlawful conduct", neither Ren's nor McGrath did anything that would do so. I agree. In my view, the trial judge used an approach that is too broad. Assessed against the correct test, their conduct was not unlawful.

[40] Dealing with Ren's conduct, at the time it purchased feed from McGrath, it had no contract with either Purina or Raywalt. Ren's was free to purchase Purina feed from McGrath at the best price it could obtain and sell it wherever it could. I disagree with the trial judge's conclusion that Ren's was not entitled to be able to obtain Purina feed for resale at advantageous pricing available only to Purina dealers. Ren's conduct in doing so breached no contract. Nor was this conduct tortious or in breach of any statute. Indeed, the trial judge explicitly found that Ren's committed no crime or tort apart from the conspiracy. Ren's required no authorization from Purina to act as it did.

[41] On appeal, the respondent advanced for the first time the proposition that Ren's induced Purina to breach its contract with Raywalt and induced McGrath to breach its contract with Purina. Neither of these allegations was advanced at trial. They are belied by the trial judge's finding that, other than conspiracy, Ren's committed no tort. Moreover, the trial judge's finding that Purina knew of, and approved of the arrangement between Ren's and McGrath, leaves little room for the conclusion required by the inducing breach of contract

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tort, namely, that Ren's caused Purina to breach its contract with Raywalt or induced McGrath [page439] to breach its contract with Purina, assuming such a breach could be found. There was nothing in Ren's conduct that was wrong in law. It was not "unlawful conduct" for the purposes of the tort of conspiracy.

[42] Turning to McGrath's conduct, the trial judge found it to be "unlawful" because McGrath had no authority to effectively establish a sub-dealership for Ren's to obtain Purina feed at advantageous prices and then sell it into Raywalt's territory. The trial judge characterized McGrath's conduct as a violation of Purina's standard operating procedures. He therefore did not find McGrath's conduct to constitute a breach of his contract with Purina. Indeed, the standard dealership agreement that Raywalt and Ren's had with Purina did not prohibit such an arrangement. Moreover, the trial judge could not have found McGrath to be in breach of his dealership contract with Purina. His finding that Purina knew and approved of what McGrath was doing precluded that possibility, even if such a prohibition had been a term of McGrath's contract. There is no suggestion that McGrath's actions were tortious or in violation of any statute or in other way wrong in law. In my opinion, McGrath's actions cannot be said to be "unlawful conduct" for the purposes of the tort of conspiracy.

[43] In summary, I conclude that only Purina engaged in any unlawful conduct. The other two appellants did not. As a consequence, the finding of unlawful conduct conspiracy and the damages flowing from it must be set aside. The respondents' claim based on civil conspiracy must be dismissed.

Second issue -- The method of calculating breach of contract damages

[44] In Hamilton, Ms. Hamilton entered into a contract with Open Window Bakery Ltd. ("Open Window") for a term of 36 months to serve as its exclusive agent in Japan. The contract gave Open Window the unconditional right to terminate the contract on three months' notice, effective after the commencement of

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the 19th month of the contract. In the 16th month, Open Window wrongfully terminated the contract. The trial judge determined Ms. Hamilton's damages by inquiring into how Open Window would likely have performed its obligations under the contract hypothetically, but for its repudiation. This resulted in an award reflecting the payments that would have been made over the full 36-month term less a 25 per cent reduction for contingencies.

[45] The Supreme Court held that this was the wrong approach and substituted a damage award based on early termination at [page440] the 19th month mark together with three months' notice, reflecting Open Window's maximum exposure to damages. The court based this on the principle articulated in Cockburn v. Alexander (1848), 6 C.B. 791 that, generally speaking, where there are several ways in which the contract might be performed, the mode that is adopted is the least profitable to the plaintiff and the least burdensome to the defendant, for the purposes of assessing damages. The court described the rationale for this principle and the error in the approach used by the trial judge in the following language [at paras. 15-18]:

> This tort-like analysis proposed by Hamilton is not an established part of Canadian law. There are compelling reasons for this. Contractual obligations are voluntarily assumed by parties and given effect to by the courts. The failure to perform certain promised positive contractual obligations in contract law is conceptually distinct from the breach of unpromised negative obligations to not harm another's interests in tort law: see G. H. L. Fridman, The Law of Torts in Canada (2nd ed. 2002), at p. 11.
>
> In a successful tort claim for damages, unliquidated damages are awarded to a plaintiff on the basis that the plaintiff has suffered a loss through some wrongful interference by the defendant. The plaintiff in such cases has legally protected interests that have been found by a court to be unduly compromised. In tort cases, it is widely recognized that the inquiry into what would have been but for the tort is appropriate, since the plaintiff's interest is in being restored to (or at least awarded compensation in

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respect of) the position the plaintiff would otherwise be in. See Fridman, supra, at p. 2; A. M. Linden, Canadian Tort Law (7th ed. 2001), at p. 4, ("[f]irst and foremost, tort law is a compensator"); J. G. Fleming, The Law of Torts (9th ed. 1998), at p. 5; and R. F. V. Heuston and R. A. Buckley, Salmond and Heuston on the Law of Torts (21st ed. 1996), at pp. 8-9.

However, under the general principle applicable in breach of contracts with alternative performances enunciated above, it is not necessary that the non-breaching party be restored to the position they would likely, as a matter of fact, have been in but for the repudiation. Rather, the non-breaching party is entitled to be restored to the position they would have been in had the contract been performed.

In this case, the relevant contractual duties have been expressly set out by the parties in the agreement. Hamilton is entitled to OWB's performance of these voluntarily assumed duties. Hamilton has no compensable interest in the advantages she might have expected under any particular performance of the contract, since the contract itself provided for alternative methods of performance at the election of the defendant. If Hamilton wanted to secure herself the benefits associated with a given particular method of performance, she should have contracted for only that method of performance.

(Emphasis in original)

[46] The trial judge distinguished Hamilton [at para. 106], finding that it applied only where the parties acted honestly and in good faith, and that Purina had not done so, having [page441] "conducted itself in a manner that 'defeated or eviscerated the very purpose and objective' of its agreement with Raywalt".

[47] With respect, I do not agree. The trial judge erred in finding Hamilton to be premised on good faith conduct by the breaching party. Contrary to his view, there was no finding by the trial judge in Hamilton that Open Window had acted in good faith at all material times. Nor is there any suggestion in the

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Supreme Court's decision that good faith conduct is a pre-requisite for the least burdensome principle to apply. Indeed, Open Window had wrongfully terminated Ms. Hamilton by repudiating the entire contract, thereby defeating its very purpose, yet the least burdensome principle of calculating damages was applicable.

[48] In my view, Hamilton cannot be distinguished as the trial judge did, and should have been followed in assessing the breach of contract damages in this case, even if Purina did not act in good faith in breaching the contract.

[49] Had that been done, the trial judge would not have embarked on a hypothetical inquiry into how Purina would likely have performed its obligations under the contract if it had not breached the contract. That is the very sort of inquiry that Hamilton says should not be done in approaching breach of contract damages where there are alternate modes of performing the contract.

[50] The contract provided that Purina had the unconditional right to cancel the contract at any time on 60 days' notice. Article V(B) of the contract reads, "Notwithstanding anything to the contrary in this article, either of the parties may cancel this Agreement at any time by giving sixty (60) days advance notice to the other party." There is no doubt that this is the least burdensome mode of performance for Purina. It should have been used as the basis for calculating the damages for breach of contract.

[51] Moreover, by finding an implied duty of good faith on Purina not to act in a way that defeats the very purpose of the contract and then finding that Purina could not rely on Article V(B) because it breached that implied duty, the trial judge erred by using the implied duty of good faith to alter the express terms of the contract, including the right to terminate on notice. In Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656 (C.A.), at para. 53, this court made clear that Canadian courts have not accorded this power to an implied duty of good faith.

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[52] The trial judge also suggested that it would be unconscionable in these circumstances to allow Purina to rely on a [page442] clause like V(B) in the calculation of breach of contract damages. I do not agree that unconscionability can be used in this way. In my view, that doctrine is applicable to determine whether the contract itself is unconscionable, given, for example, the circumstances in which it was made. The doctrine is not applicable to determine how damages should be assessed in light of the circumstances of a particular breach.

[53] In summary, I conclude that the trial judge erred in failing to apply the approach in Hamilton to calculate the damages owed by Purina for its breach of contract. His task should have been to calculate the breach of contract damages needed to restore Raywalt to the position it would have been in had the contract been performed, adopting the mode of performance provided by the contract that is least burdensome to Purina.

[54] The trial judge found that had Purina performed the contract, there is no doubt that Raywalt would still have been in business at the end of January 1992, when it in fact closed its doors. At that point, the contract gave Purina the unconditional right of cancelling the agreement on 60 days' notice. This was the mode of performance least burdensome to Purina and therefore constituted its maximum exposure for damages for breach of the contract with Raywalt.

[55] Using this approach, the quantification of the damages owed by Purina for breach of contract requires the determination of the amount Raywalt lost because of Purina's breach from the time Raywalt opened for business in March 1991 until the end of March 1992, two months after it actually closed its doors.

[56] In my view, the trial judge made findings of fact sufficient for this court to do that calculation, recognizing that this exercise is more of an art than a science. He calculated that, had Purina performed its contractual obligations, Raywalt would have had a profit of $145,654 at the end of January 1992, instead of being insolvent.

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[57] He arrived at this amount after considering the expert evidence, together with evidence of additional pet food sales that Raywalt would have been able to make in the last two months of that first year of operation. The appellants attack this figure on two bases.

[58] First, they say that the expert opinion relied on already included the additional pet food sales and that it was an error to count them a second time. I do not agree. The expert's evidence makes only cryptic reference to the pet food sales and it was entirely open to the trial judge to find that they were not included in the expert's opinion of Raywalt's first-year profits [page443] and could therefore properly be added to the expert's calculation of loss in the first year.

[59] Second, they say that the trial judge did not add to Raywalt's costs the additional costs that would have been required in achieving these additional sales. Again, I disagree. There was an ample evidentiary basis for the trial judge to reach the conclusion he did for both Raywalt's gross sales and its expenses had Purina honoured its contract.

[60] I see no basis for interfering with the trial judge's valuation of first-year profits lost to Raywalt.

[61] The trial judge also calculated the net profits that Raywalt would have achieved in its second year of operation had the appellants acted lawfully, as part of his calculation of tort damages. He quantified that loss at $318,071. The appellants raise a number of challenges to this calculation, all of which I reject, as explained in the next section of these reasons. I am therefore prepared to accept that figure as the profits Raywalt would have made in its second year of operation had Purina not breached its contract. This provides a good basis for determining the profits lost to Raywalt through February and March 1992, representing the 60 days' notice Purina was required to give, which I would assess at one-sixth of this number, namely, $53,011.83.

[62] Thus calculated, I would fix the damages to which

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Raywalt is entitled for Purina's breach of contract at $145,654 plus $53,011.83, for a total of $198,665.83.

Third issue -- The calculation of damages

[63] As I have indicated, the trial judge concluded that damages for the unlawful conduct conspiracy should reflect the ongoing concern value of Raywalt at the time it was harmed. He calculated this by assessing what the net profit of the business would have been in its second year of operation and then applying a three times earnings multiple to that figure.

[64] The appellants raise a number of challenges to his assessment of Raywalt's net profit for that second year. Although I have found that the finding of unlawful conduct conspiracy cannot stand, it is necessary to address these challenges since I have used the calculation of Raywalt's net profits for the second year to calculate Raywalt's contract damages for February and March 1992.

[65] First, the appellants say that the trial judge made several errors, resulting in an overvaluation of the contribution that additional pet food sales would have made. They say that the trial judge double counted that contribution by adding it to the expert evidence he relied on. I disagree with this, as I have [page444] explained above. They also say that the trial judge impermissibly relied on hearsay evidence in making his finding. I disagree. In my view, it was open to him to rely on the evidence he did hear, which was completely unobjected to at trial by the appellants. Lastly, they say that the trial judge insufficiently discounted for the possibility that these additional sales might not take place. However, the discount to be applied was an assessment that the trial judge was entitled to make on the evidence before him. That is what he did. There is no basis for this court to interfere with it.

[66] Second, the appellants argue that the trial judge erred in the discount he applied in using Ren's earnings for the same period as input to calculate what Raywalt would have earned but for the harm inflicted on it. However, the trial judge was fully aware that some discount was appropriate because Ren's

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sold some products that Raywalt did not. He based the discount he selected on evidence of the percentage of Ren's business that these additional products represented, measured by tonnage. That was a conclusion he was entitled to draw. There is no basis for this court to second guess it and apply a higher discount rate.

[67] Third, the appellants quarrel with the trial judge's calculation of the value of Ren's feed sales that Raywalt would have taken over but for the conspiracy. They say that there was evidence of this value that the trial judge should have preferred to the evidence he accepted. In my opinion, that too was up to him. His calculation was based on evidence that he was entitled to act upon. There is no basis for this court to interfere.

[68] Fourth, the appellants say that the trial judge committed a palpable and overriding error in assessing the administrative expenses that Raywalt would have incurred in its second year of operation. Again, I disagree. His assessment was well founded on evidence of what those expenses would have been. The trial judge accepted this evidence and made no reversible error in doing so.

[69] In summary, I conclude that all of the appellant's challenges to the trial judge's calculation of the profit that Raywalt would have made in its second year of operation must fail.

Fourth issue -- Prejudgment interest

[70] In his original reasons for judgment, the trial judge applied a prejudgment interest rate of 6.65 per cent to his assessment of damages for breach of contract and unlawful conduct conspiracy. He did so without the parties having an opportunity to make submissions on the issue. He set out his basis for selecting this rate, at para. 219 of his original reasons: [page445]

> The average rate of interest established for pre-judgment interest by section 128 of the Courts of Justice Act, R.S.O.

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1990, c. C.43, for 1992, the year in which I find that the cause of action of the plaintiffs arose, is 6.65%.

[71] Following the release of these reasons, the trial judge agreed to receive written submissions on the issue. In subsequent reasons, he declined to change the rate he had selected. He gave this explanation, at para. 8 of his supplementary reasons [[2010] O.J. No. 1796, 2010 ONSC 2597]:

> More importantly, section 128(1) of the Courts of Justice Act shows that the appropriate starting point for the calculation is not the date on which the claim was actually filed, but rather the date on which the cause of action arose: see also Sedigh v. Lange, [2000] O.J. No. 3606 (S.C.J.) at para. 11. I focused on when the cause of action arose as the relevant time and found as a fact that the plaintiffs' cause of action arose at some point in 1992 at or about the time that the business failed owing to the actions of the defendants, rather than focusing on the date upon which the plaintiffs filed their claim. As such, I continue to regard it as appropriate to average the quarterly rates for 1992 in the manner that I did at paragraph 219 of my Reasons for Judgment.

[72] The appellants also argued at trial that the trial judge ought to have adjusted the rate down to reflect the factors listed on s. 130(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43. The trial judge concluded his supplementary reasons by rejecting that submission, at para. 11:

> Here, the defendants have advanced a range of reasons for their claim that a lower rate should be applicable, but I find that they have done nothing to discharge the onus that rests upon them of persuading me that it is appropriate that I should exercise discretion in this case to deviate from what would otherwise be the applicable interest rate specified by the Courts of Justice Act.

[73] In this court, the appellants argue that the trial judge erred in this approach.

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[74] I agree. The prejudgment rate specified in the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 pursuant to the Courts of Justice Act for proceedings commenced in the last quarter of 1992, that is, when the respondents' claim was commenced, was 5.1 per cent. That is the applicable rate unless the court finds special circumstances to justify departing from it. In my view, the trial judge erred by taking as his starting point the average prejudgment interest rate for 1992, the year in which the respondents' cause of action arose, rather than the starting point as specified under the Courts of Justice Act. Moreover, he offered no special circumstances for exercising his discretion to deviate from the applicable rate specified by the Courts of Justice Act. His error was in using 6.65 per cent as the applicable rate. The proper applicable rate to be used is 5.1 per cent. [page446]

Fifth issue -- Punitive damages

[75] Finally, the appellant Purina attacks the award of punitive damages made against it. It argues that the trial judge's basis for doing so did not reach the threshold required by the jurisprudence.

[76] In Fidler v. Sun Life Assurance Co. of Canada, [2006] 2 S.C.R. 3, [2006] S.C.J. No. 30 ("Sun Life"), the Supreme Court of Canada made clear that, in breach of contract cases, conduct warranting punitive damages must be an independently actionable wrong in addition to a breach of contract. As well, it must also reach the threshold warranting punitive damages. The court described that threshold, at para. 62:

> By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency -- the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at para. 196; Whiten, at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in Whiten, at para. 36, "punitive damages straddle the

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> frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

[77] In coming to his conclusion, the trial judge was clearly influenced by his finding that Purina's conduct was both a breach of contract and part of the unlawful conduct conspiracy. Alternatively, he found that Purina's conduct constituted a second actionable wrong in that it was also a breach of its implied duty of good faith towards Raywalt. Beyond that, he justified the punitive damages award this way, at para. 238:

> Here, I find that an award of punitive damages ought to be made against Purina to serve the rational purpose of delivering the simple message that good faith, promises of good faith, and an underlying foundation of business efficacy continue to be what our law relies upon as the cornerstone of upholding and enforcing contractual promises.

[78] In my view, this sets too low a bar. It would make every breach of contract that is also a breach of an implied duty of good faith a sufficient basis for the award of punitive damages. I think that would pay insufficient regard to the caution in Sun Life that punitive damages are confined to exceptional cases in which the misconduct is of a nature that takes it beyond the usual opprobrium surrounding breaking a contract. It seems to me that breaches of an implied duty of good faith can come in so many possible different shapes and sizes that it cannot be said [page447] that generically, the breach of such a duty is per se enough to justify punitive damages. It falls, therefore, to this court to determine whether, on the facts as found below, such an award is warranted.

[79] In Sun Life, the Supreme Court of Canada affirmed that the principles set out in Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, at para. 63, continue to govern the award of punitive damages. It reiterated that in breach of contract cases, in addition to the requirement that

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the conduct constitute a marked departure from ordinary standards of decency, there is the requirement that the acts be "independently actionable". Breach of an implied duty of good faith can satisfy the requirement of an independent actionable wrong: see Whiten, at para. 79. The trial judge found that Purina had breached its implied duty of good faith. That was not contested before us and since we received no argument on it we must proceed on that basis. Coupled with breach of the exclusivity contract, the requirement of an independently actionable wrong is therefore met in this case.

[80] Thus, the question becomes: did Purina's conduct constitute such a marked departure from the ordinary standards of decency that it warrants censure through the imposition of an award of punitive damages? In answering this question, a careful analysis of Purina's conduct is warranted. In doing so, it is useful to call to mind the factors for consideration set out by the Supreme Court in Whiten, at para. 94:

> (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to

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> accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that [page448] moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[81] From the outset, Purina knew that in order for Raywalt to succeed, it had to take over Ren's sales of Purina products. As the trial judge found, the volume of Purina sales to Raywalt taken from the Ren's dealership was "critically important" to the success of the new dealership. While the exclusive right to market and sell Purina feed products within defined geographical territories is an important feature of all distributorships, to Purina's knowledge, it was crucial to Raywalt. Further, Purina was aware of the financial risks and vulnerability of Kasamekas and Jackson. As part of the start-up financing, Kasamekas gave Purina a mortgage against his home and the company's credit line was secured by personal guarantees by Kasamekas, Jackson and their spouses. The personal guarantees were secured against their homes.

[82] It is within this context that Purina's actions must be considered. Within weeks of Raywalt starting up, it learned that Purina was permitting Ren's to continue to supply Ren with feed. When challenged, Purina assured Raywalt that it would stop supplying Ren with feed. While Purina did in fact stop supplying Ren directly, it then embarked on the arrangements with McGrath to ensure that Ren continued to receive feed and sell within the Raywalt territory. That is, in essence, Purina did precisely what it told Raywalt it would not do. It did so repeatedly, over a lengthy period of time and with a complete disregard for the consequences to Raywalt. At para. 49 of the reasons for decision, the trial judge quotes from correspondence authored by Tom Robinson, a manager at Purina, which shows that he had a "clear financial and business interest in McGrath succeeding over Raywalt" and at the relevant times, took an "aggressive stance" against Raywalt.

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Because of the surreptitious way in which Purina supplied Ren, Raywalk had no knowledge of what was going on and therefore had no ability to take steps to address the problem or mitigate the financial harm that ensued.

[83] Purina's actions in supplying McGrath so that he, in turn, could supply Ren are deceitful. As such, they are reprehensible and deserving of sanction.

[84] As the preceding reasons explain, the damages award does not otherwise punish this behaviour. There is no "double recovery" aspect to making an award of punitive damages in this case. Moreover, the damages award is insufficient to accomplish the objectives of denunciation and deterrence of others from acting similarly. The amount of $30,000, set by the [page449] trial judge, is sufficient to do so. Accordingly, I would affirm the punitive damages award, albeit for different reasons than those of the trial judge.

Conclusion

[85] In summary, except for punitive damages, I would allow the appeal. I would dismiss the claim of unlawful conduct conspiracy. I would substitute for the damage award for breach of contract an award of $198,665.83, to which I would apply a prejudgment interest rate of 5.1 per cent. The trial judgment must be amended accordingly, in light of these reasons.

[86] This result may be of relevance to the costs awarded at trial and is as well the context for an award of costs of the appeal. The parties may file written submissions of no more than ten pages on both of these questions within 30 days of the release of these reasons.

Appeal allowed in part.

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TAB 15

COURT FILE NO.: 03-CL-004932
DATE: 20040809

2004 CanLII 6674 (ON SC)

SUPERIOR COURT OF JUSTICE - ONTARIO
(Commercial List)

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

AND IN THE MATTER OF SECTION 191 OF THE *CANADA BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C-44 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Sean Dunphy* and *Shana Ivall*, for Air Canada

Peter J. Osborne and *Monique Jilesen*, for Ernst & Young Inc., Monitor

Larry Steinberg, for CUPE

Hugh O'Reilly, for IAMAW

Gregory Azeff, for GECAS

Howard A. Gorman, for the Ad Hoc Unsecured Creditors Committee

Lyle Kanee, for CAW

HEARD: August 9, 2004

E N D O R S E M E N T

(CUPE Appeal)

[1] CUPE appealed the decision of July 30, 2004, rendered by Geoffrey Morawetz as Claims Officer ("CO") with respect to CUPE's pay equity claim. At the end of the hearing today I dismissed the appeal and promised written reasons. These are those written reasons.

[2] At paragraphs 36 and 37 of his reasons, the CO stated:

> (36) CUPE's pay equity claim is a contingent claim in that it has not been successful on its merits as of the date of the commencement of Air Canada's CCAA proceedings. The contingency in question is the resolution of the pay equity complaint process underway before the Tribunal (and possibly the courts via appeals of the Tribunal's decision). As with any contingent claim, there are two fundamental aspects to the determination of the claim; namely, (i) as assessment of the happening of the contingency in question; and (ii) the quantification of the claim. If CUPE successfully discharges its onus of establishing that there is some basis to presuppose the happening of the contingency, a reasonable value must then be established for the claim (and it is common in practice to discount the aggregate value of the claim in a "best case" scenario by some reasonable percentage that reflects the risk that a less optimistic scenario may in fact result). For the reasons that follow, I find that CUPE has failed to provide any evidence to substantiate the happening of the contingency in question and that the quantification of CUPE's contingent claim would in any event be negligible.
>
> (37) There is, in these proceedings, a Claims Procedure Order of Farley J. dated September 18, 2003, as amended by Order of Farley J. dated July 9, 2004, which provides that all creditors (including CUPE with respect to its pay equity claim for the Relevant Period) must prove their claims in accordance with the procedures set out therein. In short, CUPE has to prove its claim now, and not at some future date, and the failure to do so results in CUPE being barred from asserting such a claim at a future date. If CUPE fails to adduce sufficient evidence to substantiate its contingent pay equity claim at the present time, it is not open to CUPE to assert that some weight ought to be given to the likelihood or possibility that it may, in the future, be able to adduce sufficient evidence so as to prove its claim in respect of the Relevant Period. That is to say, I cannot conclude that there is a 50% chance (or 40%, or 30%, etc.) that CUPE will be able to substantiate its claim in the future if it has not already done so in these proceedings and that some percentage of the value of its pay equity claim ought to be allowed at this time. CUPE cannot on the one hand admit that it has no evidence to substantiate its claim at the present time and on the other hand seek to have a claim admitted by the Monitor nonetheless on the basis that it might at some date find evidence to substantiate its claim. The merits of CUPE's contingent pay equity claim must be established in these proceedings.

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He went on to observe at paragraph 39:

> (39) To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

Further at paragraph 40, the CO stated:

> (40) … As noted by counsel to Air Canada, there are three pre-requisite elements of a human rights complaint, without which there is no claim: (i) difference in wages; (ii) within the same establishment; and (iii) the performance of work of equal value as between the groups in question. … But, with respect to the third criterion, I agree with Air Canada that there is no evidence before me to indicate that the work performed by Flight Attendants is of equal value to the work performed by the Comparative Groups, which is the very basis of CUPE's claim. It is entirely unclear that there is any principled basis of comparison between Flight Attendants and the Comparative Groups and, in any event, no evidence before me that the outcome of such comparison establishes that there is work of equal value being performed.

[3] CUPE submitted that notwithstanding my views in *Re Olympia & York Developments Ltd.*, [1994] O.J. No. 1335 (Gen. Div.), that I should follow the Alberta practice as set out by Paperny, J. in *Re Canadian Airlines Corp.*, [2001] A.J. No. 226 (Q.B.) of hearing this matter on a *de novo* basis as opposed to a true appeal. Even if I were to agree with that notwithstanding the difference in practice related to Alberta Masters, I would observe that on the basis of the record before me, I would have come up with the same conclusions as the CO save and except as to what I might describe as wholehearted acceptance of his views at paragraph 46 when he describes "the intuitive appeal of Air Canada's argument with respect to the manner in which wages are determined". It is clear from his reference later in that paragraph to "yet another reason" that this argument of Air Canada was not a determinative feature. Indeed it may well be that the CO merely intended paragraph 46 to be simply a point which could be characterized as a buttressing observation on a check of reasonability, not that there is an obligation to do so to provide a foundation for a pay equity claim. Collective bargaining is a process of give and take. Secondly I would not be of the view that as per his observation in paragraph 47 that CUPE had an obligation to lead evidence as to:

> (b) more importantly, that the wage gap cannot be explained, in full or in part, by factors other than system gender discrimination (such as consideration of the factors set out in section 11(2) of the CHRA).

While it would seem to me that CUPE was not under any positive obligation to provide such evidence (that seemingly being Air Canada's role if it wished to do so), again that observation by the CO is not in my view determinative of the wage gap question.

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[4] See also my views in *Re Air Canada (Corporate Travel Management CTM Inc.)* and *Re Air Canada (Always Travel Inc.)* matters released August 3 and 5, 2004 respectively relying on the Court of Appeal decision in *Shelson* v. *Gowling Lafleur Henderson LLP*, [2004] O.J. No. 850 (C.A.) released March 9, 2004 at paragraph 20 relating to deference notwithstanding that a matter may be decided originally on a paper record.

[5] The onus is on a claimant to prove its claim. As discussed in paragraph 38 of his reasons, the CO required that "CUPE must demonstrate that its claim is not too speculative or remote, but it need not establish that success is probable". He went on to say at paragraph 39:

> (39) In the present case, I am satisfied for the reasons set out below that CUPE's claim has not been proven. The claim is remote and speculative as there is no evidence to substantiate that the claim has any merit. To be clear, this is not a situation in which CUPE has a valid claim, the value of which is simply uncertain or difficult to compute; rather, I find that CUPE has not proved that it has any claim at all.

It seems to me to be an unreasonable analysis of his reasoning that would allow CUPE to advance at paragraph 46 of its factum:

> (46) To require scientific certainty is to set up inappropriate roadblocks to the goal of the CHRA, namely to remedy discrimination…

The fact of the matter is that CUPE provided no evidence as to the particular case involving Air Canada (and the "merged Canadian Airlines" question) as to the third criterion.

[6] It is indeed troubling that a *Canadian Human Rights Act* / pay equity case could rattle around the Commission, the Tribunal and the courts for 14 years and for this Court to be advised that it is likely to take another decade before this matter can be adjudicated to the end under that legislation. However, that process is not the one which is required to be followed in the determination of a claim under the CCAA. Contingent unliquidated claims are determined under the CCAA claims process even in the most complicated of litigation and even though a claim may not have been actually initiated in a court or otherwise. I do not wish or intend to minimize the hurdles and hoops which may be involved in the payment equity litigation in the established "ordinary course", but I would observe that if CUPE had provided an acceptable expert report on job evaluation, even if in "simplified form" (as opposed to no evidence), then Air Canada would have had to respond to that evidence. Would that report have had to be precise (apparently to the degree envisaged by parties in pay equity disputes)? The simple answer to that is that is not necessary in a CCAA claims process.

[7] The appeal is dismissed. While that claim as agreed between Air Canada and CUPE only deals with the monetary aspect of the claim up to September 30, 2004, I would trust that with respect to the process otherwise continuing, that with respect to the determination of this

2004 CanLII 6674 (ON SC)

as with any other human rights issue (which the Supreme Court of Canada has determined should be regarded as a quasi-constitutional right) such determination can be accomplished with cooperation in very significantly less time than a further decade. The resolution of such an important question demands nothing less.

J.M. Farley

Released: August 9, 2004

2004 CanLII 6674 (ON SC)

TAB 16

Ross Valliant *Appellant*

v.

Air Canada *Respondent*

INDEXED AS: AIR CANADA *v.* M & L TRAVEL LTD.

File No.: 22416.

1993: April 26; 1993: October 21.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts — Directors of closely held corporation — Business of corporation a travel agency — Agreement between travel agency and airline for ticket sales — Receipts less commission to be forwarded to airline — Notwithstanding separate trust account for money from ticket sales, money placed in travel agency's general account — Business difficulties resulting in directors making independent and contradictory instructions to bank as to operating account — Bank withdrawing amount owing it on line of credit to travel agency pursuant to terms of credit agreement — Airline suing directors personally for monies owing it — Whether relationship between travel agency and airline one of trust or of debtor and creditor — If trust relationship, whether directors personally liable for breach of trust by corporation.

Appellant borrowed money on a personal loan, invested it in a travel agency and paid the interest from the agency's general banking account. He became one of the agency's two directors and its vice-president. While both directors had signing authority, the day-to-day operation of the business was left to the other director. The travel agency, on becoming a member of IATA, signed a passenger sales agency agreement with IATA (conferring the right to sell air carrier tickets and receive commissions) and a passenger sales agency agreement with Air Canada (authorizing the agency to receive blank airline ticket stock for Air Canada and to issue tickets directly to the public). Funds collected from the sale of Air Canada tickets were to be held in trust by the

Ross Valliant *Appelant*

c.

Air Canada *Intimée*

RÉPERTORIÉ: AIR CANADA *c.* M & L TRAVEL LTD.

N° du greffe: 22416.

1993: 26 avril; 1993: 21 octobre.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Fiducies — Administrateurs d'une société à peu d'actionnaires — La société exploite une agence de voyages — Convention entre l'agence de voyages et la compagnie d'aviation pour la vente de billets — Les recettes moins les commissions devaient être remises à la compagnie d'aviation — Nonobstant les comptes en fiducie distincts pour l'argent provenant de la vente des billets, l'argent était déposé dans le compte général de l'agence de voyages — Des difficultés commerciales amènent des administrateurs à donner des instructions divergentes à la banque relativement au compte d'affaires — La banque a retiré les montants qui lui étaient dus sur la marge de crédit de l'agence de voyages aux termes de la convention de crédit — La compagnie d'aviation poursuit les administrateurs personnellement pour les montants qui lui sont dus — Le rapport établi entre l'agence de voyages et la compagnie d'aviation constituait-il une fiducie ou une obligation liant un débiteur et un créancier? — S'il s'agit d'une fiducie, les administrateurs sont-ils responsables personnellement pour la violation de l'obligation fiduciaire par la société?

L'appelant a emprunté de l'argent au moyen d'un prêt personnel, l'a investi dans une agence de voyages et a payé les intérêts sur le compte de banque général de l'agence. Il est devenu l'un des deux administrateurs de l'agence et son vice-président. Les deux administrateurs avaient le pouvoir de signature mais l'autre administrateur gérait l'entreprise au jour le jour. Lorsqu'elle est devenue membre de l'ATAI, l'agence de voyages a conclu un contrat d'agence de vente passages avec l'ATAI (conférant le droit de vendre des billets d'avion et de toucher des commissions) et un contrat d'agence de vente passages avec Air Canada (autorisant l'agence à recevoir une provision de formulaires de billets à remplir et à distribuer les billets directement au public).

1993 CanLII 33 (SCC)

travel agency and were to be paid twice a month to Air Canada. These payments were regularly made until March 1979.

The travel agency obtained an operating line of credit from a chartered bank in 1978. The monies advanced under the line of credit and interest thereon constituted a demand loan in favour of the Bank. Both directors personally guaranteed the loan and authorized the Bank to remove any monies owing on the loan at any time from the agency's general account. Although a trust account was set up by the managing director for the deposit of the airline funds held by the agency, these funds were maintained in the agency's general operating bank account.

A dispute arose between the directors in April 1979. The managing director discovered cancelled cheques for the instalment payments on appellant's personal loan. It was his understanding that appellant had agreed to cease making the payments for the time being and he stopped payment on the last instalment cheque. Appellant suspected the managing director of misappropriating funds and stopped payment on all cheques and withdrawals. At this time, the travel agency owed Air Canada $25,079.67 for ticket sales.

The travel agency was closed for 10 days. Both directors, through their solicitors, negotiated for the purchase by one of the other's interest and both, during this time, made efforts to pay Air Canada. Appellant testified that he opened a trust account, drew cheques for the monies that were still in the company account, withdrew the stop payment orders, and attempted to transfer the funds into the new trust account. The Bank refused to transfer the funds or to honour the cheques made out to Air Canada because of the conflicting instructions from the two directors. The Bank, after sending demand notices, withdrew the full amount owing it under the line of credit from the travel agency's general account.

Air Canada sued the travel agency and both directors personally for the money owed to it for ticket sales. Its claim against the travel agency was successful but the claim against the two directors was dismissed. Air Canada successfully appealed the judgment as it related to the two directors and judgment was entered against them as well. At issue here were: (1) whether the relationship between travel agency and respondent was one

L'agence de voyages devait détenir en fiducie les fonds provenant de la vente de billets d'Air Canada et les lui verser deux fois par mois. Jusqu'en mars 1979, ces paiements ont été faits régulièrement.

L'agence de voyages a obtenu une marge de crédit d'exploitation d'une banque à charte en 1978. Les sommes avancées conformément à la marge de crédit et les intérêts dus constituaient un prêt remboursable sur demande de la banque. Les deux administrateurs ont garanti personnellement le prêt et autorisé la banque à retirer du compte général de l'agence toute somme due sur celui-ci. Bien que l'administrateur délégué ait ouvert un compte en fiducie afin d'y déposer les fonds de la compagnie d'aviation détenus par l'agence, ces fonds ont été gardés dans un compte d'affaires général de l'agence à la banque.

En avril 1979, un conflit est intervenu entre les administrateurs. L'administrateur délégué a découvert des chèques payés au titre des versements échelonnés sur le prêt personnel de l'appelant. Il était d'avis que l'appelant avait consenti à cesser les paiements pour le moment et a fait opposition au chèque tiré pour le dernier versement. L'appelant a soupçonné l'administrateur délégué de détourner des fonds et a fait opposition à tous les chèques et retraits. À ce moment-là, l'agence devait 25 079,67 $ à Air Canada pour des billets vendus.

L'agence de voyages a été fermée pendant 10 jours. Les deux administrateurs, par l'entremise de leurs avocats, ont négocié l'achat de leur participation respective et, durant ce temps, tous deux ont fait un effort pour payer Air Canada. L'appelant a témoigné avoir ouvert un compte en fiducie, tiré des chèques pour les sommes non utilisées dans le compte de la société, mis fin à l'opposition aux chèques et tenté de transférer les fonds dans le nouveau compte en fiducie. La banque a refusé de virer les fonds ou d'honorer les chèques tirés à l'ordre d'Air Canada à cause des instructions divergentes des deux administrateurs. Après avoir envoyé des avis relatifs au prêt remboursable sur demande, la banque a retiré le montant complet de la dette en vertu de la marge de crédit du compte d'affaires général de l'agence.

Air Canada a poursuivi l'agence et les deux administrateurs personnellement, au sujet de la somme due pour les billets vendus. Elle a eu gain de cause contre l'agence de voyages mais son action contre les administrateurs a été rejetée. Air Canada a interjeté appel avec succès contre les deux administrateurs et un jugement a également été inscrit contre eux. Les questions en l'espèce sont les suivantes: (1) le rapport établi entre

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of trust, or one of debtor and creditor; and (2) if the relationship was one of trust, under what circumstances could the directors of a corporation be held personally liable for breach of trust by the corporation, and were those circumstances present here. The legal issue raised by this second ground of appeal concerned the standards for the imposition of personal liability to be applied to strangers who participate in a breach of trust. Although involving a corporation, the case fell to be resolved on trust principles, and does not raise general questions of the personal liability of directors for the acts of the corporation.

Held: The appeal should be dismissed.

Per La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The relationship was conceded to be one of trust. The wording of the agreement evidenced an intention to create a trust. Respondent was the object of the trust and the money collected for ticket sales its subject matter. Given the intention to create a trust in the agreement between the travel agency and respondent, the absence of a prohibition on the commingling of funds could be considered but was not determinative of the type of relationship. The setting up of the trust account and the fact that the IATA agreement allowed the travel agency to affect Air Canada's legal responsibilities indicated a relationship consistent with a trust relationship. The travel agency breached the trust when it failed to account to the respondent for the monies collected through sales of Air Canada tickets.

The imposition of personal liability on a stranger to a trust depends on whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. A stranger to the trust can be held liable as a constructive trustee for breach of trust (trustee *de son tort*). The stranger, although not appointed a trustee, takes on him- or herself to act as trustee and to possess and administer trust property and becomes liable if he or she commits a breach of trust while acting as a trustee. This type of liability is inapplicable here because the directors did not personally take possession of trust property or assume the office or function of trustees.

l'agence et l'intimée constitue-t-il une fiducie ou une obligation entre débiteur et créancier? (2) s'il s'agit d'une fiducie, dans quelles circonstances les administrateurs d'une société peuvent-ils être tenus personnellement responsables de la violation de la fiducie par la société, et ces circonstances existaient-elles en l'espèce? La question de droit posée par ce second moyen d'appel fait entrer en jeu les normes qui régissent l'attribution d'une responsabilité personnelle aux tiers qui participent à la violation d'une fiducie. Bien qu'une société par actions soit en cause, l'affaire doit être tranchée selon les principes applicables à la fiducie et elle ne soulève pas de questions générales touchant la responsabilité personnelle des administrateurs pour les actes de la société.

Arrêt: Le pourvoi est rejeté.

Les juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major: Il a été concédé que le rapport était une fiducie. L'intention de créer une fiducie ressort du texte du contrat. Le bénéficiaire est l'intimée et les biens assujettis à la fiducie sont les fonds encaissés par suite de la vente de billets. Comme l'intention de créer une fiducie est exprimée dans le contrat entre l'agence de voyages et l'intimée, on peut tenir compte de l'absence d'interdiction de regrouper les fonds mais elle n'est pas déterminante à l'égard du genre de rapport. L'ouverture du compte en fiducie et le fait que l'accord de l'ATAI permettait à l'agence de voyages d'influer sur les responsabilités juridiques d'Air Canada indiquaient un rapport compatible avec l'existence d'une fiducie. L'agence de voyages a violé l'obligation fiduciaire quand elle n'a pas rendu compte à l'intimée des sommes perçues par suite de la vente de ses billets.

L'attribution d'une responsabilité personnelle à un tiers à une fiducie est subordonnée à la question de savoir si la conscience du tiers est suffisamment en cause pour que soit justifiée l'attribution d'une responsabilité personnelle. La responsabilité pour la violation d'une fiducie peut être attribuée à un tiers en qualité de fiduciaire par interprétation (fiduciaire «de son tort»). Le tiers, bien qu'il n'ait pas été nommé fiduciaire, prend sur lui d'agir comme fiduciaire et de détenir et d'administrer les biens en fiducie, et devient responsable s'il manque à une de ses obligations pendant qu'il agit comme fiduciaire. Ce type de responsabilité est inapplicable en l'espèce parce que les administrateurs n'ont pas pris possession personnellement des biens en fiducie et ne se sont pas attribué la charge ou la fonction de fiduciaire.

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Strangers to the trust can also be personally liable for breach of trust if they knowingly participate in a breach of trust. They either were acting as a trustee in receipt and chargeable with trust property (a constructive trusteeship termed "knowing receipt") or they knowingly assisted in a dishonest and fraudulent design on the part of the trustees (termed "knowing assistance"). Since the "knowing receipt" category did not apply here, the only basis upon which the directors could be held personally liable was as constructive trustees under the "knowing assistance" head of liability. This basis of liability raises two main issues: the nature of the breach of trust and the degree of knowledge required of the stranger.

The knowledge requirement for this "knowing assistance" type of liability is actual knowledge; recklessness or wilful blindness will suffice. A person will be deemed to have known of the trust if it was imposed by statute. If the trust was contractually created, then whether the stranger knew of the trust will depend on his or her familiarity or involvement with the contract.

The receipt of a benefit as a result of the breach of trust will be neither a sufficient nor a necessary condition for the drawing of an inference that a stranger knew of the breach. Constructive notice has been found to be insufficient to bind the stranger's conscience so as to give rise to personal liability. While cases involving recklessness or wilful blindness indicate a want of probity which justifies imposing a constructive trust, the carelessness involved in constructive knowledge cases will not normally amount to a want of probity, and will therefore be insufficient to bind the stranger's conscience.

Whether the breach of trust was fraudulent and dishonest must be considered, not whether the appellant's actions should be so characterized. The stranger will be liable if he or she knowingly assisted the trustee in a fraudulent and dishonest breach of trust. Therefore, it is the corporation's actions which must be examined. Where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue. The appellant's actions were

Une responsabilité personnelle peut incomber à des tiers en cas de manquement à une obligation fiduciaire s'ils participent sciemment à ce manquement. Ils agissaient soit à titre de fiduciaires parce qu'ils avaient reçu des biens en fiducie et devaient en rendre compte (fiducie par interprétation appelée «réception en connaissance de cause»), soit parce qu'ils avaient sciemment aidé les fiduciaires à réaliser un dessein malhonnête et frauduleux (appelée «aide apportée en connaissance de cause»). Étant donné que la catégorie de la «réception en connaissance de cause» ne s'applique pas en l'espèce, une responsabilité personnelle ne peut être attribuée aux administrateurs que s'ils ont apporté une «aide en connaissance de cause». La responsabilité qui repose sur ce fondement soulève deux questions principales: la nature de la violation de l'obligation fiduciaire, et le degré de connaissance exigé du tiers.

La connaissance requise pour la responsabilité fondée sur l'«aide en connaissance de cause» est la connaissance de fait; l'insouciance ou l'ignorance volontaire suffiront également. Une personne est réputée savoir qu'il y a une fiducie en cas de fiducie en vertu d'une loi. En cas de fiducie conventionnelle, la question de savoir si le tiers était au courant de la fiducie dépend de sa connaissance du contrat ou de sa participation à celui-ci.

Le fait de tirer avantage de la violation de l'obligation fiduciaire n'est ni une condition suffisante ni une condition nécessaire pour conclure que le tiers était au courant de la violation. Il a été décidé que la connaissance présumée était insuffisante pour que la conscience d'un tiers soit en cause au point qu'il puisse être tenu personnellement responsable. En cas d'insouciance ou d'ignorance volontaire, on peut déduire une absence de probité qui justifie l'attribution d'une fiducie par interprétation, mais le manque de diligence démontré dans les cas où il y a connaissance présumée n'équivaut normalement pas à un manque de probité et sera par conséquent insuffisant pour que la conscience du tiers puisse être mise en cause.

Il faut examiner si la violation de l'obligation fiduciaire a été frauduleuse et malhonnête, et non si les actions de l'appelant doivent être ainsi qualifiées. Le tiers sera tenu responsable s'il a sciemment aidé le fiduciaire à violer l'obligation fiduciaire frauduleusement et malhonnêtement. Par conséquent, ce sont les actions de la société qu'il faut examiner. Lorsque le fiduciaire est une société par actions, et non un particulier, il peut être plus difficile de trancher la question de savoir si la violation de l'obligation fiduciaire a été malhonnête et frauduleuse parce que la société ne peut agir que par l'intermédiaire de personnes physiques qui sont souvent les

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relevant to this examination, given the extent to which the travel agency was controlled by the defendant directors.

The breach of trust by the travel agency was dishonest and fraudulent from an equitable standpoint. The taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability. As a party to the contract between itself and the respondent, the travel agency knew that the Air Canada monies were held in trust for the respondent, and were not for the general use of the travel agency. It set up trust accounts, but never used them. It also knew that any positive balance in its general account was subject to the Bank's demand. By placing the trust monies in the general account which were then subject to seizure by the Bank, the travel agency took a risk to the prejudice of the rights of the respondent beneficiary, Air Canada. It had no right to take this risk.

Appellant participated or assisted in the breach of trust. He dealt with the funds in question — he stopped payment on all cheques, opened a trust account, and attempted to withdraw the stop payment orders and to transfer the funds into the new trust account in order to pay the respondent. The breach of trust was directly caused by the conduct of the defendant directors. Their actions in stopping payment on the cheques to protect their own interests not only prevented payment on cheques issued to Air Canada but also precipitated the seizure by the Bank of the only funds available in the unprotected general account. The directors are personally liable for the breach of trust as constructive trustees provided that the requisite knowledge on the part of the directors is proved.

The knowledge requirement will not generally be a difficult hurdle to overcome in cases involving directors of closely held corporations. Such directors, if active, usually have knowledge of all of the actions of the corporate trustee. Here, however, the appellant was not as closely involved with the day-to-day operations as was the other director. He nevertheless knew of the terms of the agreement between the travel agency and the respondent airline because he signed that agreement and he knew that the trust funds were being deposited in the general bank account, which was subject to the demand loan from the Bank. This constitutes actual knowledge

tierces parties dont la responsabilité est en cause. Les actions de l'appelant étaient pertinentes dans cet examen, étant donné le degré de contrôle exercé sur l'agence de voyages par les administrateurs défendeurs.

La violation de l'obligation fiduciaire par l'agence de voyages était malhonnête et frauduleuse selon les principes de l'*equity*. Le fait de courir sciemment et de manière injustifiée un risque au détriment du bénéficiaire est suffisant pour légitimer l'attribution d'une responsabilité personnelle. En tant que partie au contrat conclu entre elle-même et l'intimée, l'agence de voyages savait que les sommes appartenant à Air Canada étaient détenues en fiducie au nom de celle-ci et ne devaient pas être affectées aux activités générales de l'agence de voyages. Elle a ouvert des comptes en fiducie, mais ne les a jamais utilisés. Elle savait également que tout solde positif dans son compte général pouvait être demandé par la banque. En plaçant les fonds en fiducie dans le compte général qui était susceptible d'être saisi par la banque, l'agence de voyages a couru un risque au détriment des droits d'Air Canada, bénéficiaire intimée. Elle n'avait pas le droit de courir ce risque.

L'appelant a participé ou aidé à la violation d'une obligation fiduciaire. Il a géré les fonds en question — il a fait opposition au paiement de tous les chèques, a ouvert un compte en fiducie et tenté de retirer l'opposition au paiement et de transférer les fonds dans le nouveau compte en fiducie afin de rembourser l'intimée. La violation de l'obligation fiduciaire a été causée directement par la conduite des administrateurs défendeurs. Leur action pour faire opposition à des chèques, non seulement a empêché le paiement de chèques tirés à l'ordre d'Air Canada, mais a hâté la saisie par la banque des seuls fonds se trouvant dans le compte général non protégé. Les administrateurs sont personnellement responsables de la violation d'une obligation fiduciaire à titre de fiduciaires par interprétation, à la condition qu'il soit prouvé qu'ils avaient la connaissance voulue.

La connaissance exigée ne sera généralement pas un obstacle difficile à surmonter lorsqu'il s'agit d'administrateurs d'une société à peu d'actionnaires. Ces administrateurs, s'ils jouent un rôle actif, sont d'ordinaire au courant de toutes les actions de la société fiduciaire. En l'espèce, toutefois, l'appelant ne prenait pas une part aussi active aux activités quotidiennes que l'autre administrateur. Il connaissait néanmoins les conditions de l'accord entre l'agence de voyages et la compagnie d'aviation intimée, puisqu'il a signé le contrat et qu'il savait en outre que les fonds en fiducie étaient déposés dans le compte en banque général, qui était assujetti au

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of the breach of trust because even without subjective knowledge of the breach of trust, given the facts of which he did have subjective knowledge, he was wilfully blind to the breach, or reckless in his failure to realize that there was a breach. Furthermore, appellant received a benefit from the breach of trust, in that his personal liability to the Bank on the operating line of credit was extinguished. Therefore, he knowingly and directly participated in the breach of trust, and is personally liable to the respondent airline for that breach.

Per McLachlin J.: The relationship between the corporation and Air Canada was one of trust, not debtor and creditor. Appellant was clearly liable as a constructive trustee for the breach of trust which the corporation committed respecting Air Canada's account.

A number of issues should not be decided here but rather left for consideration in cases in which they might arise. A stranger to a trust must know of his or her participation in a breach of trust to be personally liable for it. It was not necessary, however, to decide whether subjective knowledge (actual knowledge of the breach or wilful blindness and recklessness) or objectively determined knowledge (what a reasonably diligent person would have known) is necessary. The evidence here met the higher standard of subjective knowledge. It was also unnecessary to decide whether any breach could give rise to liability or whether the breach had to be fraudulent or dishonest because the breach here was fraudulent and dishonest in the sense that it involved a risk to the property to the prejudice of the beneficiary. Lastly, a decision as to whether liability could be imposed in the absence of personal benefit did not need to be made because appellant benefitted personally from the breach.

prêt à demande de la banque. Cela équivaut à la connaissance de fait de la violation d'une obligation fiduciaire parce que, même en l'absence de connaissance subjective de la violation de l'obligation fiduciaire, étant donné les faits dont il avait la connaissance subjective, il a fait preuve d'ignorance volontaire de la violation, ou d'insouciance en ne se rendant pas compte de la violation. Par surcroît, l'appelant a tiré avantage de la violation d'une obligation fiduciaire, en ce sens que son engagement personnel envers la banque à l'égard de la marge de crédit d'exploitation a été éteint. Par conséquent, il a sciemment et directement participé à la violation d'une obligation fiduciaire et est personnellement responsable envers la compagnie d'aviation intimée de cette violation.

Le juge McLachlin: Il existait un rapport de fiduciaire entre la société et Air Canada et non un rapport de débiteur et créancier. L'appelant était clairement responsable à titre de fiduciaire par interprétation de la violation d'une obligation fiduciaire que la société a commise relativement au compte d'Air Canada.

Un certain nombre de questions ne devraient pas être tranchées en l'espèce mais plutôt examinées dans des affaires où elles pourront être soulevées. Le tiers à une fiducie doit participer en connaissance de cause à la violation pour en être tenu personnellement responsable. Toutefois, il n'est pas nécessaire de décider si la connaissance requise doit être subjective (une connaissance de fait de la violation ou l'ignorance volontaire et l'insouciance) ou déterminée de façon objective (ce qu'une personne raisonnablement diligente aurait dû savoir). La preuve en l'espèce satisfait à la norme plus élevée de la connaissance subjective. De plus, il n'est pas nécessaire de déterminer si toute violation pourrait entraîner la responsabilité ou si la violation devait être frauduleuse et malhonnête car la violation en l'espèce était frauduleuse et malhonnête dans le sens qu'il y avait un risque pour les biens au détriment du bénéficiaire. Finalement, il n'est pas nécessaire de décider si la responsabilité pourrait être attribuée en l'absence d'avantage personnel parce que, en l'espèce, l'appelant a tiré un avantage personnel de la violation.

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APPEAL from a judgment of the Ontario Court of Appeal (1991), 2 O.R. (3d) 184, 77 D.L.R. (4th) 536, allowing an appeal from a judgment of Flanigan Dist. Ct. J. Appeal dismissed.

Peter J. Bishop, for the appellant.

Guy L. Poppe and *Harry G. Leslie*, for the respondent.

The judgment of La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

IACOBUCCI J. — This appeal concerns the personal liability of directors of a closely held corporation for breach of a trust by the corporation. The appellant was one of two directors of a small travel agency which contracted with the respondent airline to sell Air Canada tickets. Two main questions are raised on this appeal. First, was the relationship between the corporation and the respondent airline one of trust? Second, if so, is the appellant director personally liable for the breach of trust by the corporation? The legal issue raised by this second ground of appeal concerns the standards for the imposition of personal liability to be applied to strangers who participate in a breach of trust. Although involving a corporation, the case falls to be resolved on trust principles, and does not raise

Glatt (1979), 25 O.R. (2d) 567; *Scott c. Riehl* (1958), 15 D.L.R. (2d) 67.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1991), 2 O.R. (3d) 184, 77 D.L.R. (4th) 536, qui a accueilli un appel contre un jugement du juge Flanigan de la Cour de district. Pourvoi rejeté.

Peter J. Bishop, pour l'appelant.

Guy L. Poppe et *Harry G. Leslie*, pour l'intimée.

Version française du jugement des juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major rendu par

LE JUGE IACOBUCCI — Le présent pourvoi porte sur la responsabilité personnelle des administrateurs d'une société à peu d'actionnaires pour la violation d'une obligation fiduciaire par la société. L'appelant était l'un des deux administrateurs d'une petite agence de voyages qui avait signé un contrat avec la compagnie d'aviation intimée relativement à la vente de billets d'Air Canada. Deux questions principales se posent dans le présent pourvoi. Premièrement, le rapport établi entre la société et la compagnie d'aviation intimée constituait-il une fiducie? Deuxièmement, dans l'affirmative, l'administrateur appelant est-il personnellement responsable de la violation d'une obligation fiduciaire par la société? La question de droit posée par ce second moyen d'appel fait entrer en jeu les normes qui régissent l'attribution d'une responsabilité personnelle aux tiers qui participent à la violation d'une obligation fiduciaire. Bien qu'une société par actions soit en cause, l'affaire doit être tranchée selon les principes applicables à

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general questions of the personal liability of directors for the acts of the corporation.

I. Background

In 1973, the defendant Phil Martin and one Ross Linton incorporated M & L Travel Limited (M & L) to carry on the business of a travel agency in Ottawa. In 1975, Linton withdrew from the business and Martin continued by himself. In 1977, Martin wanted M & L to become a member of the International Air Transport Association (IATA) so that he could receive larger commissions and issue tickets directly to customers. To become a member, M & L had to fulfil certain requirements. These included having working capital of at least $20,000 and the sponsorship of a major airline. Therefore, in the fall of 1977, Martin invited the appellant Valliant to become a shareholder and invest in M & L. In January 1978, Valliant invested $25,550 in M & L and acquired 50 percent of the issued shares. Valliant obtained this money through a personal loan on which he was required to pay monthly instalments of $752. The trial judge found that Martin had agreed that Valliant could withdraw this amount from M & L's account on a monthly basis until the personal loan was paid in full.

Martin became President of M & L and Valliant its Vice-President, and they were its sole directors. Each had signing authority, but Martin ran the day-to-day business. Valliant, who had no experience with the travel agency business, dropped in occasionally and worked full time, for a salary, only when Martin was ill or on vacation. In November 1978, Valliant brought his wife into the travel agency to deal with problems with M & L's books. She was given signing authority and worked part time for the agency until April 1979.

The IATA accepted the membership application of M & L based on sponsorship by Air Canada. M & L entered into two written agreements. The first was a passenger sales agency agreement between IATA and M & L, executed on September 14, 1978

la fiducie et elle ne soulève pas de questions générales touchant la responsabilité personnelle des administrateurs pour les actes de la société.

I. Le contexte

En 1973, le défendeur Phil Martin et un nommé Ross Linton ont constitué la société M & L Travel Limited (M & L), agence de voyages devant exercer son activité à Ottawa. En 1975, Linton s'est retiré de l'affaire et Martin a continué seul. En 1977, Martin a voulu que M & L adhère à l'Association du transport aérien international (ATAI) afin de toucher des commissions plus importantes et de vendre des billets directement aux clients. Pour y adhérer, M & L devait satisfaire à certaines exigences. Parmi celles-ci, on compte un fonds de roulement d'au moins 20 000 $ et le parrainage d'une importante compagnie d'aviation. Par conséquent, à l'automne de 1977, Martin a invité l'appelant Valliant à devenir actionnaire et à investir dans M & L. En janvier 1978, Valliant a investi 25 550 $ et a acquis 50 pour 100 des actions émises. Il a obtenu cet argent au moyen d'un prêt personnel qui l'obligeait à rembourser 752 $ par mois. Le juge de première instance a conclu que Martin avait consenti à ce que Valliant retire cette somme du compte de M & L chaque mois jusqu'au remboursement complet du prêt personnel.

Martin est devenu président de M & L et Valliant, vice-président, et ils en étaient les seuls administrateurs. Chacun était signataire autorisé, mais Martin gérait l'entreprise au jour le jour. Valliant, qui n'avait aucune expérience dans une agence de voyages, passait de temps à autre et ne travaillait à plein temps, contre rémunération, que lorsque Martin était malade ou en vacances. En novembre 1978, Valliant a fait entrer son épouse à l'agence afin qu'elle s'occupe des problèmes posés par la tenue des livres de M & L. Elle est devenue signataire autorisée et a occupé un emploi à temps partiel à l'agence jusqu'en avril 1979.

L'ATAI a accepté la demande d'adhésion de M & L, parrainée par Air Canada. M & L a conclu deux accords écrits. Le premier était un contrat d'agence de vente passages conclu entre l'ATAI et M & L le 14 septembre 1978 et signé par Martin

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and signed by Martin as President. This agreement conferred on M & L the right to sell air carrier tickets and receive commissions. Valliant was familiar with the contents of this agreement. The second agreement, also called a passenger sales agency agreement, was entered into between M & L and Air Canada on March 15, 1979 and was signed by Valliant as Vice-President. This agreement authorized M & L to receive blank airline ticket stock from Air Canada and to issue tickets directly to the public. Funds collected from the sale of Air Canada tickets were to be held in trust by M & L and paid twice a month to Air Canada. Until March 1979, these payments were regularly made. The agreement contained the following clause:

All monies, less applicable commissions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation (and for which the Agent has issued tickets or exchange orders) shall be the property of the Airline, and shall be held in trust by the Agent until satisfactorily accounted for to the airline. All such monies, less applicable commissions to which the Agent is entitled hereunder, shall be remitted to the Airline by the Agent in accordance with the Airline's accounting procedures.

On August 30, 1978, M & L obtained an operating line of credit of $15,000 from the Provincial Bank of Canada in Ottawa (the Bank). Martin and Valliant personally guaranteed the loan and authorized the Bank to remove from the general account of M & L any monies at any time owing on the loan. The monies advanced under the line of credit and interest thereon constituted a demand loan in favour of the Bank.

Also in 1978, Martin set up trust accounts on behalf of M & L for the deposit of the airline funds. For unexplained reasons, these accounts were never used. Instead, M & L maintained a general operating account with the Bank. Funds from all sources, including the sale of Air Canada tickets, were placed in this account. General operating expenses, the interest on the line of credit,

en qualité de président. Il accordait à M & L le droit de vendre des billets d'avion et de toucher des commissions. Valliant était au courant des clauses de ce contrat. Le second, aussi appelé contrat d'agence de vente passages, a été conclu entre M & L et Air Canada le 15 mars 1979 et a été signé par Valliant en qualité de vice-président. Ce contrat autorisait M & L à recevoir d'Air Canada une provision de formulaires de billets d'avion à remplir, et à vendre les billets directement au public. M & L devait détenir en fiducie les fonds provenant de la vente de billets d'Air Canada et les lui verser deux fois par mois. Jusqu'en mars 1979, ces paiements ont été faits régulièrement. Le contrat contenait la clause suivante:

[TRADUCTION] Toutes les sommes que l'Agent perçoit à l'égard du transport aérien de passagers (et pour lesquelles il a remis des billets ou des bons d'échange), moins les commissions applicables auxquelles il a droit conformément aux présentes, appartiennent à la Compagnie d'aviation, et l'Agent doit les détenir en fiducie, jusqu'à ce qu'il en ait rendu compte de façon satisfaisante à la compagnie d'aviation. L'Agent doit remettre toutes ces sommes, moins les commissions applicables auxquelles il a droit conformément aux présentes, à la Compagnie d'aviation en conformité avec les méthodes comptables de la Compagnie d'aviation.

Le 30 août 1978, M & L a obtenu une marge de crédit d'exploitation de 15 000 $ de la Banque Provinciale du Canada à Ottawa (la banque). Martin et Valliant ont garanti personnellement le prêt et ont autorisé la banque à retirer du compte général de M & L toute somme due sur celui-ci. Les sommes avancées conformément à la marge de crédit et les intérêts dus constituaient un prêt remboursable sur demande de la banque.

En 1978 également, Martin a ouvert des comptes en fiducie au nom de M & L afin d'y déposer les fonds de la compagnie d'aviation. Pour des raisons inexpliquées, ces comptes n'ont jamais servi. M & L a plutôt utilisé un compte d'affaires général à la banque. Ce compte a été crédité des fonds de toutes provenances, y compris la vente de billets d'Air Canada. Il a été débité des charges générales

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Valliant's personal loan payments, and Martin's salary were all paid out of this account.

In April 1979, a dispute arose between Martin and Valliant. Martin, concerned about the poor cash flow position of the agency, went into the office on April 5, 1979. He found the cancelled cheques for the instalment payments on Valliant's personal loan. Martin thought that Valliant had agreed to cease making the payments for the time being, and therefore, Martin called the Bank and stopped payment on the last instalment cheque. He took the day's receipts and a number of cancelled cheques to his lawyer. On April 6, 1979, Valliant noticed the missing funds and documents, and suspected that Martin was misappropriating funds. He changed the locks on the doors and called the Bank and stopped payment on all cheques and withdrawals. At this time, M & L owed Air Canada $25,079.67 for ticket sales.

Between April 6 and April 16, 1979, the business of M & L was closed. Martin and Valliant, through their solicitors, negotiated for the purchase by one of the other's interest. During this time, both Valliant and Martin made efforts to pay Air Canada. Valliant, in particular, testified that he opened a trust account, drew cheques for the monies that were still in the company account, withdrew the stop payment orders, and attempted to transfer the funds into the new trust account. However, the Bank refused to transfer the funds or to honour the cheques made out to Air Canada because of the conflicting instructions from Martin and Valliant. The Bank, now aware of the financial and managerial difficulties facing M & L, sent a demand notice to Valliant, M & L, and probably Martin on April 23, 1979. On April 24, 1979, the Bank withdrew $15,184.11 from the operating account, satisfying in full the demand note relating to the line of credit personally guaranteed by both Martin and Valliant.

Air Canada sued M & L and Martin and Valliant personally for the $25,079.67 owed to it for ticket sales. At trial, Air Canada succeeded against M &

d'exploitation, des intérêts sur la marge de crédit, des versements sur le prêt personnel de Valliant et du salaire de Martin.

En avril 1979, un conflit est intervenu entre Martin et Valliant. Martin, inquiet de la situation de la trésorerie de l'agence, s'est rendu au bureau le 5 avril 1979. Il a trouvé les chèques payés au titre des versements échelonnés sur le prêt personnel de Valliant. Martin croyait que Valliant avait consenti à cesser les paiements pour le moment et, en conséquence, il a appelé la banque et a fait opposition au chèque tiré pour le dernier versement. Il a pris les recettes du jour et un certain nombre de chèques payés et s'est rendu chez son avocat. Le 6 avril 1979, Valliant a remarqué qu'il manquait des fonds et des documents et il a soupçonné Martin de détourner des fonds. Il a changé les serrures des portes et a appelé la banque pour faire opposition à tous les chèques et retraits. À ce moment-là, M & L devait 25 079,67 $ à Air Canada pour des billets vendus.

Entre le 6 et le 16 avril 1979, M & L a fermé ses portes. Martin et Valliant, par l'entremise de leurs avocats, ont négocié l'achat de leur participation respective. Durant ce temps, Valliant et Martin ont fait un effort pour payer Air Canada. Valliant, en particulier, a témoigné avoir ouvert un compte en fiducie, tiré des chèques pour les sommes non utilisées dans le compte de la société, mis fin à l'opposition aux chèques et tenté de transférer les fonds dans le nouveau compte en fiducie. Toutefois, la banque a refusé de virer les fonds ou d'honorer les chèques tirés à l'ordre d'Air Canada à cause des instructions divergentes de Martin et de Valliant. La banque, sachant maintenant que M & L éprouvait des difficultés financières et des problèmes de gestion, a envoyé un avis relatif au prêt remboursable sur demande à Valliant, à M & L et probablement à Martin le 23 avril 1979. Le 24 avril 1979, la banque a retiré 15 184,11 $ du compte d'affaires, en règlement complet du billet à demande relatif à la marge de crédit garantie personnellement par Martin et Valliant.

Air Canada a poursuivi M & L, ainsi que Martin et Valliant personnellement, au sujet de la somme de 25 079,67 $ due pour les billets vendus. Au pro-

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L but the trial judge dismissed the claim against Martin and Valliant. The Ontario Court of Appeal allowed the appeal of Air Canada and entered judgment against Martin and Valliant as well.

II. Judgments Below

A. *Ontario District Court* (Flanigan Dist. Ct. J.)

The trial judge held that there was clearly a trust relationship between Air Canada and the travel agency, and that the travel agency had breached that trust by failing to protect Air Canada's interest. However, the more difficult question was whether Martin and Valliant were personally liable for breach of trust.

The trial judge stated that the only way in which liability could be imposed on the individual defendants is if they had taken it upon themselves to possess and administer trust property for the beneficiary as if they were trustees. Each individual would then be a trustee *de son tort*. However, the trial judge concluded:

> . . . in this case there is no assumption, in my view, by the individual defendants to assume this trust. It is true, in signing the bank documents they gave the bank the right to do as they did but right up until the last moment they were trying each in their own way effectively or not, to protect the interest of Air Canada to keep their own interest alive by preserving the business of the travel agency. . . . So, I see nothing mala fides in the actions of the individual defendants and I think they were inept in some of their actions but, they were in no way, in my view, trustees that breached a trust so far as Air Canada is concerned.

Therefore, the trial judge dismissed the claim against the individual defendants.

B. *Ontario Court of Appeal* (1991), 2 O.R. (3d) 184 (Griffiths J.A.)

Griffiths J.A. began by noting that it was not contested that there was a trust relationship

cès, Air Canada a eu gain de cause contre M & L, mais le juge a rejeté l'action contre Martin et Valliant. La Cour d'appel de l'Ontario a fait droit à l'appel d'Air Canada et a inscrit un jugement contre Martin et Valliant également.

II. Les juridictions inférieures

A. *La Cour de district de l'Ontario* (le juge Flanigan)

Le juge de première instance a décidé que, de toute évidence, Air Canada et l'agence de voyages avaient établi une fiducie et que l'agence de voyages a violé son obligation fiduciaire en ne protégeant pas l'intérêt d'Air Canada. Toutefois, la question plus difficile était de savoir si Martin et Valliant étaient personnellement responsables de la violation.

Le juge a dit que le seul motif pour attribuer la responsabilité aux défendeurs à titre individuel serait pour avoir pris possession de biens en fiducie et les avoir administrés pour le compte du bénéficiaire comme s'ils avaient été des fiduciaires. Chacun d'eux serait alors un fiduciaire «de son tort». Toutefois, le juge a conclu:

> [TRADUCTION] . . . en l'espèce, les défendeurs ne se sont pas attribué individuellement cette fiducie, à mon sens. Il est vrai qu'en signant les documents bancaires, ils ont accordé à la banque le droit d'agir comme elle l'a fait, mais jusqu'au dernier moment, ils ont tenté chacun à sa façon, efficacement ou non, de protéger l'intérêt d'Air Canada afin de lutter contre l'extinction de leur propre intérêt en préservant l'entreprise d'agence de voyages. [. . .] C'est pourquoi je ne vois aucune mauvaise foi dans les actions accomplies par les défendeurs individuellement et je pense qu'ils ont fait preuve d'ineptie dans certains de leurs actes, mais ils n'étaient aucunement, à mon avis, des fiduciaires qui ont manqué à leur obligation fiduciaire envers Air Canada.

Le juge de première instance a donc rejeté la demande engagée contre les défendeurs individuellement.

B. *La Cour d'appel de l'Ontario* (1991), 2 O.R. (3d) 184 (le juge Griffiths)

Le juge Griffiths a d'abord fait remarquer que l'existence d'une fiducie entre Air Canada et M &

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between Air Canada and M & L, and that M & L was liable for breach of that trust. He also agreed with the trial judge that the individual defendants in this case could not be classified as trustees *de son tort*. In *Law of Trusts in Canada* (2nd ed. 1984), Professor Donovan Waters states that to be held liable as a trustee *de son tort*, the trustee must have possession and control of the trust property. To have that possession and control, the trustee must have some legal right or title to the trust property. In this case, the trial judge properly found that neither Martin nor Valliant had assumed legal control or possession of the trust funds, since the funds were at all times administered in the name of M & L.

Griffiths J.A. held that M & L was clearly liable for breach of contract since it failed to remit the funds as required. However, as directors, Martin and Valliant could not be held personally liable for that breach of contract. It was therefore necessary, for Martin and Valliant to be potentially personally liable, that M & L also be found to have been in breach of trust. Griffiths J.A. concluded at p. 194:

> . . . on the authority of *Canadian Pacific Airlines Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233, . . . affd Ont. C.A., Robins, Krever and Carthy JJ.A., January 19, 1990 (. . . 71 O.R. (2d) 63 (note) . . .), that the agreement between Air Canada and the corporation clearly created a trust relationship between them with the result that any monies received by the corporation from the sale of Air Canada tickets were impressed with a trust.

Griffiths J.A. then went on to consider whether the directors could be personally liable for the breach by their corporation of a trust relationship created by contract. This issue, he noted, had not been considered in any reported Canadian or English cases. He reviewed several cases where the directors had been held personally liable for breaches of trust imposed by statute, including *Wawanesa Mutual Insurance Co. v. J. A. (Fred) Chalmers & Co.* (1969), 7 D.L.R. (3d) 283 (Sask. Q.B.); *Henry Electric Ltd. v. Farwell* (1986), 29

L n'était pas contestée et que M & L était responsable de la violation de cette obligation fiduciaire. Il a également convenu avec le juge de première instance que ni l'un ni l'autre des défendeurs individuels dans la présente espèce ne pouvait être tenu pour fiduciaire «de son tort». Dans son ouvrage *Law of Trusts in Canada* (2e éd. 1984), le professeur Donovan Waters dit que, pour encourir la responsabilité en qualité de fiduciaire «de son tort», le fiduciaire doit avoir la possession et le contrôle des biens en fiducie. La possession et le contrôle supposent un droit ou un titre sur les biens en fiducie. En l'espèce, le juge de première instance a conclu à bon droit que ni Martin ni Valliant ne s'était attribué le contrôle ou la possession, en droit, des biens en fiducie, car les fonds ont toujours été administrés au nom de M & L.

Le juge Griffiths a décidé que M & L était nettement responsable de l'inexécution du contrat car elle n'avait pas remis les sommes comme elle le devait. Toutefois, à titre d'administrateurs, Martin et Valliant ne pouvaient être tenus personnellement responsables de cette inexécution du contrat. Pour conclure à leur responsabilité personnelle, il fallait donc juger que M & L avait aussi violé une obligation fiduciaire. Le juge Griffiths conclut, à la p. 194:

> [TRADUCTION] . . . vu la décision *Canadian Pacific Airlines Ltd. c. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233, [. . .] conf. par C.A. Ont., les juges Robins, Krever et Carthy, le 19 janvier 1990 ([. . .] 71 O.R. (2d) 63 (note) [. . .]), que le contrat conclu entre Air Canada et la société a créé de toute évidence une fiducie entre elles, de sorte que toute somme reçue par la société et produite par la vente de billets d'Air Canada portait la marque de la fiducie.

Il a ensuite étudié la question de savoir si les administrateurs pouvaient être tenu personnellement responsables de la violation par leur société d'une obligation fiduciaire créée par contrat. Cette question, a-t-il fait observer, n'a fait l'objet d'aucune décision publiée, au Canada ou en Grande-Bretagne. Il a examiné plusieurs précédents dans lesquels les administrateurs avaient été tenus personnellement responsables de manquements à une obligation fiduciaire imposée par une loi, y compris *Wawanesa Mutual Insurance Co. c. J. A.*

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D.L.R. (4th) 481 (B.C.C.A.); and *Andrea Schmidt Construction Ltd. v. Glatt* (1979), 25 O.R. (2d) 567 (H.C.).

Griffiths J.A. also referred to *Myrta Forastieri v. Eastern Air Lines, Inc.*, 18 Avi. 17,145 (D.P.R. 1983), a U.S. decision involving facts similar to the present case. In that case, the court held, at pp. 17,148-17,149 that:

> Irrespective of good faith or intent, in an instance wherein the corporation had a duty to pay out funds from designated proceeds but such proceeds were used for other purposes, the directors were held personally liable because they had a duty to see that the funds were used for the agreed-upon purpose and they could not excuse themselves on the grounds that they did not dissipate or misappropriate the funds nor were in other respects derelict in their duty. . . .
>
> . . .
>
> We agree, therefore, that failure to remit funds collected by a corporate agent which belong to its principal airline gives rise to personal liability of those corporate employees who participate in the conversion. The imposition of such liability presumes, however, that the responsible persons actually had possession or control over the property such that it could be said that their conduct constitutes participation. Under the circumstances of the present case the joint control over the financial affairs and operations of this very closely held corporation by the two individual plaintiffs/counterdefendants supports a finding that if conversion occurred, it was a joint act of those two persons. They shared ownership of the corporation equally; they shared management of the business operations equally; they shared equally in the special compensation arrangements set up for themselves; and most important, they shared control over the corporate accounts since all checks issued required both their signatures. . . .

Griffiths J.A. concluded that *Wawanesa v. Chalmers, Henry Electric Ltd. v. Farwell* and *Andrea Schmidt Construction Ltd.* could not be distin-

(Fred) Chalmers & Co. (1969), 7 D.L.R. (3d) 283 (B.R. Sask.); *Henry Electric Ltd. c. Farwell* (1986), 29 D.L.R. (4th) 481 (C.A.C.-B.); et *Andrea Schmidt Construction Ltd. c. Glatt* (1979), 25 O.R. (2d) 567 (H.C.).

Le juge Griffiths s'est aussi référé à l'affaire *Myrta Forastieri c. Eastern Air Lines, Inc.*, 18 Avi. 17,145 (D.P.R. 1983), décision américaine portant sur des faits semblables à ceux de l'espèce. Dans cette affaire, la cour a décidé ce qui suit, aux pp. 17,148 et 17,149:

> [TRADUCTION] Peu importe leur bonne foi ou leur intention, dans une situation où la société avait l'obligation de verser des sommes sur des produits désignés, mais où ces produits ont été employés à d'autres fins, les administrateurs ont été jugés personnellement responsables parce qu'ils avaient l'obligation de voir à ce que les fonds soient employés à la fin convenue et ils ne pouvaient faire valoir comme excuse qu'ils n'avaient pas dissipé ou détourné les fonds ou qu'ils n'avaient pas manqué de quelque autre manière à leur obligation. . .
>
> . . .
>
> Par conséquent, nous reconnaissons que cette omission par une société mandataire de verser les sommes perçues, qui appartiennent à la ligne aérienne mandante, fait jouer la responsabilité personnelle des employés de la société qui ont participé au détournement. L'attribution de cette responsabilité présuppose, cependant, que les responsables avaient effectivement la possession ou le contrôle des biens, de sorte qu'on pourrait dire que leur conduite constituait une participation. Dans les circonstances de l'espèce, le fait que les deux demandeurs/défendeurs reconventionnels exerçaient le contrôle conjoint des affaires financières et des activités de cette société à très peu d'actionnaires permet de conclure que s'il y a eu détournement, celui-ci a été une action conjointe de ces deux individus. Ils étaient propriétaires de la société à parts égales; ils partageaient également la gestion de l'entreprise; ils ont bénéficié également des arrangements spéciaux passés pour leur rémunération et, chose la plus importante, ils partageaient le contrôle des comptes de la société car tous les chèques tirés devaient porter la signature de chacun. . .

Le juge Griffiths a conclu qu'il n'y avait pas lieu d'opérer de distinction d'avec les décisions *Wawanesa c. Chalmers, Henry Electric Ltd. c. Farwell* et

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guished on the basis that the trust was created by statute. Instead, he held, at p. 203, that:

> What is significant in those cases is that the shareholders and directors that were held responsible were the sole owners and directors and were the sole directing and operating minds of the corporations. . . . For the purposes of this appeal, I adopt the reasoning of the United States District Court of Puerto Rico in *Myrta Forastieri v. Eastern Air Lines*, *supra*, that it is just and equitable to impose personal liability on directors who participate in the breach of trust by the corporation because, in effect, they have participated in a conversion of trust funds.

Griffiths J.A. then reviewed the facts which justified the imposition of personal liability in the case at bar. First, both Martin and Valliant had at least some control over the operation of the business, and both had signing authority. Second, it was Martin and Valliant as the operating minds of M & L who deposited the trust funds in the general operating account and paid operating expenses out of that account. Third, M & L had a duty to (at p. 204) "keep these monies separate, to earmark them as funds held for Air Canada and, at the very least, to advise the bank that such funds, separately maintained, were trust funds". Since this was not done, M & L committed a breach of trust. Finally, the Bank seized the funds from the account because Martin and Valliant had both stopped payment on cheques issued on the account: "The movement of these directors, acting solely in their own interest to stop payment on cheques, not only prevented payment on cheques issued to Air Canada, but precipitated the seizure by the bank of the only funds available in the unprotected general account" (p. 204). Therefore, Griffiths J.A. concluded at pp. 204-5:

> In my view, this is an appropriate case to impose personal liability on Martin and Valliant for the breach of trust. They were the sole owners and operating minds of the corporation. They directed and authorized the

Andrea Schmidt Construction Ltd. parce que dans celles-ci, la fiducie avait été créée par une loi. Il a plutôt décidé ce qui suit, à la p. 203:

> [TRADUCTION] Ce qui importe dans ces affaires c'est que les actionnaires et les administrateurs à qui a été attribuée une responsabilité étaient les seuls propriétaires et administrateurs et qu'ils étaient les seules âmes dirigeantes des sociétés [. . .] Aux fins du présent appel, j'adopte le raisonnement de la Court of District des États-Unis à Porto Rico dans l'affaire *Myrta Forastieri c. Eastern Air Lines*, précitée, qu'il est juste et équitable d'attribuer une responsabilité personnelle aux administrateurs qui ont participé à la violation de l'obligation fiduciaire de la société parce que, en fait, ils ont participé au détournement des fonds en fiducie.

Le juge Griffiths a ensuite étudié les faits qui justifiaient l'attribution d'une responsabilité personnelle dans le cas qui nous occupe. Premièrement, Martin et Valliant exerçaient tous les deux un certain contrôle sur l'exploitation de l'entreprise et tous deux étaient signataires autorisés. Deuxièmement, ce sont Martin et Valliant, à titre d'âmes dirigeantes de M & L, qui déposaient les fonds en fiducie dans le compte d'affaires général et payaient les frais d'exploitation sur ce compte. Troisièmement, M & L avait l'obligation (à la p. 204) [TRADUCTION] «de garder ces sommes dans un compte distinct, d'indiquer que c'étaient des fonds détenus au nom d'Air Canada et, à tout le moins, d'aviser la banque que ces fonds, gardés séparément, étaient des fonds en fiducie». Comme cela n'a pas été fait, M & L a commis une violation de son obligation fiduciaire. Enfin, la banque a saisi les fonds dans le compte parce que Martin et Valliant avaient tous deux fait opposition aux chèques tirés sur ce compte: [TRADUCTION] «Le geste de ces administrateurs, agissant seulement dans leur propre intérêt pour faire opposition à des chèques, non seulement a empêché le paiement de chèques tirés à l'ordre d'Air Canada, mais a hâté la saisie par la banque des seuls fonds se trouvant dans le compte général non protégé» (p. 204). Par conséquent, le juge Griffiths a conclu, aux pp. 204 et 205:

> [TRADUCTION] À mon avis, il convient en l'espèce d'attribuer une responsabilité personnelle à Martin et à Valliant pour violation d'une obligation fiduciaire. Ils étaient les seuls propriétaires et les âmes dirigeantes de

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deposit of funds from Air Canada sales in the general account without in any way designating these funds as trust funds. They permitted these funds to be intermingled with other funds and they drew cheques on these funds in complete disregard of the trust obligations imposed under the agreement with Air Canada, an agreement which conferred on the corporation of which they were the sole shareholders the important privilege of selling Air Canada tickets directly to the public. Martin and Valliant permitted Air Canada funds to be placed in a general account that was overdrawn without adequate controls and, in particular, without advising the bank that these funds were trust funds, with the result that these funds were exposed to appropriation by the bank to satisfy the corporation's loan guaranteed by Martin and Valliant. In failing to exercise proper control over the trust funds, both Martin and Valliant received a benefit in that their personal liability to the bank was extinguished.

The steps taken by Martin and Valliant to protect the interests of Air Canada were inept, and too little too late. In any event, these steps were taken to preserve the travel agency and not to protect Air Canada's interest. Griffiths J.A. therefore concluded that Martin and Valliant were both parties to the conversion of trust funds and should be held personally liable.

III. Issues

As mentioned at the outset, there are two main issues raised in this case. First, was the relationship between M & L and the respondent one of trust, or one of debtor and creditor? Second, if the relationship was one of trust, then under what circumstances can the directors of a corporation be held personally liable for breach of trust by the corporation, and are those circumstances present in this case?

IV. Analysis

1. *The Nature of the Relationship between M & L and Air Canada*

In this Court, the appellant initially argued that the relationship between M & L and the respon-

la société. Ils ont dirigé et autorisé le dépôt des fonds produits par la vente de billets d'Air Canada dans le compte général sans indiquer d'aucune façon qu'il s'agissait de fonds en fiducie. Ils ont permis que ces fonds soient confondus avec d'autres et ils ont tiré des chèques sur ces fonds en passant outre aux obligations fiduciaires stipulées dans l'accord conclu avec Air Canada, qui accordait à la société, dont ils étaient les seuls actionnaires, le privilège important de vendre des billets d'Air Canada directement au public. Martin et Valliant ont permis que les fonds d'Air Canada soient placés dans un compte général qui a été mis à découvert sans contrôles suffisants et, en particulier, sans que la banque soit avisée que ces fonds étaient des fonds en fiducie, de telle sorte que la banque pouvait s'approprier ces fonds pour régler la dette de la société garantie par Martin et Valliant. En n'exerçant pas de contrôle adéquat sur les fonds en fiducie, Martin et Valliant ont reçu un avantage qui a consisté dans l'extinction de leur dette personnelle envers la banque.

Les moyens pris par Martin et Valliant pour protéger les intérêts d'Air Canada étaient ineptes et c'était trop peu trop tard. Quoi qu'il en soit, ils ont pris ces mesures pour préserver l'agence de voyages et non pour protéger l'intérêt d'Air Canada. Le juge Griffiths a donc conclu que Martin et Valliant avaient tous deux été parties au détournement des fonds en fiducie et devaient être tenus personnellement responsables.

III. Les questions en litige

Comme je l'ai dit au début, deux questions principales se posent dans le présent pourvoi. Premièrement, le rapport établi entre M & L et l'intimée constituait-il une fiducie ou une obligation entre débiteur et créancier? Deuxièmement, s'il s'agissait d'une fiducie, dans quelles circonstances les administrateurs d'une société peuvent-ils être tenus personnellement responsables de la violation d'une obligation fiduciaire par la société, et ces circonstances existent-elles en l'espèce?

IV. Analyse

1. *La nature du rapport entre M & L et Air Canada*

Devant notre Cour, l'appelant a d'abord soutenu que le rapport entre M & L et la compagnie d'avia-

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dent airline was one of debtor and creditor, rather than one of trust. However, at the hearing, the appellant properly conceded that the relationship was one of trust. Given this concession, I will consider this question only briefly.

The appellant relied on the fact that the agreement between the airline and M & L did not require it to keep the proceeds of Air Canada tickets in a separate account or trust fund, or to remit the funds forthwith. Rather, M & L was permitted to keep such funds for a period of up to 15 days, and then for a further 7-day grace period. Furthermore, M & L was liable for the total sale price of all tickets sold, less its commission, regardless of whether it had actually collected the full amount from its customers. That is, M & L was free to sell Air Canada tickets on credit to its customers. Prior to his concession on this point, the appellant submitted that, in these circumstances, M & L was not a trustee of the sale proceeds of the Air Canada tickets.

In concluding that the relationship between M & L and the airline was one of trust, the Court of Appeal relied on *Canadian Pacific Air Lines, Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233. Although the Court of Appeal's decision in that case (1990), 71 O.R. (2d) 63 (note), was brief, the reasons of the trial judge, at p. 237, went into greater depth:

> In order to constitute a trust, an arrangement must have three characteristics, known as the three certainties: certainty of intent, of subject-matter and of object. The agreement . . . is certain in its intent to create a trust. The subject-matter is to be the funds collected for ticket sales. The object, or beneficiary, of the trust is also clear; it is to be the airline. The necessary elements for the creation of a trust relationship are all present. I find that such a relationship did exist between CP and the two travel agencies.

This analysis is clearly applicable to the facts of the present case. That the intent of the agreement is to create a trust is evident from the following wording: "All monies, less applicable commis-

tion intimée procédait d'une obligation entre débiteur et créancier et non d'une fiducie. Toutefois, à l'audience, l'appelant a concédé avec raison que c'était une fiducie. Étant donné cette concession, je ne vais dire que quelques mots sur cette question.

L'appelant a invoqué le fait que l'accord entre la ligne aérienne et M & L ne l'obligeait pas à garder le produit de la vente des billets d'Air Canada dans un compte distinct ou en fiducie, ou à remettre les fonds immédiatement. M & L pouvait, au lieu de cela, garder ces fonds pendant une période maximale de 15 jours, puis jouir d'un délai de grâce de sept jours. En outre, M & L était redevable du prix de vente total de tous les billets vendus, moins sa commission, peu importe qu'elle ait recouvré la somme complète de ses clients. C'est-à-dire qu'il était loisible à M & L de vendre des billets d'Air Canada à crédit à ses clients. Avant de faire sa concession sur ce point, l'appelant a soutenu que, vu ces circonstances, M & L n'était pas fiduciaire du produit de la vente des billets d'Air Canada.

Pour conclure à l'existence d'une fiducie entre M & L et la ligne aérienne, la Cour d'appel s'est appuyée sur l'arrêt *Canadian Pacific Air Lines, Ltd. c. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233. Bien que la Cour d'appel ait rendu une décision brève dans cette affaire (1990), 71 O.R. (2d) 63 (note), les motifs du juge de première instance, à la p. 237, étaient plus détaillés:

> [TRADUCTION] Pour constituer une fiducie, un accord doit comporter trois caractéristiques, appelées les trois certitudes: certitude quant à l'intention, quant aux biens assujettis à la fiducie et quant aux bénéficiaires. L'accord [. . .] est certain quant à l'intention de créer une fiducie. Les biens assujettis à la fiducie sont les fonds perçus pour la vente de billets. Le bénéficiaire est aussi certain; c'est la compagnie d'aviation. Les éléments essentiels à la création d'une fiducie sont tous présents. Je conclus qu'une telle fiducie existait entre CP et les deux agences de voyages.

Cette analyse s'applique clairement aux faits de la présente espèce. L'intention de créer une fiducie ressort à l'évidence du passage qui suit du contrat: «Toutes les sommes que l'Agent perçoit à l'égard

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sions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation (and for which the Agent has issued tickets or exchange orders) shall be the property of the Airline, and shall be held in trust by the Agent until satisfactorily accounted for to the airline." The object of the trust is the respondent airline, and its subject-matter is the funds collected for ticket sales.

While the presence or absence of a prohibition on the commingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative. See *R. v. Lowden* (1981), 27 A.R. 91 (C.A.), at pp. 101-2; *Bank of N.S. v. Soc. Gen. (Can.)*, [1984] 4 W.W.R. 232 (Alta. C.A.), at p. 238; *McEachren v. Royal Bank* (1990), 78 Alta. L.R. (2d) 158 (Q.B.), at p. 183; *Stephens Travel Service International Pty. Ltd. v. Qantas Airways Ltd.* (1988), 13 N.S.W.L.R. 331 (C.A.), at p. 341. In *R. v. Lowden*, *supra*, McGillivray C.J.A. stated as follows at pp. 101-2:

> Undoubtedly a direction that moneys are to be kept separate and apart is a strong indication of a trust relationship being created. It does not appear to me, however, that the converse is necessarily so. In the case of a travel agent, how he handled the funds handed to him for the purchase of a ticket would, as far as the public is concerned, be something that they would not have reason to think about. It would be a matter of internal management. The fact that there is no specific discussion about moneys being kept separate and apart from other moneys does not detract from the fact that the money is paid for a particular purpose, namely the obtaining of tickets for specific flights or reservations at named accommodation for a particular period.

The appellant relied on the decision of this Court in *M. A. Hanna Co. v. Provincial Bank of Canada*, [1935] S.C.R. 144. In that case, the Court dealt with the relationship between a supplier of coal and its sales agent. The Court concluded that the relationship was one of debtor-creditor, citing the fact that the parties had specifically cancelled a portion of their agreement requiring the separation of the funds collected by the sales agent. The sales

du transport aérien de passagers (et pour lesquelles il a remis des billets ou des bons d'échange), moins les commissions applicables auxquelles il a droit conformément aux présentes, appartiennent à la Compagnie d'aviation, et l'Agent doit les détenir en fiducie, jusqu'à ce qu'il en ait rendu compte de façon satisfaisante à la compagnie d'aviation.» Le bénéficiaire est la compagnie d'aviation et les biens assujettis à la fiducie sont les fonds encaissés par suite de la vente de billets.

Certes, la présence ou l'absence d'une interdiction de regrouper les sommes est un facteur qui indique un lien de la nature d'une créance, mais il n'est pas nécessairement décisif. Voir *R. c. Lowden* (1981), 27 A.R. 91 (C.A.), aux pp. 101 et 102; *Bank of N.S. c. Soc. Gen. (Can.)*, [1984] 4 W.W.R. 232 (C.A. Alb.), à la p. 238; *McEachren c. Royal Bank* (1990), 78 Alta. L.R. (2d) 158 (B.R.), à la p. 183; *Stephens Travel Service International Pty. Ltd. c. Qantas Airways Ltd.* (1988), 13 N.S.W.L.R. 331 (C.A.), à la p. 341. Dans l'arrêt *R. c. Lowden*, précité, le juge en chef McGillivray dit, aux pp. 101 et 102:

> [TRADUCTION] Sans aucun doute, s'il est stipulé que les fonds doivent être gardés dans des comptes distincts, il y a de fortes raisons d'inférer qu'une fiducie a été créée. Il ne me semble pas, cependant, que l'inverse soit nécessairement vrai. Dans le cas d'un agent de voyages, le public n'a aucune raison de se préoccuper de ce que l'agent fait de l'argent qui lui est versé à l'achat d'un billet. C'est une question de gestion interne. Le fait qu'on ne discute pas particulièrement de l'obligation de placer la somme dans un compte distinct n'enlève rien au fait que l'argent est versé à une fin précise, savoir l'obtention de billets en vue de vols déterminés ou de réservations dans des hôtels désignés pour une période donnée.

L'appelant s'est fondé sur l'arrêt de notre Cour *M. A. Hanna Co. c. Provincial Bank of Canada*, [1935] R.C.S. 144. Dans cet arrêt, la Cour a examiné le rapport entre un fournisseur de charbon et son représentant. Elle a conclu que leur lien était celui d'un débiteur et d'un créancier, citant le fait que les parties avaient expressément annulé une partie de leur convention qui stipulait la séparation des fonds encaissés par le représentant. Ce dernier

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agent paid the supplier by cheques drawn on its general account. The supplier's acquiescence to this practice, and the fact that the agent had use of the funds before payment came due, indicated to this Court that the parties viewed their relationship as one of debtor-creditor. The Court relied on the following passage from *Henry v. Hammond*, [1913] 2 K.B. 515, at p. 521:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.

This decision was distinguished in *Qantas*, *supra*, at p. 348, by Hope J.A., dealing with facts similar to the present case:

> As it seems to me, . . . the decision . . . has no relevance to the circumstances of the present case where, on the proper construction of the agreement, a trust was expressly created, and where the distinction between an express and a constructive trust does not affect the resolution of the rights of the parties.

Since there was clear language in the agreement that the funds were to be held in trust, Hope J.A. remarked that there would have to be extremely strong indications to alter the plain meaning of those words. On the question of the commingling of funds, Hope J.A. stated at p. 341 that "I do not understand why the absence of an express separate account provision should cut down the effect of the express provision for a trust . . . ." This holding is consistent with the Canadian authorities. See *R. v. Lowden*, *supra*, at pp. 101-2; *Bank of N.S. v. Soc. Gen. (Can.)*, *supra*, at p. 238; *McEachren v. Royal Bank*, *supra*, at p. 183.

payait le fournisseur par chèque tiré sur son compte général. L'acquiescement du fournisseur à cette pratique et le fait que le représentant avait l'usage des fonds avant l'échéance du versement indiquaient, de l'avis de la Cour, que les parties considéraient leur rapport comme celui d'un débiteur et d'un créancier. La Cour a invoqué le passage qui suit de l'arrêt *Henry c. Hammond*, [1913] 2 K.B. 515, à la p. 521:

> [TRADUCTION] De toute évidence, si les conditions selon lesquelles la personne perçoit l'argent prévoient qu'elle est tenue de le déposer séparément à la banque ou ailleurs et de rendre la somme ainsi gardée dans un compte distinct à la personne qui y a droit, elle est la fiduciaire de cet argent et doit le rendre à la personne qui en est la bénéficiaire. Si, en revanche, elle n'est pas tenue de garder l'argent séparément, mais a le droit de le mélanger avec le sien propre et de le gérer à sa guise, à charge, quand on le lui réclame, de remettre une somme équivalente, alors, à mon sens, elle n'est pas fiduciaire de la somme, mais simple débitrice.

Une distinction d'avec cet arrêt a été faite dans l'arrêt *Qantas*, précité, à la p. 348, par le juge Hope, qui traite de faits semblables à ceux de l'espèce:

> [TRADUCTION] À ce qu'il me semble, [. . .] l'arrêt [. . .] n'est pas pertinent par rapport aux circonstances de l'espèce si l'accord, correctement interprété, crée une fiducie explicite et si la distinction entre un fiduciaire explicite et une fiducie par interprétation ne joue pas dans la détermination des droits des parties.

Comme l'accord renfermait des termes clairs stipulant que les fonds devaient être détenus en fiducie, le juge Hope a fait remarquer qu'il faudrait de très fortes raisons pour modifier le sens évident de ces mots. Sur la question du regroupement des fonds, le juge Hope a dit, à la p. 341: [TRADUCTION] «Je ne comprends pas pourquoi l'absence d'une disposition explicite prévoyant un compte distinct devrait annihiler l'effet de la clause créant expressément une fiducie . . .» Cette conclusion est conforme à la jurisprudence canadienne. Voir *R. c. Lowden*, précité, aux pp. 101 et 102; *Bank of N.S. c. Soc. Gen. (Can.)*, précité, à la p. 238, et *McEachren c. Royal Bank*, précité, à la p. 183.

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The majority of U.S. cases have concluded that relationships similar to the one in the present case are trust relationships. See *Air Traffic Conference v. Downtown Travel Center, Inc.*, 14 Avi. 17,172 (N.Y. 1976); *Air Traffic Conference of America v. Worldmark Travel, Inc.*, 15 Avi. 18,483 (N.Y. 1980); *Myrta Forastieri, supra.*

However, a contrary finding was made in *In re Morales Travel Agency*, 667 F.2d 1069 (1st Cir. 1981), at pp. 1071-72, in which the court held that the terms of the IATA agreement between the airline and the travel agency were inadequate to give rise to a trust upon the proceeds from tickets sold by the agency to its customers:

To be sure, Resolution 820(a) recited, in general terms, that the agent was to hold whatever monies it collected in trust for the carrier until accounted for, and that these monies were the carrier's property until settlement occurred. However, talismanic language could not throw a protective mantle over these receipts in the absence of a genuine trust mechanism. Here the relationship remained in practical fact that of debtor-creditor. The contract nowhere required Morales to keep the proceeds of Eastern's ticket sales separate from any other funds, whether Morales' own funds or the proceeds of other airlines' ticket sales. Nor was any specific restriction placed upon Morales' use of the supposed trust funds. Morales was left free to use what it received for its own benefit rather than Eastern's, and to transform the receipts into assets with no apparent encumbrance, upon which potential creditors might rely. The use of the word "trust" and the designation of the airline as titleholder, in a contract which is not publicly filed, would not save potential creditors from relying on such assets as office equipment, accounts receivable, and a bank account solely in the name of the agency. In the absence of any provision requiring Morales to hold the funds in trust by keeping them separate, and otherwise restricting their use, the label "trust" could in these circumstances and for present purposes have no legal effect. See *In re*

Dans la majorité des précédents américains, les tribunaux ont conclu que les rapports semblables à celui analysé en l'espèce constituaient des fiducies: *Air Traffic Conference c. Downtown Travel Center, Inc.*, 14 Avi. 17,172 (N.Y. 1976); *Air Traffic Conference of America c. Worldmark Travel, Inc.*, 15 Avi. 18,483 (N.Y. 1980); *Myrta Forastieri*, précité.

Toutefois, la cour est arrivée à une conclusion contraire dans l'affaire *In re Morales Travel Agency*, 667 F.2d 1069 (1st Cir. 1981), aux pp. 1071 et 1072, dans laquelle elle a décidé que les termes employés dans la convention de l'ATAI entre la ligne aérienne et l'agence de voyages étaient insuffisants pour créer une fiducie à l'égard du produit de la vente de billets par l'agence à ses clients:

[TRADUCTION] Indiscutablement, la résolution 820*a*) stipulait, dans des termes généraux, que l'agent devait détenir toutes les sommes perçues en fiducie pour le transporteur jusqu'à ce qu'il en ait rendu compte et que ces sommes appartenaient au transporteur jusqu'au règlement de compte. Toutefois, aucun langage magique ne pouvait mettre les sommes encaissées à l'abri en l'absence d'un mécanisme fiduciaire véritable. En l'espèce, le rapport est resté en pratique celui d'un débiteur et d'un créancier. Le contrat ne comportait aucune clause obligeant Morales à garder dans un compte distinct le produit de la vente des billets d'Eastern et les autres fonds, qu'ils soient les siens propres ou ceux provenant de la vente de billets d'autres lignes aériennes. Et aucune disposition ne restreignait explicitement l'emploi que Morales pouvait faire des présumés fonds en fiducie. Morales avait toute latitude pour utiliser les sommes encaissées pour son propre bénéfice et non celui d'Eastern, et pour convertir les recettes en biens libres de toute charge apparente, sur lesquels des créanciers éventuels pourraient compter. L'emploi du mot «fiducie» et la désignation de la ligne aérienne comme titulaire du titre, dans un contrat qui n'est pas inscrit dans un registre public, n'empêcheraient pas les créanciers éventuels de compter sur les autres biens tels le matériel de bureau, les comptes débiteurs et un compte en banque ouvert au nom de l'agence seulement. Faute de disposition obligeant Morales à détenir les fonds en fiducie et à les déposer dans un compte distinct, et limitant leur utilisation, le terme «fiducie» ne peut, dans les circonstances et aux fins des présentes, avoir aucun effet en droit. Voir *In re Penn. Central Transportation Co.*,

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Penn. Central Transportation Co., 328 F.Supp. 1278 (E.D.Pa. 1971); Scott on Trusts § 12.2 (3d ed.).

The *Morales* court relied on the District Court decision of *In re Penn Central Transportation Co.*, 328 F.Supp. 1278 (Pa. 1971). This decision was subsequently reviewed by the U.S. Court of Appeals, 3rd Circuit, which concluded that a relationship of trust did exist, and that the commingling of funds was only one indication of a debtor-creditor relationship and was not necessarily conclusive (486 F.2d 519 (1973)). Rosenn J. held at p. 525 that the "[c]ommingling of monies has minimal significance in the extraordinary operations of interline railroads. . . . Normal operation conditions with innumerable daily collections of various categories preclude practically and economically any effective daily segregation [of funds]." The *Morales* decision and those which purport to follow it are therefore of questionable persuasion and contrary to other decisions.

In conclusion, it is well established that the nature of the relationship between the parties is a matter of intention. In the present case, the relationship of trust is further evidenced by the express prohibition restricting the use of the funds, and the supervision and control of the carrier over the financial dealings of M & L. Since there is clear evidence of intention to create a trust in the agreement between M & L and the respondent airline, the absence of a prohibition on the commingling of funds is not determinative, although it may be a factor to be taken into account by the trial judge, as it was here. Moreover, in the present case M & L acted in accordance with that intention and set up trust accounts, which, although never used, confirm that the relationship was viewed by the directors as a trust relationship. Finally, it must be noted that the nature of the relationship is consistent with trust as the IATA agreement allowed M & L to affect Air Canada's legal responsibilities.

328 F.Supp. 1278 (E.D.Pa. 1971); Scott on Trusts § 12.2 (3e éd.).

Dans l'affaire *Morales*, la cour a invoqué la décision de la District Court *In re Penn Central Transportation Co.*, 328 F.Supp. 1278 (Pa. 1971). Celle-ci a ensuite été révisée par la Court of Appeals des États-Unis, 3rd Circuit, qui a conclu à l'existence d'une fiducie et déclaré que le regroupement des fonds n'était qu'un facteur pouvant indiquer un rapport entre débiteur et créancier et qu'elle n'était pas nécessairement décisive (486 F.2d 519 (1973)). Le juge Rosenn a décidé, à la p. 525, que le [TRADUCTION] «. . . regroupement des sommes n'a qu'une importance minime dans les opérations extraordinaires des chemins de fer au chapitre du trafic interréseaux. [. . .] Les opérations ordinaires, qui comportent d'innombrables liaisons quotidiennes de diverses catégories, interdisent en pratique, et rendent non rentable, toute séparation réelle quotidienne [des fonds].» La décision *Morales* et celles qui sont censées la suivre ont donc un caractère persuasif discutable et sont contraires à d'autres décisions.

En conclusion, il est bien établi que la nature du rapport entre les parties dépend de leur intention. En l'espèce, l'existence d'une fiducie est étayée en outre par la limitation explicite de l'emploi des fonds et par la surveillance et le contrôle exercés par le transporteur sur les opérations financières de M & L. Comme l'intention de créer une fiducie est clairement exprimée dans le contrat entre M & L et la compagnie d'aviation intimée, l'absence d'interdiction de regrouper les fonds n'est pas déterminante, encore qu'elle puisse être un facteur dont le juge de première instance doit tenir compte, comme il l'a fait en l'espèce. Par surcroît, M & L a agi en l'espèce conformément à cette intention et a ouvert des comptes en fiducie qui, bien qu'ils n'aient pas été utilisés, confirment que le rapport était considéré par les administrateurs comme une fiducie. Enfin, il convient de faire remarquer que la nature du rapport est compatible avec l'existence d'une fiducie car l'accord de l'ATAI permettait à M & L d'influer sur les responsabilités juridiques d'Air Canada.

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2. *Personal Liability of the Directors as Constructive Trustees*

(a) General Principles

Having found that the relationship between M & L and the respondent airline was a trust relationship, there is no question that M & L's actions were in breach of trust. M & L failed to account to the respondent for the monies collected through sales of Air Canada tickets. What remains to be decided is whether the directors of M & L should be held personally liable for the breach of trust on the basis that they were constructive trustees. Whether personal liability is imposed on a stranger to a trust depends on the basic question of whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. See *In re Montagu's Settlement Trusts*, [1987] Ch. 264, at p. 285. The authorities reflect distinct approaches to answer this question depending on the circumstances of the case, and it is to these that I shall now turn.

There are two general bases upon which a stranger to the trust can be held liable as a constructive trustee for breach of trust. First, although not directly relevant to this appeal, strangers to the trust can be liable as trustees *de son tort*. Such persons, although not appointed trustees, "take on themselves to act as such and to possess and administer trust property". See *Selangor United Rubber Estates, Ltd. v. Cradock (No. 3)*, [1968] 2 All E.R. 1073, at p. 1095. In the *Selangor* case, Ungoed-Thomas J. went on to describe the distinguishing features of such constructive trustees:

> . . . (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees precedes the

2. *La responsabilité personnelle des administrateurs en qualité de fiduciaires par interprétation*

a) Les principes généraux

Vu la conclusion que M & L et l'intimée étaient liées par une fiducie, il n'y a aucun doute que les actes de M & L constituaient une violation d'une obligation fiduciaire. M & L n'a pas rendu compte à l'intimée des sommes perçues par suite de la vente de ses billets. Il reste à décider si les administrateurs de M & L devraient être tenus personnellement responsables de violation d'une obligation fiduciaire à titre de fiduciaires par interprétation. La question de savoir si une responsabilité personnelle incombe à un tiers est subordonnée à la question fondamentale de savoir si la conscience du tiers est suffisamment en cause pour que soit justifiée l'attribution d'une responsabilité personnelle. Voir *In re Montagu's Settlement Trusts*, [1987] Ch. 264, à la p. 285. La jurisprudence et la doctrine apportent diverses solutions à ce problème selon les circonstances de chaque espèce. Ce sont ces solutions que j'étudierai maintenant.

Deux principes généraux régissent l'attribution à un tiers d'une responsabilité pour violation d'une obligation fiduciaire, en qualité de fiduciaire par interprétation. Premièrement, quoique cette situation ne soit pas directement pertinente en l'espèce, le tiers peut être tenu responsable à titre de fiduciaire «de son tort». En pareil cas, le tiers, bien qu'il n'ait pas été nommé fiduciaire [TRADUCTION] «prend sur lui d'agir comme fiduciaire et de détenir et d'administrer les biens en fiducie». Voir *Selangor United Rubber Estates, Ltd. c. Cradock (No. 3)*, [1968] 2 All E.R. 1073, à la p. 1095. Dans cette affaire, le juge Ungoed-Thomas décrit les caractéristiques de ces fiduciaires par interprétation:

> [TRADUCTION] . . . a) ils ne prétendent pas agir de leur propre chef, mais pour le compte des bénéficiaires; b) ils n'encourent pas de responsabilité du seul fait de s'être engagés à agir (excepté, bien sûr, la responsabilité pour la reddition de comptes et pour l'omission d'accomplir l'obligation dont ils se sont ainsi chargés) et, en conséquence, ils ont acquis leur qualité de fiduciaire avant

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occurrence which may be the subject of claim against them.

Thus a trustee *de son tort* will not be personally liable simply for the assumption of the duties of a trustee, but only if he or she commits a breach of trust while acting as a trustee. See *Barnes v. Addy* (1874), L.R. 9 Ch. App. 244; Underhill and Hayton, *Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 351; Philip H. Pettit, *Equity and the Law of Trusts* (6th ed. 1989), at p. 152.

This type of liability is inapplicable to the present case because the directors of M & L did not personally take possession of trust property or assume the office or function of trustees. Both the trial judge and the Court of Appeal concluded that neither of the directors had assumed legal control or possession of the funds which were to be held in trust for the respondent airline. In the words of Griffiths J.A., at p. 193, "[s]uch funds were, at all material times, administered, at least, in the name of the corporation. Certainly, it cannot be said that either Martin or Valliant were administering the trust funds on behalf of the beneficiary Air Canada."

Second, strangers to the trust can also be personally liable for breach of trust if they knowingly participate in a breach of trust. The starting point for a review of the bases of this kind of personal liability is *Barnes v. Addy*, *supra*, which involved an estate, for which three trustees had been designated by the testator. The will allowed for the appointment of new trustees without the consent of any other party, but did not allow for a decrease in the number of trustees. Two of the trustees died and a rift developed between the family and the third trustee, who wished to retire. He instructed his solicitor to prepare an instrument appointing Barnes, who was the husband of one of the beneficiaries, as sole trustee. The solicitor advised him against having only one trustee, but prepared the instrument on the instructions of his client. Barnes' solicitor approved the appointment. Barnes invested the trust funds for his own purposes and

que ne se produise le fait qui peut donner lieu à une demande dirigée contre eux.

Ainsi, un fiduciaire «de son tort» ne sera pas personnellement responsable simplement du fait qu'il s'est chargé des devoirs d'un fiduciaire, mais seulement s'il manque à une de ses obligations pendant qu'il agit comme fiduciaire. Voir *Barnes c. Addy* (1874), L.R. 9 Ch. App. 244; Underhill et Hayton, *Law Relating to Trusts and Trustees* (14e éd. 1987), à la p. 351; Philip H. Pettit, *Equity and the Law of Trusts* (6e éd. 1989), à la p. 152.

Ce type de responsabilité est inapplicable à la présente espèce parce que les administrateurs de M & L n'ont pas pris possession personnellement des biens en fiducie et ne se sont pas attribué la charge ou la fonction de fiduciaire. Le juge de première instance et la Cour d'appel ont conclu qu'aucun des administrateurs ne s'était attribué le contrôle ou la possession des fonds qui devaient être détenus en fiducie pour le bénéfice de la compagnie d'aviation intimée. Pour citer les propos du juge Griffiths, à la p. 193, [TRADUCTION] «[c]es fonds ont été, à toutes les époques en cause, administrés au moins, au nom de la société. On ne peut certainement pas dire que Martin ou Valliant ait administré les fonds en fiducie pour le compte de la bénéficiaire Air Canada».

Deuxièmement, une responsabilité personnelle peut incomber à un tiers en cas de manquement à une obligation fiduciaire s'il participe sciemment à ce manquement. Le point de départ de l'examen du fondement de ce type de responsabilité personnelle est l'arrêt *Barnes c. Addy*, précité, qui portait sur une succession à l'égard de laquelle le testateur avait désigné trois fiduciaires. Le testament permettait la nomination de nouveaux fiduciaires sans le consentement de qui que ce soit, mais ne permettait pas la réduction du nombre de fiduciaires. Deux des fiduciaires sont décédés et un désaccord a opposé la famille et le troisième fiduciaire, qui a voulu se démettre. Celui-ci a donné à son avocat le mandat de rédiger un acte nommant Barnes, qui était l'époux de l'une des bénéficiaires, seul fiduciaire. L'avocat lui a déconseillé de nommer un seul fiduciaire, mais il a rédigé l'acte suivant les instructions de son client. L'avocat de Barnes a

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went bankrupt. The beneficiaries sued the previous trustee, his solicitor and Barnes' solicitor for breach of trust. The action against the solicitors was dismissed on the basis that they had no knowledge of, or any reason to suspect, a dishonest design in the transaction, and that they did not receive any trust property.

Lord Selborne L.C., at pp. 251-52, set out the ways in which a non-trustee can become responsible for a trust:

> Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

In addition to a trustee *de son tort*, there were traditionally therefore two ways in which a stranger to the trust could be held personally liable to the beneficiaries as a participant in a breach of trust: as one in receipt and chargeable with trust property and as one who knowingly assisted in a dishonest and fraudulent design on the part of the trustees. The former category of constructive trusteeship has been termed "knowing receipt" or "knowing receipt and dealing", while the latter category has been termed "knowing assistance".

The former category of "knowing receipt" of trust property is inapplicable to the present case because it requires the stranger to the trust to have

approuvé la nomination. Barnes a placé les fonds en fiducie pour son propre bénéfice et a fait faillite. Les bénéficiaires ont poursuivi le fiduciaire précédent, son avocat et l'avocat de Barnes en violation d'une obligation fiduciaire. L'action contre les avocats a été rejetée parce qu'ils n'avaient pas eu connaissance, ou qu'ils n'avaient aucune raison de soupçonner, de dessein malhonnête et qu'ils ne s'étaient vu confier aucun bien en fiducie.

Le lord chancelier Selborne expose, aux pp. 251 et 252, les manières dont une responsabilité pour une fiducie peut incomber à une personne qui n'est pas fiduciaire:

> [TRADUCTION] Ceux qui créent une fiducie revêtent le fiduciaire du pouvoir et du contrôle juridiques sur les biens en fiducie, lui imposant une responsabilité correspondante. Celle-ci peut sans aucun doute être étendue en *equity* à d'autres qui ne sont pas à proprement parler fiduciaires, si on conclut qu'ils se sont attribué la fonction de fiduciaire «de son tort» ou qu'ils ont participé en réalité à une fraude commise par le fiduciaire au détriment du bénéficiaire. Mais, en revanche, les tiers ne sont pas tenus pour fiduciaires par interprétation simplement parce qu'ils agissent comme mandataires des fiduciaires pour des opérations relevant de leur autorité, opérations que pourrait désapprouver une cour d'*equity*, sauf si ces mandataires reçoivent une partie des biens en fiducie et doivent en rendre compte, ou s'ils aident sciemment les fiduciaires à réaliser un dessein malhonnête et frauduleux.

Outre le cas du fiduciaire «de son tort», il y avait donc traditionnellement deux manières dont un tiers pouvait être tenu personnellement responsable envers les bénéficiaires à titre de participant à la violation d'une obligation fiduciaire: soit parce qu'il avait reçu des biens en fiducie et devait en rendre compte, soit parce qu'il avait sciemment aidé les fiduciaires à réaliser un dessein malhonnête et frauduleux. La première catégorie de fiducie par interprétation a été appelée «réception en connaissance de cause» ou «réception en connaissance de cause et gestion», tandis que la seconde a été appelée «aide apportée en connaissance de cause».

La première catégorie, savoir la «réception en connaissance de cause» de biens en fiducie, est inapplicable en l'espèce parce qu'elle exige que le

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received trust property in his or her personal capacity, rather than as an agent of the trustees. See *Baden, Delvaux & Lecuit v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.*, [1983] B.C.L.C. 325 (Ch.), appeal dismissed, [1985] B.C.L.C. 258 (C.A.); *International Sales and Agencies Ltd. v. Marcus*, [1982] 3 All E.R. 551; *Karak Rubber Co. v. Burden (No. 2)*, [1972] 1 All E.R. 1210 (Ch.), at pp. 1234-35; *Belmont Finance Corp. v. Williams Furniture Ltd. (No. 1)*, [1979] 1 All E.R. 118 (C.A.), at pp. 129, 134; Underhill, *supra*, at p. 360; Pettit, *supra*, at pp. 159-60. See, *contra*, *Lee v. Sankey* (1873), L.R. 15 Eq. 204. As I have already noted, the courts below found that the directors of M & L did not personally control the trust funds in the present case, and this finding was not challenged before us.

Thus the only basis upon which the directors could be held personally liable as constructive trustees is under the "knowing assistance" head of liability. To repeat, in *Barnes v. Addy*, *supra*, at p. 252, Lord Selborne L.C. stated that persons who "assist with knowledge in a dishonest and fraudulent design on the part of the trustees" will be liable for the breach of trust as constructive trustees. See also, *Soar v. Ashwell*, [1893] 2 Q.B. 390 (C.A.). This basis of liability raises two main issues: the nature of the breach of trust and the degree of knowledge required of the stranger.

(b) Degree of Knowledge of the Stranger

The latter point may be quickly addressed. The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice. See *Belmont Finance*, *supra*, at pp. 130, 136; *In re Montagu's Settlement Trusts*, *supra*, at pp. 271-72; 285; *Carl-Zeiss-Stiftung v. Herbert Smith & Co. (No. 2)*, [1969] 2 All E.R. 367 (C.A.), at p. 379. In the latter case, Sachs L.J. stated that to be held liable the stranger must have

tiers ait reçu des biens en fiducie de son propre chef et non en qualité de mandataire des fiduciaires. Voir *Baden, Delvaux & Lecuit c. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France S.A.*, [1983] B.C.L.C. 325 (Ch.), appel rejeté [1985] B.C.L.C. 258 (C.A.); *International Sales and Agencies Ltd. c. Marcus*, [1982] 3 All E.R. 551; *Karak Rubber Co. c. Burden (No. 2)*, [1972] 1 All E.R. 1210 (Ch.), aux pp. 1234 et 1235; *Belmont Finance Corp. c. Williams Furniture Ltd. (No. 1)*, [1979] 1 All E.R. 118 (C.A.), aux pp. 129 et 134; Underhill, *op. cit.*, à la p. 360; Pettit, *op. cit.*, aux pp. 159 et 160. Voir, pour une opinion contraire, *Lee c. Sankey* (1873), L.R. 15 Eq. 204. Je le répète, les tribunaux d'instance inférieure ont conclu que les administrateurs de M & L ne contrôlaient pas personnellement les fonds en fiducie dans la présente espèce, et cette conclusion n'a pas été attaquée devant nous.

En conséquence, une responsabilité personnelle ne peut être attribuée aux administrateurs, en qualité de fiduciaires par interprétation, que s'ils ont apporté une aide «en connaissance de cause». Comme nous l'avons vu, le lord chancelier Selborne a dit, dans l'arrêt *Barnes c. Addy*, précité, à la p. 252, que les personnes qui «aident sciemment les fiduciaires à réaliser un dessein malhonnête et frauduleux» seront tenus responsables de violation d'une obligation fiduciaire, en qualité de fiduciaires par interprétation. Voir aussi l'arrêt *Soar c. Ashwell*, [1893] 2 Q.B. 390 (C.A.). La responsabilité qui repose sur ce fondement soulève deux questions principales: la nature de la violation de l'obligation fiduciaire, et le degré de connaissance exigé du tiers.

b) Le degré de connaissance du tiers

Je vais disposer brièvement de ce dernier point. La connaissance requise pour ce type de responsabilité est la connaissance de fait; l'insouciance ou l'ignorance volontaire suffiront également. Voir *Belmont Finance*, précité, aux pp. 130 et 136; *In re Montagu's Settlement Trusts*, précité, aux pp. 271, 272 et 285; *Carl-Zeiss-Stiftung c. Herbert Smith & Co. (No. 2)*, [1969] 2 All E.R. 367 (C.A.), à la p. 379. Dans cette dernière affaire, le lord juge Sachs

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had "both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust — though, of course, in both cases a person wilfully shutting his eyes to the obvious is in no different position than if he had kept them open." Whether the trust is created by statute or by contract may have an impact on the question of the stranger's knowledge of the trust. If the trust was imposed by statute, then he or she will be deemed to have known of it. If the trust was contractually created, then whether the stranger knew of the trust will depend on his or her familiarity or involvement with the contract.

a dit que, pour être tenu responsable, le tiers doit avoir [TRADUCTION] «à la fois la connaissance de fait de l'existence de la fiducie et la connaissance de fait du caractère répréhensible du manquement à la fiducie — encore que, bien entendu, dans les deux cas, la situation de celui qui nie l'évidence et de celui qui l'admet ne soit pas différente». Selon que la fiducie a été créée par une loi ou par un contrat, on ne donnera pas la même réponse à la question de savoir si le tiers savait qu'il y avait une fiducie. En cas de fiducie en vertu d'une loi, il est réputé le savoir. En cas de fiducie conventionnelle, la question de savoir si le tiers était au courant de la fiducie dépend de sa connaissance du contrat ou de sa participation à celui-ci.

If the stranger received a benefit as a result of the breach of trust, this may ground an inference that the stranger knew of the breach. See *Shields v. Bank of Ireland*, [1901] 1 I.R. 222, at p. 228; *Gray v. Johnston* (1868), L.R. 3 H.L. 1, at p. 11, *per* Lord Cairns, L.C.; *Selangor*, *supra*, at p. 1101; *Coleman v. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243, at p. 254; Waters, *supra*, at p. 401; *Fonthill Lbr. Ltd. v. Bk. Montreal*, [1959] O.R. 451 (C.A.), at p. 468; *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78 (B.C.C.A.), at pp. 116-17. The receipt of a benefit will be neither a sufficient nor a necessary condition for the drawing of such an inference.

Si le tiers a tiré avantage de la violation d'une obligation fiduciaire, on peut en inférer qu'il était au courant de la violation. Voir *Shields c. Bank of Ireland*, [1901] 1 I.R. 222, à la p. 228; *Gray c. Johnston* (1868), L.R. 3 H.L. 1, à la p. 11, le lord chancelier Cairns; *Selangor*, précité, à la p. 1101; *Coleman c. Bucks and Oxon Union Bank*, [1897] 2 Ch. 243, à la p. 254; Waters, *op. cit.*, à la p. 401; *Fonthill Lbr. Ltd. c. Bk. Montreal*, [1959] O.R. 451 (C.A.), à la p. 468; *Groves-Raffin Construction Ltd. c. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78 (C.A.C.-B.), aux pp. 116 et 117. Le fait de tirer avantage n'est ni une condition suffisante ni une condition nécessaire pour qu'une telle inférence soit justifiée.

The reason for excluding constructive knowledge (that is, knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry) was discussed in *In re Montagu's Settlement Trusts*, *supra*, at pp. 271-73, 275-85. Megarry V.-C. held, at p. 285, that constructive notice was insufficient to bind the stranger's conscience so as to give rise to personal liability. While cases involving recklessness or wilful blindness indicate a "want of probity which justifies imposing a constructive trust", Megarry V.-C., at p. 285, held that the carelessness involved in constructive knowledge cases will not normally amount to a want of probity, and will therefore be insufficient to bind the stranger's conscience. See

La raison pour laquelle la connaissance présumée est exclue (c'est-à-dire la connaissance de circonstances dont une personne honnête déduirait les faits ou la connaissance de faits qui inciteraient une personne honnête à demander des renseignements) a été examinée dans l'affaire *In re Montagu's Settlement Trusts*, précité, aux pp. 271 à 273, et 275 à 285. Le vice-chancelier Megarry a décidé, à la p. 285, que la connaissance présumée était insuffisante pour que la conscience d'un tiers soit en cause au point qu'il puisse être tenu personnellement responsable. Certes, en cas d'insouciance ou d'ignorance volontaire, on peut déduire une [TRADUCTION] «absence de probité qui justifie l'attribution d'une fiducie par interprétation», mais le vice-chancelier Megarry a conclu, à la p. 285, que

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also, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 331 (Q.B.), at pp. 341-49, 351-57, rev'd in part, [1992] 4 All E.R. 409 (C.A.), at pp. 416-18, rev'd in part on other grounds, [1992] 4 All E.R. 512 (H.L.).

(c) Nature of the Breach of Trust

With regard to the first issue, the nature of the breach of trust, the authorities can be divided into two lines. Most of the English authorities have followed the *Barnes v. Addy* standard which requires participation by the stranger in a dishonest and fraudulent design. See *Carl-Zeiss-Stiftung*, *supra*, at p. 379; *Belmont Finance*, *supra*, at p. 135; Pettit, *supra*, at pp. 154-56; Underhill, *supra*, at pp. 355-57. An extensive review of the authorities was undertaken by Ungoed-Thomas J. in the *Selangor* case. He concluded as follows at pp. 1104-5:

I come to the third element, "dishonest and fraudulent design on the part of the trustees". I have already indicated my view, for reasons already given, that this must be understood in accordance with equitable principles for equitable relief.

I therefore cannot accept the suggestion that, because an action is not of such a dishonest and fraudulent nature as to amount to some crime, that it is not fraudulent and dishonest in the eyes of equity — or that an intention eventually to restore or give value for property — which it was suggested might provide a good defence to a criminal charge — would of itself make its appropriation and use in the meantime, with its attendant risks and deprivation of the true owner, unobjectionable in equity, and thus make what would otherwise be dishonest and fraudulent free from such objection.

It was suggested for the plaintiff company that "fraudulent" imports the element of loss into what is dishonest, so that the phrase means dishonest resulting in loss to the claimant. It seems to me unnecessary and, indeed, undesirable to attempt to define "dishonest and

le manque de diligence démontrée dans les cas où il y a connaissance présumée n'équivaut normalement pas à un manque de probité et sera, par conséquent, insuffisant pour que la conscience du tiers puisse être mise en cause. Voir aussi *Lipkin Gorman c. Karpnale Ltd.*, [1992] 4 All E.R. 331 (B.R.), aux pp. 341 à 349 et 351 à 357, inf. en partie par [1992] 4 All E.R. 409 (C.A.), aux pp. 416 à 418, inf. en partie pour d'autres motifs par [1992] 4 All E.R. 512 (H.L.).

c) La nature de la violation d'une obligation fiduciaire

Pour ce qui est de la première question, la nature de la violation d'une obligation fiduciaire, la jurisprudence et la doctrine peuvent être divisées en deux écoles. La plupart des arrêts et des ouvrages anglais ont suivi la norme de l'arrêt *Barnes c. Addy* qui exige la participation du tiers à la réalisation d'un dessein malhonnête et frauduleux. Voir *Carl-Zeiss-Stiftung*, précité, à la p. 379; *Belmont Finance*, précité, à la p. 135; Pettit, *op. cit.*, aux pp. 154 à 156; Underhill, *op. cit.*, aux pp. 355 à 357. Le juge Ungoed-Thomas a fait un examen approfondi de la jurisprudence et de la doctrine dans l'affaire *Selangor*. Il conclut, aux pp. 1104 et 1105:

[TRADUCTION] J'arrive au troisième élément, le «dessein malhonnête et frauduleux des fiduciaires». J'ai déjà émis l'opinion, pour les motifs exposés ci-dessus, que cet élément doit être interprété selon les principes de l'*equity* applicables à la réparation fondée sur l'*equity*.

Je ne peux donc pas accepter l'argument que, parce qu'une action n'est pas malhonnête et frauduleuse au point d'équivaloir à un crime, elle n'est pas malhonnête et frauduleuse au regard de l'*equity* — ou que l'intention de restituer les biens ou d'en rembourser le prix plus tard — qui, selon ce qu'on a prétendu, pourrait être une défense valable contre une accusation criminelle — rend en soi l'appropriation et l'utilisation dans l'intervalle, malgré les risques qu'elles comportent et la privation subie par le véritable propriétaire, acceptables au regard de l'*equity*, et rend par conséquent irréprochable ce qui serait par ailleurs malhonnête et frauduleux.

On a fait valoir au nom de la société demanderesse que le terme «frauduleux» ajoute à ce qui est malhonnête l'élément de perte, de sorte que l'expression signifie malhonnête et causant une perte au demandeur. Il ne me semble pas utile, et même il me semble peu souhai-

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fraudulent design", since a definition in vacuo, without the advantage of all the circumstances that might occur in cases that might come before the court, might be to restrict their scope by definition without regard to, and in ignorance of, circumstances which should patently come within them. The words themselves are not terms of art and are not taken from a statute or other document demanding construction. They are used in a judgment as the expression and indication of an equitable principle and not in a document as constituting or demanding verbal application and, therefore, definition. They are to be understood "according to the plain principles of a court of equity" to which SIR RICHARD KINDERSLEY, V.-C., referred [in *Bodenham v. Hoskins*, (1852), 21 L.J.Ch. at p. 873; [1843-60] All E.R. Rep. at p. 697], and these principles, in this context at any rate, are just plain, ordinary commonsense. I accept that "dishonest and fraudulent", so understood, is certainly conduct which is morally reprehensible; but what is morally reprehensible is best left open to identification and not to be confined by definition.

table, de tenter de définir l'expression «dessein malhonnête et frauduleux», puisqu'en donnant une définition dans l'abstrait, sans référence à toutes les circonstances que les tribunaux pourraient avoir à apprécier dans les litiges dont ils seraient saisis, l'on pourrait restreindre la portée de ces termes sans prendre en considération et sans connaître les circonstances qui devraient manifestement être visées par ceux-ci. Ce ne sont pas des termes techniques et ils ne sont pas tirés de textes de loi ou d'autres documents qu'il faut interpréter. Ils sont employés dans un jugement qui traite d'un principe d'*equity* et non dans un document qui constitue ou qui nécessite une interprétation et, par conséquent, une définition. Ils doivent être interprétés «selon les principes ordinaires d'une cour d'*equity*» dont parlait SIR RICHARD KINDERSLEY, vice-chancelier [dans l'arrêt *Bodenham c. Hoskins*, (1852), 21 L.J.Ch. à la p. 873; [1843-60] All E.R. Rep., à la p. 697], et ces principes, dans le présent contexte en tout cas, représentent le simple bon sens. Je conviens que les mots «malhonnête et frauduleux», ainsi compris, désignent une conduite moralement répréhensible; mais il vaut mieux identifier dans chaque cas ce qui est moralement répréhensible que de le restreindre par une définition.

In *Belmont Finance*, *supra*, at p. 135, Goff L.J. discussed the approach taken on this issue by Ungoed-Thomas J. in *Selangor*, *supra*:

If and so far as Ungoed-Thomas J intended, as I think he did, to say that it is not necessary that the breach of trust in respect of which it is sought to make the defendant liable as a constructive trustee should be fraudulent or dishonest, I respectfully cannot accept that view. I agree that it would be dangerous and wrong to depart from the safe path of the principle as stated by Lord Selborne LC [in *Barnes v. Addy*, *supra*] to the uncharted sea of something not innocent (and counsel for the plaintiff conceded that mere innocence would not do) but still short of dishonesty.

In my judgment, therefore, it was necessary in this case . . . to prove, that the breach of trust by the directors [who were the trustees] was dishonest.

In the same case, Buckley L.J. stated at p. 130:

Dans l'arrêt *Belmont Finance*, précité, à la p. 135, le lord juge Goff analyse le point de vue du juge Ungoed-Thomas dans l'affaire *Selangor*, précitée:

[TRADUCTION] Si, et dans la mesure où, le juge Ungoed-Thomas a voulu, comme je crois qu'il l'a voulu, dire qu'il n'est pas nécessaire que la violation d'une obligation fiduciaire pour laquelle on veut attribuer au défendeur une responsabilité à titre de fiduciaire par interprétation, soit malhonnête et frauduleuse, je dois malheureusement exprimer mon désaccord. Je conviens qu'il serait dangereux et erroné de s'écarter du principe prudent qu'a énoncé le lord chancelier Selborne [dans l'arrêt *Barnes c. Addy*, précité] pour adopter le concept inexploré de ce qui n'est pas innocent (et l'avocat de la demanderesse a concédé que la simple innocence ne suffirait pas) mais n'équivaut pas à de la malhonnêteté.

À mon sens, par conséquent, il était nécessaire en l'espèce [. . .] de prouver que la violation d'une obligation fiduciaire par les administrateurs [qui étaient les fiduciaires] était malhonnête.

Dans le même arrêt, le lord juge Buckley dit, à la p. 130:

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. . . I do not myself see that any distinction is to be drawn between the words 'fraudulent' and 'dishonest'; I think they mean the same thing, and to use the two of them together does not add to the extent of dishonesty required.

. . .

The plaintiff has contended that in every case the court should consider whether the conduct in question was so unsatisfactory, whether it can be strictly described as fraudulent or dishonest in law, as to make accountability on the footing of constructive trust equitably just. This, as I have said, is admitted to constitute an extension of the rule as formulated by Lord Selborne LC [in *Barnes v. Addy*, *supra*]. That formulation has stood for more than 100 years. To depart from it now would, I think, introduce an undesirable degree of uncertainty to the law, because if dishonesty is not to be the criterion, what degree of unethical conduct is to be sufficient? I think we should adhere to the formula used by Lord Selborne LC. So in my judgment the design must be shown to be a dishonest one, that is to say, a fraudulent one.

In the oft-cited case of *Baden, Delvaux*, *supra*, at p. 406, Peter Gibson J. reviewed the authorities on this point:

As to the second element the relevant design on the part of the trustee must be dishonest and fraudulent. In *Selangor* [1968] 2 All ER 1073 at 1098, 1104 Ungoed-Thomas J held that this element must be understood in accordance with equitable principles for equitable relief and that conduct which is morally reprehensible can properly be said to be dishonest and fraudulent for the purposes of that element. But in *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] Ch 250 the Court of Appeal made clear that it is not sufficient that there should be misfeasance or a breach of trust falling short of dishonesty and fraud. For present purposes there is no distinction to be drawn between the two adjectives 'dishonest' and 'fraudulent' (see *Belmont* at 267). It is common ground between the parties that I can take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take' (*R v Sinclair* [1968] 3 All ER 241).

[TRADUCTION] . . . je ne pense pas pour ma part qu'une distinction s'impose entre les mots «frauduleux» et «malhonnête»; je pense qu'ils ont le même sens, et les employer ensemble n'élargit pas l'étendue de la malhonnêteté exigée.

. . .

La société demanderesse a soutenu que le tribunal doit dans tous les cas décider si la conduite en cause a été tellement peu satisfaisante, qu'elle puisse ou non être qualifiée strictement de frauduleuse ou de malhonnête en droit, qu'il est juste selon l'*equity* d'attribuer la responsabilité sur la base de la fiducie par interprétation. On a reconnu, je le répète, que c'était là une extension de la règle énoncée par le lord chancelier Selborne [dans l'arrêt *Barnes c. Addy*, précité]. Or, cet énoncé a résisté pendant plus d'un siècle. S'en écarter aujourd'hui introduirait, à mon avis, un degré inacceptable d'incertitude dans le droit parce que, si la malhonnêteté n'est pas le critère, quel degré de conduite contraire à l'éthique sera suffisant? Je pense que nous devons nous en tenir à la formulation du lord chancelier Selborne. En conséquence, il faut prouver, à mon sens, que le dessein était malhonnête, c'est-à-dire frauduleux.

Dans l'affaire souvent citée *Baden, Delvaux*, précitée, le juge Peter Gibson passe en revue la jurisprudence sur ce point, à la p. 406:

[TRADUCTION] Quant au deuxième élément, le dessein en cause du fiduciaire doit être malhonnête et frauduleux. Dans l'affaire *Selangor* [1968] 2 All ER 1073, aux pp. 1098 et 1104, le juge Ungoed-Thomas a conclu que cet élément devait être interprété selon les principes de l'*equity* applicables à la réparation fondée sur l'*equity* et qu'une conduite moralement répréhensible pouvait à bon droit être tenue pour malhonnête et frauduleuse aux fins de cet élément. Mais dans l'arrêt *Belmont Finance Corp Ltd c Williams Furniture Ltd* [1979] Ch 250, la Cour d'appel a bien précisé que l'atteinte à un droit ou une violation d'une obligation fiduciaire qui n'équivaut pas à la malhonnêteté et à la fraude n'était pas suffisante. Aux fins des présentes, aucune distinction ne s'impose entre les deux adjectifs «malhonnête» et «frauduleux» (voir l'arrêt *Belmont*, à la p. 267). Les parties s'entendent pour dire que je peux considérer applicable la définition suivante de la fraude: «le fait de courir un risque au détriment des droits d'autrui, lorsque l'on court ce risque sciemment et sans droit» (*R c Sinclair* [1968] 3 All ER 241).

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The English "fraudulent and dishonest design" analysis was adopted by the Saskatchewan Court of Appeal in *MacDonald v. Hauer* (1976), 72 D.L.R. (3d) 110. In that case, one of the trustees opened a margin account in his own name for the purpose of securities trading. He pledged securities belonging to the estate for which he was trustee with a broker as security for the margin, and gave his business associate Hauer his power of attorney on the account. The profits on the account were to be shared equally between the trustee and Hauer. The estate's securities were eventually sold by Hauer. Bayda J.A. (as he then was) found Hauer liable in equity for breach of trust as a constructive trustee. Relying on *Barnes v. Addy*, *supra*, Bayda J.A. held at p. 121 that the three essential elements for finding a stranger to a trust to be a constructive trustee were: "(1) assistance by the stranger of a nominated trustee (2) with knowledge (3) in a dishonest and fraudulent design on the part of the nominated trustee (or fraudulent or dishonest disposition of the trust property)", although it should be noted that Bayda J.A. appears later in his analysis also to rely on a passage from *Selangor*, *supra*, which is characteristic of the second approach, discussed below.

Barnes v. Addy was also followed in *Scott v. Riehl* (1958), 15 D.L.R. (2d) 67 (B.C.S.C.). In that case, the two defendants were the directors of a construction company. The directors had failed to comply with the provisions of the *Mechanics' Lien Act, 1956*, S.B.C. 1956, c. 27, requiring certain monies to be held in trust. All monies received were deposited into one bank account, which was always overdrawn. The director and president of the corporation, Riehl, "knew that monies deposited, such as those received from the plaintiffs, must [not] be used for the general purposes of the company in abuse of the trust created by s. 3 of the Act. He knowingly created, maintained and operated this unlawful system. The company was the instrument of its operation, but he was the direc-

Le point de vue anglais sur le «dessein malhonnête et frauduleux» a été repris par la Cour d'appel de la Saskatchewan dans l'arrêt *MacDonald c. Hauer* (1976), 72 D.L.R. (3d) 110. Dans cette affaire, l'un des fiduciaires avait ouvert un compte sur marge à son propre nom pour faire des opérations sur titres. Il a laissé en gage au courtier, pour garantir la marge, des titres appartenant à la succession dont il était le fiduciaire et il a donné à son associé Hauer une procuration à l'égard du compte. Le fiduciaire et Hauer devaient partager à parts égales les profits tirés du compte. Hauer a finalement vendu les titres de la succession. Le juge Bayda (maintenant Juge en chef de la Saskatchewan) a déclaré que Hauer était responsable en *equity* de violation d'une obligation fiduciaire en qualité de fiduciaire par interprétation. S'appuyant sur l'arrêt *Barnes c. Addy*, précité, le juge Bayda a conclu, à la p. 121, que les trois éléments essentiels pour conclure qu'un tiers était fiduciaire par interprétation étaient les suivants: [TRADUCTION] «(1) le tiers a apporté son aide à un fiduciaire désigné; (2) il a agi en connaissance de cause; (3) le fiduciaire désigné avait un dessein malhonnête et frauduleux (ou il a aliéné les biens en fiducie de façon frauduleuse ou malhonnête)», mais il y a lieu de noter que, plus loin dans son analyse, il semble aussi s'être appuyé sur un extrait de l'affaire *Selangor*, précitée, qui est caractéristique de la seconde démarche examinée ci-dessous.

L'arrêt *Barnes c. Addy* a aussi été suivi dans l'affaire *Scott c. Riehl* (1958), 15 D.L.R. (2d) 67 (C.S.C.-B.). Dans cette affaire, les deux défendeurs étaient les administrateurs d'une société de construction. Les administrateurs n'avaient pas respecté les dispositions de la *Mechanics' Lien Act, 1956*, S.B.C. 1956, ch. 27, qui prescrivaient que certaines sommes soient détenues en fiducie. Toutes les sommes perçues étaient déposées dans un compte en banque, qui était toujours à découvert. Riehl, administrateur et président de la société, [TRADUCTION] «savait que les sommes déposées, notamment celles reçues des demandeurs, [ne] devaient [pas] être affectées aux activités générales de la société, en contravention de la fiducie créée par l'art. 3 de la Loi. Il a sciemment

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tor" (p. 70). Wilson J. (as he then was) concluded at pp. 73-74 as follows:

> . . . on the facts here Riehl, as agent received and misdirected trust funds. The acts of reception and application of these particular monies may not physically have been his, but they were entirely directed by him, with the possible, although not proven, collusion of the defendant Schumak. Riehl received a benefit, through the payment of his salary out of the account into which these trust funds were paid. His complicity in the misappropriation of these funds is proven; it was not an act of negligence or a mistake of judgment but a wrongful act knowingly done. In these circumstances not only the principal but the agent is liable.
>
> I have not ignored the numerous cases cited to me by defence counsel in which it has been held that directors are not personally responsible to strangers for acts done by them on behalf of the company but are at most responsible to the company. I only say that none of these cases goes so far as to say that where a fraudulent breach of trust known by the director to be fraudulent, is done by the company at his direction, so that he is not only a party to but the instigator of the fraudulent breach of trust and benefits from the breach of trust he is not to be held liable.

In *Wawanesa Mutual Insurance Co., supra*, the defendant corporation Chalmers was the agent of the plaintiff insurance company, Wawanesa. The defendant Mislowski was the sole shareholder, president, general manager, and the only active director of Chalmers. There was no written agency agreement between Chalmers and Wawanesa, but a provision in *The Saskatchewan Insurance Act*, R.S.S. 1960, c. 77, provided that an agent who received monies as premiums for a contract of insurance was "deemed to hold the premium in trust for the insurer" and liable to pay out to the insurer such monies less commission within 15 days after demand. The insurance company sued both the corporation and Mislowski for unpaid insurance premiums collected by the corporation,

créé, maintenu et fait fonctionner ce système illégal. C'est par l'entremise de la société qu'il l'a fait fonctionner, mais il en était l'administrateur» (p. 70). Le juge Wilson (plus tard Juge en chef de la Cour suprême de la C.-B.) a conclu, aux pp. 73 et 74:

> [TRADUCTION] . . . il ressort des faits de l'espèce que Riehl, en tant que mandataire, a reçu et mal employé les fonds en fiducie. Il n'a peut-être pas lui-même reçu et utilisé ces sommes, mais il a assumé seul la direction des opérations, peut-être avec la connivence, qui n'a pas été prouvée, du défendeur Schumak. Riehl a reçu un avantage, sous la forme du paiement de son salaire sur le compte dans lequel ces fonds en fiducie étaient déposés. Sa complicité dans le détournement des fonds a été établie; ce n'était pas un acte fait par suite d'une négligence ou d'une erreur de jugement, mais un acte fautif, accompli sciemment. Vu les circonstances, le mandant et le mandataire sont tous deux responsables.
>
> J'ai tenu compte des nombreux précédents cités par l'avocat de la défense dans lesquels les tribunaux ont décidé que les administrateurs ne sont pas personnellement responsables envers les tiers des actes qu'ils ont accomplis au nom de la société, mais que tout au plus, une responsabilité envers la société leur incombe. Je dis seulement qu'aucune de ces décisions ne va jusqu'à dire que, si une violation frauduleuse d'une obligation fiduciaire, dont l'administrateur connaît le caractère frauduleux, est commise par la société sous sa direction, de sorte qu'il est non seulement partie à la violation, mais encore l'instigateur de la violation frauduleuse d'une obligation fiduciaire et qu'il en tire avantage, il ne doit pas être tenu responsable.

Dans l'affaire *Wawanesa Mutual Insurance Co.*, précitée, la société Chalmers, défenderesse, était un agent de la compagnie d'assurances demanderesse, Wawanesa. Le défendeur Mislowski était le seul actionnaire, président, directeur général et le seul administrateur actif de Chalmers. Aucun contrat d'agence écrit ne liait Chalmers et Wawanesa, mais une clause de *The Saskatchewan Insurance Act*, R.S.S. 1960, ch. 77, portait qu'un agent qui recevait des sommes au titre de primes d'assurance était [TRADUCTION] «réputé détenir la prime en fiducie pour le bénéfice de l'assureur» et était tenu de verser ces sommes à l'assureur, une fois les commissions soustraites, dans un délai de 15 jours après en avoir reçu la demande. La compagnie d'assurances a poursuivi la société et Mislowski

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which had been deposited into the corporation's general account from which office expenses and salaries had been paid. Mislowski also had a construction business with a separate general account, but he constantly transferred funds between the insurance and construction accounts. The trial judge held the corporation liable for breach of trust, and then proceeded to discuss the liability of Mislowski at p. 287:

> The conversion of the trust funds to other purposes was a wrongful and illegal act or series of acts. There can be no doubt that the breach was inspired and directed by Mislowski who made all the corporate decisions. See Underhill's *Law Relating to Trusts & Trustees*, 11th ed., p. 558:
>
> > . . . the liability for breach of trust is not confined to express trustees, but extends to all who are actually privy to the breach.

The trial judge therefore concluded that Mislowski was also liable for Wawanesa's loss.

There is, however, a second line of Canadian authority, holding that a person who is the controlling or directing mind of a corporate trustee can be liable for an innocent or negligent breach of trust if the person knowingly assisted in the breach of trust. That is, in these cases, proof of fraud and dishonesty has not been required. In *Horsman Bros. Holdings Ltd. v. Panton & Panton*, [1976] 3 W.W.R. 745 (B.C.S.C.), which involved similar facts to those in *Scott v. Riehl*, *supra*, counsel for the beneficiary of the statutory trust conceded that the breach of trust was "innocent", that is, that the defendant directors had no knowledge that they were committing a breach of trust by conducting the corporation's affairs in the way in which they did. However, he relied upon the decision in *Scott v. Riehl* in support of the contention that the defendant directors should nonetheless be personally lia-

pour les primes non payées que la société avait perçues et qui avaient été déposées dans son compte général sur lequel les charges d'exploitation et les salaires avaient été payés. Mislowski avait aussi une entreprise de construction qui avait un compte général distinct, mais il transférait sans cesse des fonds du compte d'agent d'assurances au compte de l'entreprise de construction et vice versa. Le juge de première instance a conclu que la société était responsable de violation d'une obligation fiduciaire, puis s'est penché sur la responsabilité de Mislowski, à la p. 287:

> [TRADUCTION] L'emploi des fonds en fiducie à d'autres fins représentait un acte ou une série d'actes fautifs et illégaux. Il n'y a aucun doute que la violation a été inspirée et dirigée par Mislowski, qui a pris toutes les décisions pour la société. Voir Underhill, *Law Relating to Trusts & Trustees*, 11e éd., à la p. 558:
>
> > . . . la responsabilité pour violation d'une obligation fiduciaire n'est pas limitée aux fiduciaires expressément désignés, mais s'étend à toutes les parties qui sont effectivement au courant de la violation.

Le juge de première instance a donc conclu que Mislowski était également responsable de la perte subie par Wawanesa.

Il existe cependant un second courant jurisprudentiel au Canada, selon lequel, la responsabilité pour violation d'une obligation fiduciaire commise de bonne foi ou par négligence peut être attribuée à la personne qui est l'âme dirigeante d'une société fiduciaire, si elle a sciemment aidé à commettre la violation. C'est-à-dire que, dans ces causes, la preuve de la fraude et de la malhonnêteté n'a pas été exigée. Dans *Horsman Bros. Holdings Ltd. c. Panton & Panton*, [1976] 3 W.W.R. 745 (C.S.C.-B.), qui portait sur des faits semblables à ceux de l'affaire *Scott c. Riehl*, précitée, l'avocat de la bénéficiaire de la fiducie créée par la loi a concédé que la violation d'une obligation fiduciaire avait été commise «de bonne foi», c'est-à-dire que les administrateurs défendeurs ignoraient qu'ils commettaient une violation d'une obligation fiduciaire en dirigeant les affaires de la société comme ils l'ont fait. Toutefois, il a invoqué la décision *Scott c. Riehl* pour affirmer que les administrateurs défendeurs devraient néanmoins être

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ble for the corporate breach of trust. Craig J. held as follows at pp. 750-51:

> Counsel for the defendants seeks to distinguish the *Riehl* case on the ground that Wilson J. was dealing with a "fraudulent" breach of trust whereas in this case I am dealing with an "innocent" breach of trust. I am not sure that Wilson J. was dealing with a "fraudulent" breach of trust in the *Riehl* case, but, even if he were, I think that his remarks are equally applicable to an "innocent" breach of trust. If a person deals with the funds, which are within the meaning of s. 3, in a manner inconsistent with the trust, he breaches the trust, even though he may do so "innocently".
>
> . . .
>
> Accordingly, I find that the defendants did breach the trust provisions of s. 3 and that they are liable to the plaintiff for this breach.

This analysis was adopted by the British Columbia Court of Appeal in *Trilec Installations Ltd. v. Bastion Construction Ltd.* (1982), 135 D.L.R. (3d) 766. On facts similar to *Horsman Bros.*, *supra*, the beneficiaries of a trust under the *Builders Lien Act*, R.S.B.C. 1979, c. 40, sued the corporate trustee and its director for breach of trust. The defendant director argued, at p. 767, that "by simply depositing the trust moneys in the corporate appellant's general bank account from which it was taken by others than the beneficiaries of the trust", there was no breach of trust. Carrothers J.A. noted that the defendant director and corporate president, who had personally made the deposit of the funds in question, had conceded that he knew when he made the deposit that the funds probably would be taken, as in fact they were, by persons other than the trust beneficiaries. Carrothers J.A. concluded that the defendant director had committed a breach of trust by failing to preserve the trust monies for the trust beneficiaries, and instead depositing the monies for the general purposes of the trustee cor-

tenus personnellement responsables de la violation d'une obligation fiduciaire par la société. Le juge Craig a conclu, aux pp. 750 et 751:

> [TRADUCTION] L'avocat des défendeurs cherche à faire une distinction d'avec l'affaire *Riehl* parce que le juge Wilson examinait une violation «frauduleuse» d'une obligation fiduciaire, tandis qu'en l'espèce, je dois me prononcer sur une violation «de bonne foi» d'une obligation fiduciaire. Je ne suis pas certain que le juge Wilson examinait une violation «frauduleuse» d'une obligation fiduciaire dans l'affaire *Riehl*, mais, même si c'était le cas, je pense que ses remarques s'appliquent aussi à la violation «de bonne foi». Si une personne gère les fonds visés par l'art. 3 d'une manière incompatible avec la fiducie, elle viole l'obligation fiduciaire, même si elle agit «de bonne foi».
>
> . . .
>
> Par conséquent, je conclus que les défendeurs ont violé les dispositions de l'art. 3 relatives à la fiducie et qu'ils sont responsables envers la demanderesse de cette violation.

Cette analyse a été adoptée par la Cour d'appel de la Colombie-Britannique dans l'arrêt *Trilec Installations Ltd. c. Bastion Construction Ltd.* (1982), 135 D.L.R. (3d) 766. Relativement à des faits semblables à ceux de l'affaire *Horsman Bros.*, précitée, les bénéficiaires d'une fiducie en vertu de la *Builders Lien Act*, R.S.B.C. 1979, ch. 40, ont intenté une action en violation d'une obligation fiduciaire contre la société fiduciaire et son administrateur. L'administrateur défendeur a soutenu, à la p. 767, que [TRADUCTION] «le simple fait d'avoir déposé dans le compte en banque général de la société appelante les fonds en fiducie, que d'autres que les bénéficiaires ont retirés», ne constituait pas une violation d'une obligation fiduciaire. Le juge Carrothers a fait observer que le défendeur, administrateur et président de la société, qui avait lui-même fait le dépôt des fonds en question, avait admis qu'il savait, en faisant le dépôt, que ceux-ci seraient probablement retirés, comme ils l'ont été, par d'autres que les bénéficiaires de la fiducie. Il a conclu que l'administrateur défendeur avait commis une violation d'une obligation fiduciaire en ne préservant pas les sommes en fiducie pour les bénéficiaires et en déposant plutôt les sommes dans un compte général de la société fiduciaire.

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poration. Therefore, he was personally liable for his breach of trust.

The Ontario Court of Appeal in the present case relied heavily on *Henry Electric*, *supra*, in which the British Columbia Court of Appeal dealt with facts very similar to the present case, although involving a statutory trust under the *Builders Lien Act*, R.S.B.C. 1979, c. 40. Farwell was the owner and sole director of the corporation. Carrothers J.A. held, at pp. 485-86, that he was the single operating mind of the corporation and was personally liable for the corporate breach of trust:

> In my view Farwell, as the sole director and shareholder of the Farwell company, was the exclusive operating mind of that company and was correctly held liable for the breach of trust first by putting the general account of the Farwell company in jeopardy to satisfy its loan from its banker and subsequently by allowing the deposit of trust funds into the general account of the corporation for general purposes without adequate account controls thus exposing the trust funds to withdrawal unilaterally by the bank for purposes in breach of the trust. While the bank did not forewarn either the Farwell company or Farwell of this particular application of contract moneys against the Farwell company's indebtedness to the bank, this action was foreseeable and ought to have been foreseen and guarded against.

> Farwell was clearly a director of the Farwell company who knowingly assented to or acquiesced in the breach of trust and he is personally liable for breach of trust in addition to the corporation. I do not make the *quasi*-criminal finding that Farwell has committed an offence under the provisions of s. 2(2) of the Act, but rather that Farwell is civilly liable for the breach of trust contemplated by those provisions.

. . .

> It is also not to be overlooked that, in addition to foreseeability by Farwell of the breach of trust which occurred, Farwell personally benefited from the breach

Par conséquent, une responsabilité personnelle lui incombait pour la violation d'une obligation fiduciaire.

La Cour d'appel de l'Ontario dans la présente espèce a accordé beaucoup d'importance à l'arrêt *Henry Electric*, précité, dans lequel la Cour d'appel de la Colombie-Britannique a examiné des faits très semblables à ceux de l'espèce, quoiqu'ils aient concerné une fiducie en vertu de la *Builders Lien Act*, R.S.B.C. 1979, ch. 40. Farwell était propriétaire et seul administrateur de la société. Le juge Carrothers a conclu, aux pp. 485 et 486, qu'il en était l'unique âme dirigeante et qu'il était personnellement responsable de la violation d'une obligation fiduciaire par la société:

> [TRADUCTION] À mon avis, Farwell, en qualité de seul administrateur et actionnaire de la société Farwell, était l'unique âme dirigeante de cette société et on lui a attribué à bon droit la responsabilité de la violation d'une obligation fiduciaire, d'abord parce qu'il a mis le compte général de la société Farwell en mauvaise posture afin de rembourser un prêt consenti par son banquier et, ensuite, parce qu'il a permis le dépôt des fonds en fiducie dans le compte général de la société pour ses activités générales sans avoir de droit de regard suffisant sur le compte, courant ainsi le risque de voir la banque retirer unilatéralement les fonds en fiducie à des fins contraires à la fiducie. Bien que la banque n'ait pas averti la société Farwell ni Farwell qu'elle allait utiliser les sommes provenant de contrats pour rembourser la dette de Farwell envers elle, cette action était prévisible et aurait dû être prévue et faire l'objet de mesures protectrices.

> Farwell était de toute évidence un administrateur de la société Farwell qui a sciemment consenti à la violation d'une obligation fiduciaire, et il est personnellement responsable de la violation d'une obligation fiduciaire, en plus de la responsabilité de la société. Je ne conclus pas qu'une responsabilité quasi pénale incombe à Farwell pour l'infraction prévue au par. 2(2) de la Loi, mais plutôt que Farwell a une responsabilité civile pour la violation d'une obligation fiduciaire visée dans ces dispositions.

. . .

> Il ne faut pas oublier non plus que, non seulement la violation d'une obligation fiduciaire était prévisible pour Farwell, mais encore qu'il en a personnellement tiré

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by reduction of his personal liability on his guarantee to the bank in respect of the Farwell company loan.

Esson J.A. (as he then was) dissented, relying on *Scott v. Riehl*, *supra*. He distinguished that case on the grounds that the one bank account was always overdrawn, and Riehl knew that the trust monies deposited in that account should not have been used for the general purposes of the company in abuse of the trust. Nevertheless, he accepted "that a person in Mr. Farwell's position can be liable without proof of fraud." He relied on s. 2 of the statute which provided that the trustee "shall not appropriate or convert any part of (the trust moneys) to his own use, or to any use not authorized by the trust". Esson J.A. noted at p. 489 that under s. 2, "[t]he unauthorized use may not be fraudulent and yet the agent may be liable for his part in bringing about the breach if he be the instigator of the breach and benefit from it."

Nonetheless, Esson J.A. held that there had been no breach of trust by the company, as there had been no appropriation or conversion of trust funds to the use of the company or any use not authorized by the trust. Esson J.A. stated that the act in that case, as distinct from *Scott v. Riehl*, was not a wrongful act knowingly done, although it may have been an act of negligence. Esson J.A. found, contrary to the majority's finding, that the bank's unilateral act of withdrawal of the trust monies from the general account was not reasonably foreseeable by Farwell. Esson J.A. concluded as follows at p. 491:

To put the trust funds into a pot, without any other element of fault, does not, in my view, constitute appropriation or conversion of the fund to the trustee's own use or any use not authorized by the trust. Unless there was a breach of trust, the potential benefit to Mr. Farwell from the act of the bank, by reducing the company's indebtedness and thus his indebtedness on his guarantee, is not relevant. It may be that the statute which creates

avantage car l'engagement personnel qu'il avait donné à la banque pour garantir le prêt de la société Farwell a été réduit.

Le juge Esson (maintenant Juge en chef de la Cour suprême de la Colombie-Britannique) a exprimé sa dissidence, en s'appuyant sur l'affaire *Scott c. Riehl*, précitée. Selon lui, la situation dans cette affaire était différente parce que le seul compte en banque y était toujours à découvert et que Riehl savait que les sommes en fiducie déposées dans ce compte n'auraient pas dû être affectées aux activités générales de la société en contravention de la fiducie. Néanmoins, il a convenu [TRADUCTION] «qu'une personne dans la situation de M. Farwell peut être tenue responsable sans que la fraude ait été prouvée». Il s'est fondé sur l'art. 2 de la loi qui disposait que le fiduciaire [TRADUCTION] «ne doit pas détourner les (fonds en fiducie) pour son propre bénéfice ni les employer à toute fin non autorisée par la fiducie». Le juge Esson a fait remarquer, à la p. 489, que, sous le régime de l'art. 2, [TRADUCTION] «[l]'emploi non autorisé peut ne pas être frauduleux et pourtant le mandataire peut être tenu responsable pour son rôle dans la violation s'il en est l'instigateur et s'il en retire un avantage».

Néanmoins, le juge Esson a décidé que la société n'avait pas violé l'obligation fiduciaire, car les fonds en fiducie n'avaient pas été détournés pour le bénéfice de la société ni employés à une autre fin non autorisée par la fiducie. Selon lui, l'acte en cause, par contraste avec l'affaire *Scott c. Riehl*, n'était pas un acte fautif commis sciemment, encore qu'il ait peut-être résulté de la négligence. Il a décidé, contrairement à la majorité, que l'acte unilatéral de la banque, qui avait retiré les fonds en fiducie du compte général, n'était pas raisonnablement prévisible pour Farwell. Il a conclu, à la p. 491:

[TRADUCTION] Placer les fonds en fiducie dans un fonds commun, si aucune autre faute n'a été établie, ne constitue pas, à mon sens, un détournement de fonds pour le bénéfice du fiduciaire ni un emploi non autorisé par la fiducie. Sauf en cas de violation d'une obligation fiduciaire, l'avantage que M. Farwell pouvait tirer de l'acte de la banque, qui a réduit la dette de la société et par le fait même la garantie qu'il avait donnée, n'est pas perti-

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the trust should impose liability upon persons who are the directing mind of corporate trustees and who fail to ensure that the trust funds are dealt with in the most prudent manner possible. But as the law stands there was on these facts no basis for imposing liability on the director.

The second line of authority, in which proof of fraud and dishonesty is not required, was also adopted in Ontario in *Andrea Schmidt Construction Ltd.*, *supra*. That case involved a mortgage between Blendcraft Construction (the mortgagor) and a real estate investment corporation called Burnac (the mortgagee). The parties had agreed that a portion of monies advanced under the mortgage would be applied to reduce Blendcraft's indebtedness under an unrelated mortgage, known as the Thompson mortgage, also held by Burnac. The advance given by Blendcraft to Burnac for this purpose was subject to a trust under *The Mechanics' Lien Act*, R.S.O. 1970, c. 267. Schmidt, an unpaid contractor, sued Blendcraft, its director, and Burnac for breach of trust. The trial judge imposed personal liability on Mr. Glatt, the sole shareholder, director and officer of Blendcraft for breach of trust by the corporation with respect to the monies held in trust under *The Mechanics' Lien Act*. The trial judge concluded as follows at pp. 575-76:

There remains to be considered the liability of Mr. Glatt. He was the sole officer, director and shareholder of Blendcraft. His evidence was that he had no personal dealings with or liability to Schmidt [the beneficiary of the trust] and that all his dealings were as an officer of Blendcraft as were all his dealings with Burnac. While that may be correct as far as it goes, every act of Blendcraft including its breach of trust was expressly directed by Glatt. Glatt was aware that Blendcraft was committing a breach of trust. It was Glatt, as agent of Blendcraft, who acquiesced in the misdirection of trust funds. He received a benefit from the diversion in that his liability as covenantor on the Thompson mortgage was reduced. The situation in this case is similar to the situations in the two cases in British Columbia cited by counsel: *Scott et al. v. Riehl & Schumak* (1958), 15 D.L.R. (2d) 67, 25 W.W.R. 525; and *Horsman Bros.*

nent. Il se peut que la loi qui crée la fiducie devrait attribuer une responsabilité aux personnes qui sont les âmes dirigeantes de sociétés fiduciaires et qui ne veillent pas à ce que les fonds en fiducie soient gérés de la manière la plus prudente possible. Mais, vu l'état actuel du droit et les faits de l'espèce, aucune raison ne justifiait l'attribution d'une responsabilité à l'administrateur.

Le second courant jurisprudentiel, selon lequel il n'est pas nécessaire de faire la preuve de la fraude et de la malhonnêteté, a également été suivi en Ontario dans l'arrêt *Andrea Schmidt Construction Ltd.*, précité. Cette affaire portait sur une hypothèque accordée par Blendcraft Construction (débitrice) à une société d'investissement immobilier appelée Burnac (créancière). Les parties avaient convenu qu'une partie des sommes avancées, garanties par l'hypothèque, compenserait la dette de Blendcraft garantie par une autre hypothèque, appelée l'hypothèque de Thompson, aussi accordée par Burnac. L'avance donnée par Blendcraft à Burnac à cette fin était assujettie à une fiducie en vertu de *The Mechanics' Lien Act*, R.S.O. 1970, ch. 267. Schmidt, entrepreneur dont la créance était exigible, a poursuivi Blendcraft, son administrateur et Burnac pour violation d'une obligation fiduciaire. Le juge de première instance a attribué une responsabilité personnelle à M. Glatt, seul actionnaire, administrateur et dirigeant de Blendcraft, pour la violation d'une obligation fiduciaire par la société relativement aux sommes détenues en fiducie en vertu de la *Mechanics' Lien Act*. Le juge a conclu, aux pp. 575 et 576:

[TRADUCTION] Il reste à statuer sur la responsabilité de M. Glatt. Il était le seul dirigeant, administrateur et actionnaire de Blendcraft. Il a témoigné ne pas avoir fait affaire personnellement avec Schmidt [bénéficiaire de la fiducie] ni avoir d'obligation envers lui, et avoir traité avec lui seulement à titre de dirigeant de Blendcraft comme il l'a fait avec Burnac. Bien que ce soit peut-être exact pour autant que l'on sache, chaque acte qu'a accompli Blendcraft, y compris la violation d'une obligation fiduciaire, a été le résultat d'un ordre exprès de Glatt. Celui-ci savait que Blendcraft commettait une violation d'une obligation fiduciaire. C'est lui, en qualité de mandataire de Blendcraft, qui a donné son accord au détournement des fonds en fiducie. Il a tiré avantage du détournement, car sa responsabilité comme partie contractante de l'hypothèque de Thompson a été diminuée. La situation en l'espèce est semblable à celle de

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Holdings Ltd. et al. v. Panton & Panton, [1976] 3 W.W.R. 745. In both those cases, directors were held liable for breach of a mechanics' lien trust committed by their respective corporations. No reason was advanced to me as to why the principles in those cases should not be applied in Ontario. Therefore, Schmidt should also have judgment against Glatt.

In *Austin v. Habitat Development Ltd.* (1992), 94 D.L.R. (4th) 359 (N.S.C.A.), the signing officer of a management company improperly diverted monies from a trust account managed for the owners of an apartment building to his own use. The other signing officer stood by, did not inform the owners and misrepresented the state of the trust account. The Nova Scotia Court of Appeal held that the company and the signing officers were fiduciaries in breach of their duty and were liable to repay the monies. Hallett J.A., concurring in the result, relied upon *Barnes v. Addy*, *supra*, *Selangor*, *supra*, and the Court of Appeal decision in the present case. He concluded, at p. 363, that "[i]t is clear from these authorities that if a director with knowledge actively participates in the conversion of trust funds, he may be found personally liable to the beneficiaries of the trust." Hallett J.A. described a conversion of trust property as follows at pp. 363-64:

> A conversion is an act of wilful interference without justification with property, including money, in a manner inconsistent with the right of the owner whereby the owner is deprived of the use or possession of the property. The transfer of the trust funds to Eastland Group was a conversion of the [beneficiaries'] money.

For the majority, Freeman J.A. held that Robinson, the director who had diverted the funds, was liable for the breach of trust he committed as agent for the corporate trustee, which was also liable as principal. With regard to Whitewood, the signing

deux causes de la Colombie-Britannique que les avocats ont citées: *Scott et al. c. Riehl & Schumak* (1958), 15 D.L.R. (2d) 67, 25 W.W.R. 525 et *Horsman Bros. Holdings Ltd. et al. c. Panton & Panton*, [1976] 3 W.W.R. 745. Dans ces deux affaires, les administrateurs ont été tenus responsables de la violation d'une obligation fiduciaire concernant un privilège du constructeur commise par leur société respective. On ne m'a fait valoir aucune raison pour laquelle les principes énoncés dans ces affaires ne devraient pas être appliqués en Ontario. Par conséquent, Schmidt devrait aussi avoir gain de cause contre Glatt.

Dans l'arrêt *Austin c. Habitat Development Ltd.* (1992), 94 D.L.R. (4th) 359 (C.A.N.-É.), le dirigeant d'une société de gestion, signataire autorisé, avait détourné les fonds d'un compte en fiducie qu'il administrait au nom des propriétaires d'un immeuble d'habitation. L'autre signataire autorisé n'est pas intervenu, n'a pas informé les propriétaires et a fait une fausse déclaration quant à l'état financier du compte en fiducie. La Cour d'appel de la Nouvelle-Écosse a décidé que la société et les signataires autorisés étaient des fiduciaires qui avaient manqué à leur obligation et qui devaient rembourser les sommes. Le juge Hallett, qui a souscrit au résultat, s'est appuyé sur les décisions *Barnes c. Addy* et *Selangor*, précitées, et sur l'arrêt de la Cour d'appel dans la présente espèce. Il a conclu, à la p. 363, qu' [TRADUCTION] «[i]l ressort à l'évidence de ces jugements que, si un administrateur participe en connaissance de cause et activement au détournement des fonds en fiducie, il peut être tenu personnellement responsable envers les bénéficiaires de la fiducie». Le juge Hallett définit le détournement de biens en fiducie en ces termes, aux pp. 363 et 364:

> [TRADUCTION] Un détournement est un acte d'ingérence délibéré et injustifié dans des biens, y compris de l'argent, d'une manière incompatible avec le droit du propriétaire et par lequel le propriétaire est privé de l'usage ou de la possession des biens. Le transfert des fonds en fiducie à Eastland Group était un détournement de l'argent [des bénéficiaires].

Au nom de la majorité, le juge Freeman a conclu que Robinson, l'administrateur qui avait détourné les fonds, était responsable de la violation d'une obligation fiduciaire qu'il avait commise en qualité de mandataire de la société fiduciaire, qui était

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officer who stood by, Freeman J.A. stated that he shared complicity with Robinson. Freeman J.A. noted, at pp. 372-73, that the difference between that case and the present case (referring to the Court of Appeal decision) was that "in the latter the converted funds were used for purposes of the company, which were incidentally beneficial to the shareholders, and were not flagrantly removed by a company officer acting for his own benefit." Because of the blatancy of the breaches of trust committed by the directors, Freeman J.A. held that they were both personally liable to the beneficiaries.

aussi responsable à titre de mandante. Quant à Whitewood, l'autre signataire autorisé qui n'est pas intervenu, le juge Freeman a dit qu'il était complice de Robinson. Il a fait observer, aux pp. 372 et 373, que la différence entre cette affaire et la présente (en parlant de l'arrêt de la Cour d'appel) résidait dans le fait que, [TRADUCTION] «dans cette dernière, les fonds détournés ont été affectés à des activités de la société, dont les actionnaires ont tiré avantage accessoirement, et n'ont pas été retirés de façon flagrante par un dirigeant de la société agissant pour son propre bénéfice». Comme les administrateurs avaient commis une violation criante d'une obligation fiduciaire, le juge Freeman a décidé qu'une responsabilité personnelle envers les bénéficiaires leur incombait à tous les deux.

The modified standard found in many of the Canadian cases involving directors of a closely held corporation reflects a difficulty with the application of the strict *Barnes v. Addy* standard to cases in which the corporate trustee is actually controlled by the stranger to the trust. In *Barnes v. Addy*, Lord Selborne L.C., at p. 252, expressed concerns regarding the imposition of liability on strangers to the trust in the absence of participation in a fraudulent and dishonest design: "those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees." Later in his reasons, Lord Selborne L.C. reiterated this position at p. 253: "if we were to hold that [a solicitor] became a constructive trustee by the preparation of such a deed, . . . not having enabled any one, who otherwise might not have had the power, to commit a breach of trust, we should be acting . . . without authority. . . ."

La norme modifiée utilisée dans nombre d'affaires canadiennes mettant en cause des administrateurs de sociétés à peu d'actionnaires traduit la difficulté d'application de la norme stricte énoncée dans l'arrêt *Barnes c. Addy* à des situations dans lesquelles la société fiduciaire est contrôlée en fait par une personne qui n'est pas partie à la fiducie. Dans l'arrêt *Barnes c. Addy*, le lord chancelier Selborne a exprimé, à la p. 252, des inquiétudes au sujet de l'attribution d'une responsabilité à des tiers qui n'ont pas participé à un dessein frauduleux et malhonnête: [TRADUCTION] «ceux qui créent une fiducie ont l'intention explicite d'exonérer, en l'absence de fraude et de malhonnêteté, ces mandataires de toutes les catégories de responsabilités qui incombent explicitement aux fiduciaires en raison de la fiducie». Plus loin dans ses motifs, le lord chancelier Selborne réaffirme sa position, à la p. 253: [TRADUCTION] «si nous décidions que, [un avocat] devient un fiduciaire par interprétation en rédigeant un tel acte, [. . .] sans avoir habilité quiconque n'aurait, sans cela, été investi du pouvoir de commettre une violation d'une obligation fiduciaire, nous excéderions [. . .] notre compétence . . .»

Generally, there are good reasons for requiring participation in a fraudulent and dishonest breach

En règle générale, il y a de bonnes raisons de n'attribuer une responsabilité aux mandataires des

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of trust before imposing liability on agents of the trustees:

Unlike the stranger who takes title, an agent who disposes of trust property has no choice in the matter. He is contractually bound to act as directed by his principal the trustee. It is one thing to tell an agent that he must breach his contract rather than participate in a fraud on the part of his principal. It is quite another to tell him that he must breach his contract any time he believes his principal's instructions are contrary to the terms of the trust. This is to tell the agent that he must first of all master the terms of his principal's undertaking and, secondly, enforce his own understanding of what that undertaking entails. In effect, it burdens him with the duties of trusteeship upon the mere receipt of trust property as agent. As we have seen, however, properly understood, the role of agent is distinct from that of trustee. An agent is not to be made a trustee *de son tort* unless he voluntarily repudiates the role of agent and takes on the job of a trustee. So long as he chooses to remain an agent, his loyalties are to his principal, the trustee, and he should be free to follow the latter's instructions short of participating in a fraud.

Ruth Sullivan, "Strangers to the Trust", [1986] *Est. & Tr. Q.* 217, p. 246.

It must be remembered that it is the nature of the breach of trust that is under consideration at this point in the analysis, rather than the intent or knowledge of the stranger to the trust. That is, the issue here is whether the breach of trust was fraudulent and dishonest, not whether the appellant's actions should be so characterized. *Barnes v. Addy* clearly states that the stranger will be liable if he or she knowingly assisted the trustee in a fraudulent and dishonest breach of trust. Therefore, it is the corporation's actions which must be examined. The appellant's actions will also be relevant to this examination, given the extent to which M & L was controlled by the defendant directors. The appellant's conduct will be more directly scrutinized when the issue of knowledge is under considera-

fiduciaires que s'ils ont participé à la violation frauduleuse et malhonnête d'une obligation fiduciaire:

[TRADUCTION] Contrairement au tiers qui s'attribue le titre, le mandataire qui aliène des biens en fiducie n'a pas le choix. Il est tenu, en vertu d'un contrat, d'agir conformément aux ordres de son mandant, le fiduciaire. C'est une chose que de dire au mandataire qu'il doit manquer à son contrat plutôt que de participer à une fraude commise par son mandant. C'est une tout autre chose que de lui dire qu'il doit manquer à son contrat chaque fois qu'il croit que les ordres de son mandant sont contraires aux conditions de la fiducie. C'est dire au mandataire qu'il doit tout d'abord posséder à fond les conditions de l'engagement de son mandant et, ensuite, donner suite à sa propre interprétation de ce que comporte cet engagement. En fait, c'est l'investir des fonctions du fiduciaire du simple fait qu'il reçoit les biens en fiducie en qualité de mandataire. Nous avons cependant vu que le rôle de mandataire, si on l'interprète correctement, est distinct de celui de fiduciaire. Le mandataire ne doit pas être tenu pour fiduciaire «de son tort», sauf s'il répudie volontairement le rôle de mandataire et accepte la fonction de fiduciaire. Tant qu'il choisit de rester mandataire, il doit être loyal envers son mandant, le fiduciaire, et il doit être libre de suivre les instructions de ce dernier, à la condition de ne pas participer à une fraude.

Ruth Sullivan, «Strangers to the Trust», [1986] *Est. & Tr. Q.* 217, p. 246.

Il ne faut pas oublier que c'est la nature de la violation d'une obligation fiduciaire que nous étudions à ce point de notre analyse et non l'intention ou la connaissance du tiers. C'est-à-dire que la question est de savoir si la violation d'une obligation fiduciaire a été frauduleuse et malhonnête, et non de savoir si les actions de l'appelant doivent être ainsi qualifiées. Le tribunal précise bien dans l'arrêt *Barnes c. Addy* que le tiers sera tenu responsable s'il a sciemment aidé le fiduciaire à violer l'obligation fiduciaire frauduleusement et malhonnêtement. Par conséquent, ce sont les actions de la société qu'il faut examiner. Les actions de l'appelant seront aussi pertinentes dans cet examen, étant donné le degré de contrôle exercé sur M & L par les administrateurs défendeurs. La conduite de l'appelant fera plus directement l'objet de l'examen lorsque nous étudierons la question de la con-

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tion. It is unnecessary, therefore, to find that the appellant himself acted in bad faith or dishonestly.

Where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue. Regardless of the type of trustee, in my view, the standard adopted by Peter Gibson J. in the *Baden, Delvaux* case, following the decision of the English Court of Appeal in *Belmont Finance*, *supra*, is a helpful one. I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'." In my opinion, this standard best accords with the basic rationale for the imposition of personal liability on a stranger to a trust which was enunciated in *In re Montagu's Settlement Trusts*, *supra*, namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. In that respect, the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability. This approach is consistent with both lines of authority previously discussed.

In the instant case, as a party to the contract between itself and the respondent, M & L knew that the Air Canada monies were held in trust for the respondent, and were not for the general use of M & L. Trust accounts were set up by M & L in 1978, but never used. M & L also knew that any positive balance in its general account was subject to the Bank's demand. By placing the trust monies in the general account which were then subject to seizure by the Bank, M & L took a risk to the prejudice of the rights of the respondent beneficiary, Air Canada, which risk was known to be one which there was no right to take. See *Baden,*

naissance. Il est donc inutile de conclure que l'appelant a lui-même agi de mauvaise foi ou malhonnêtement.

Lorsque le fiduciaire est une société par actions, et non un particulier, il peut être plus difficile de trancher la question de savoir si la violation d'une obligation fiduciaire a été malhonnête et frauduleuse parce que la société ne peut agir que par l'intermédiaire de personnes physiques qui sont souvent les tierces parties dont la responsabilité est en cause. Peu importe le type de fiduciaire, à mon avis, la norme adoptée par le juge Peter Gibson dans l'affaire *Baden, Delvaux*, précitée, décision rendue postérieurement à l'arrêt de la Cour d'appel anglaise *Belmont Finance*, précité, est utile. En conséquence, je [TRADUCTION] «consid[ère] applicable la définition suivante de la fraude: «le fait de courir un risque au détriment des droits d'autrui, lorsque l'on court ce risque sciemment et sans droit»». À mon avis, c'est la norme qui s'accorde le mieux avec la raison d'être fondamentale de l'attribution d'une responsabilité personnelle à une personne qui n'est pas partie à la fiducie, qui a été énoncée dans l'affaire *In re Montagu's Settlement Trusts*, précitée, c'est-à-dire la question de savoir si la conscience du tiers est suffisamment en cause pour que soit justifiée l'attribution d'une responsabilité personnelle. À cet égard, le fait de courir sciemment et de manière injustifiée un risque au détriment du bénéficiaire est suffisant pour légitimer l'attribution d'une responsabilité personnelle. Cette démarche est compatible avec les deux courants jurisprudentiels analysés plus haut.

En l'espèce, en tant que partie au contrat conclu entre elle-même et l'intimée, M & L savait que les sommes appartenant à Air Canada étaient détenues en fiducie au nom de celle-ci et ne devaient pas être affectées aux activités générales de M & L. Des comptes en fiducie ont été ouverts par M & L en 1978, mais jamais utilisés. M & L savait également que tout solde positif dans son compte général pouvait être demandé par la banque. En plaçant les fonds en fiducie dans le compte général qui était susceptible d'être saisi par la banque, M & L a couru un risque au détriment des droits d'Air Canada, bénéficiaire intimée, risque qu'elle a

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Delvaux, supra,; *Scott v. Riehl, supra.* Therefore, the breach of trust by M & L was dishonest and fraudulent from an equitable standpoint.

It is clear that the appellant participated or assisted in the breach of trust. As was the case in *Horsman Bros., supra,* the appellant dealt with the funds in question: in particular, he stopped payment on all cheques, and then opened a trust account and attempted to withdraw the stop payment orders and to transfer the funds into the new trust account in order to pay the respondent. The breach of trust was directly caused by the conduct of the defendant directors. As Griffiths J.A. observed, at p. 204, "[t]he movement of these directors, acting solely in their own interest to stop payment on cheques, not only prevented payment on cheques issued to Air Canada, but precipitated the seizure by the bank of the only funds available in the unprotected general account." In such circumstances, the directors are personally liable for the breach of trust as constructive trustees provided that the requisite knowledge on the part of the directors is proved.

With respect to the knowledge requirement, this will not generally be a difficult hurdle to overcome in cases involving directors of closely held corporations. Such directors, if active, usually have knowledge of all of the actions of the corporate trustee. In the instant case, the analysis is somewhat more difficult to resolve, as the appellant was not as closely involved with the day-to-day operations as was the other director, Martin. However, the appellant knew of the terms of the agreement between M & L and the respondent airline, as he signed that agreement. The appellant also knew that the trust funds were being deposited in the general bank account, which was subject to the demand loan from the Bank. This constitutes actual knowledge of the breach of trust. That is, even if the appellant could argue that he had no subjective knowledge of the breach of trust, given

couru sciemment et sans droit. Voir *Baden, Delvaux*, et *Scott c. Riehl*, précités. Par conséquent, la violation d'une obligation fiduciaire par M & L était malhonnête et frauduleuse selon les principes de l'*equity*.

De toute évidence, l'appelant a participé ou aidé à la violation d'une obligation fiduciaire. Comme dans l'affaire *Horsman Bros.*, précitée, l'appelant a géré les fonds en question: en particulier, il a fait opposition au paiement de tous les chèques, puis a ouvert un compte en fiducie et tenté de retirer l'opposition au paiement et de transférer les fonds dans le nouveau compte en fiducie afin de rembourser l'intimée. La violation d'une obligation fiduciaire a été causée directement par la conduite des administrateurs défendeurs. Comme l'a fait observer le juge Griffiths, à la p. 204, [TRADUCTION] «[l]e geste de ces administrateurs, agissant seulement dans leur propre intérêt pour faire opposition à des chèques, non seulement a empêché le paiement de chèques tirés à l'ordre d'Air Canada, mais a hâté la saisie par la banque des seuls fonds se trouvant dans le compte général non protégé». Dans ces circonstances, les administrateurs sont personnellement responsables de violation d'une obligation fiduciaire à titre de fiduciaires par interprétation, à la condition qu'il soit prouvé qu'ils avaient la connaissance voulue.

Quant à la connaissance exigée, cet obstacle est généralement facile à surmonter lorsqu'il s'agit des administrateurs d'une société à peu d'actionnaires. Ces administrateurs, s'ils jouent un rôle actif, sont d'ordinaire au courant de toutes les actions de la société fiduciaire. En l'espèce, l'analyse est un peu plus difficile car l'appelant ne prenait pas une part aussi active aux activités quotidiennes que l'autre administrateur, Martin. Toutefois, l'appelant connaissait les conditions de l'accord entre M & L et la compagnie d'aviation intimée, puisqu'il a signé le contrat. L'appelant savait en outre que les fonds en fiducie étaient déposés dans le compte en banque général, qui était assujetti au prêt à demande de la banque. Cela équivaut donc à la connaissance de fait de la violation d'une obligation fiduciaire. C'est-à-dire que, même si l'appelant pourrait soutenir qu'il n'avait

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the facts of which he did have subjective knowledge, he was wilfully blind to the breach, or reckless in his failure to realize that there was a breach. Furthermore, the appellant received a benefit from the breach of trust, in that his personal liability to the Bank on the operating line of credit was extinguished. Therefore, he knowingly and directly participated in the breach of trust, and is personally liable to the respondent airline for that breach.

V. Disposition

For the foregoing reasons, I would therefore dismiss the appeal with costs.

The following are the reasons delivered by

MCLACHLIN J. — I agree with Justice Iacobucci that the relationship between the corporation and Air Canada was one of trust, not debtor and creditor. I also agree with his proposed disposition of the appeal. In my view, whatever view one adopts on the difficult issues discussed by my colleague, the appellant is clearly liable as a constructive trustee for the breach of trust which the corporation committed respecting Air Canada's account.

There is no debate on the first requirement for imposition of personal liability on a stranger to a trust: knowing participation in the breach. The next question is whether the required knowledge is subjective knowledge (i.e., actual knowledge of the breach or wilful blindness and recklessness) or objectively determined knowledge (what a reasonably diligent person would have known). Courts have divided on this issue. The courts in England require subjective knowledge. However, certain appellate courts in Canada have suggested that a subjectively determined standard of knowledge is not appropriate in the trust context, even for a stranger to the trust, and that where a stranger should reasonably have known that the trust was

pas la connaissance subjective de la violation d'une obligation fiduciaire, étant donné les faits dont il avait la connaissance subjective, il a fait preuve d'ignorance volontaire de la violation, ou d'insouciance en ne se rendant pas compte de la violation. Par surcroît, l'appelant a tiré avantage de la violation d'une obligation fiduciaire, en ce sens que son engagement personnel envers la banque à l'égard de la marge de crédit d'exploitation a été éteint. Par conséquent, il a sciemment et directement participé à la violation d'une obligation fiduciaire et est personnellement responsable envers la compagnie d'aviation intimée de cette violation.

V. Dispositif

Pour les motifs qui précèdent, je suis d'avis de rejeter le pourvoi avec dépens.

Version française des motifs rendus par

LE JUGE MCLACHLIN — Tout comme le juge Iacobucci, j'estime qu'il existait un rapport de fiduciaire entre la société et Air Canada et non un rapport de débiteur et créancier. Je souscris également à la manière dont il tranche le présent pourvoi. À mon avis, quelle que soit la position que l'on adopte à l'égard des questions difficiles qu'analyse mon collègue, l'appelant est clairement responsable à titre de fiduciaire par interprétation de la violation d'une obligation fiduciaire que la société a commise relativement au compte d'Air Canada.

La première exigence en matière d'attribution d'une responsabilité personnelle à un tiers en matière de fiducie — la participation en connaissance de cause à la violation — ne suscite pas de débat. La question suivante est de savoir si la connaissance requise doit être subjective (c.-à-d. une connaissance de fait de la violation ou l'ignorance volontaire et l'insouciance) ou déterminée de façon objective (ce qu'une personne raisonnablement diligente aurait dû savoir). Les tribunaux sont divisés sur cette question. En Angleterre, les tribunaux exigent la connaissance subjective. Toutefois, certaines cours d'appel au Canada ont dit qu'une norme de connaissance déterminée de façon subjective ne convient pas dans le contexte de la fidu-

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being breached by his or her actions, there may be circumstances where liability is appropriate. See *MacDonald v. Hauer* (1976), 72 D.L.R. (3d) 110 (Sask. C.A.), at p. 123; *Henry Electric Ltd. v. Farwell* (1986), 29 D.L.R. (4th) 481 (B.C.C.A.), at p. 485. In this case, as my colleague points out, the evidence meets the higher English standard of subjective knowledge, given that the appellant was wilfully blind. Accordingly, it is not necessary to decide whether in some cases, an objective test might suffice. That is a difficult and important question which I would prefer to leave to a case in which it squarely arises.

The second issue is the nature of the breach which can give rise to liability. Must it be fraudulent and dishonest, or does any breach suffice? Again, the authorities are divided; as Iacobucci J. discusses, a number of Canadian courts do not adopt the dominant English view that the breach must be fraudulent and dishonest: *Horsman Bros. Holdings Ltd. v. Panton & Panton*, [1976] 3 W.W.R. 745; *Trilec Installations Ltd. v. Bastion Construction Ltd.* (1982), 135 D.L.R. (3d) 766; *Andrea Schmidt Construction Ltd. v. Glatt* (1979), 25 O.R. (2d) 567 (H.C.). Again, it is not necessary to resolve the issue in this case, since here the breach was fraudulent and dishonest in the sense discussed by my colleague of involving a risk to the property to the prejudice of the beneficiary. Given the importance and difficulty of the question, I would prefer to leave it to a case where it squarely arises.

A final matter is the effect, if any, of the fact that the appellant benefitted personally from the breach. In some Canadian cases, this has been cited as a circumstance in favour of imposing liability on the stranger to the trust: see *Scott v. Riehl* (1958), 15 D.L.R. (2d) 67; *Henry Electric Ltd.*, *supra*, and *Andrea Schmidt Construction Ltd.*, *supra*. My colleague cites it as relevant to establ-

cie, même pour un tiers à la fiducie, et que, lorsqu'un tiers aurait raisonnablement dû savoir qu'il y avait violation d'une obligation fiduciaire en raison de ses actions, il pourrait y avoir des circonstances dans lesquelles la responsabilité s'applique. Voir *MacDonald c. Hauer* (1976), 72 D.L.R. (3d) 110 (C.A. Sask.), à la p. 123; *Henry Electric Ltd. c. Farwell* (1986), 29 D.L.R. (4th) 481 (C.A.C.-B.), à la p. 485. En l'espèce, comme le souligne mon collègue, la preuve satisfait à la norme anglaise plus élevée de la connaissance subjective, étant donné l'ignorance volontaire de l'appelant. Par conséquent, il n'est pas nécessaire de décider si dans certains cas un critère objectif pourrait suffire. Il s'agit d'une question difficile et importante et je préfère qu'elle soit examinée dans une affaire où elle aura été directement soulevée.

La deuxième question porte sur la nature de la violation qui peut entraîner la responsabilité. Doit-elle être frauduleuse et malhonnête ou toute violation suffit-elle? Encore une fois, la doctrine et la jurisprudence sont divisées; comme le mentionne le juge Iacobucci, un certain nombre de tribunaux canadiens n'adoptent pas la position anglaise dominante que la violation doit être frauduleuse et malhonnête: *Horsman Bros. Holdings Ltd. c. Panton & Panton*, [1976] 3 W.W.R. 745; *Trilec Installations Ltd. c. Bastion Construction Ltd.* (1982), 135 D.L.R. (3d) 766; *Andrea Schmidt Construction Ltd. c. Glatt* (1979), 25 O.R. (2d) 567 (H.C.). De même, il n'est pas nécessaire de trancher la question en l'espèce car la violation y était frauduleuse et malhonnête dans le sens mentionné par mon collègue, savoir qu'il y avait un risque pour les biens au détriment du bénéficiaire. Compte tenu de l'importance et de la difficulté de la question, je préfère qu'elle soit examinée dans une affaire où elle aura été directement soulevée.

Enfin, il reste la question de l'effet, le cas échéant, de l'avantage personnel que tire l'appelant de la violation. Dans certains arrêts canadiens, cela a été mentionné comme un élément favorisant l'attribution de la responsabilité à un tiers à la fiducie: voir *Scott c. Riehl* (1958), 15 D.L.R. (2d) 67; *Henry Electric Ltd.* et *Andrea Schmidt Construction Ltd.*, précités. Mon collègue dit que cette

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lishing actual knowledge of the breach, and refers to it as a factor in his conclusion that the appellant is liable. Given that this factor is present in this case, it is not necessary to decide whether liability could be imposed in the absence of personal benefit. My colleague, I hasten to add, does not himself venture on this question.

While I agree with Iacobucci J. that on the facts here, liability is clearly made out, I would prefer to leave consideration of the questions to which I have referred to future cases in which they directly arise.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Peter J. Bishop & Associates, Ottawa.

Solicitor for the respondent: Guy L. Poppe, Toronto.

question est pertinente pour établir la connaissance de fait de la violation et la mentionne comme un facteur dans sa conclusion que l'appelant est responsable. Étant donné que ce facteur est présent en l'espèce, il n'est pas nécessaire de décider si la responsabilité pourrait être attribuée en l'absence d'avantage personnel. Je m'empresse d'ajouter que mon collègue n'aborde pas cette question.

Bien que je convienne avec le juge Iacobucci que, d'après les faits de l'espèce, la responsabilité soit clairement établie, je préfère que les questions que j'ai mentionnées soient examinées dans des affaires où elles auront été directement soulevées.

Je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant: Peter J. Bishop & Associates, Ottawa.

Procureur de l'intimée: Guy L. Poppe, Toronto.

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TAB 17

Auctioneers' Association of Alberta v. Hunter, 2002 ABQB 0028

Date: 20020109
Action No. 0103 02121

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

2002 ABQB 28 (CanLII)

BETWEEN:

AUCTIONEERS' ASSOCIATION OF ALBERTA

Plaintiff

- and -

RICHARD SCOTT HUNTER

Defendant

REASONS FOR DECISION
of
M. FUNDUK, Master in Chambers

APPEARANCES:

K. G. Heintz
Venture Law Group
Counsel for the Plaintiff

Ms. J. V. Roy
Kobewka Stadnyk
Counsel for the Defendant

[1] These are competing applications for summary judgment.

[2] The Defendant was a member of the Plaintiff. He was also the sole principal of Scott Hunter Auction Service Ltd. ("company"). The company was a public auctioneer. At the relevant times the Public Auctions Act (later repealed and rolled into Part 12 of the Fair Trading Act S.A. 1998, c. F-1.05) applied.

[3] Section 5 requires a public auctioneer to be licensed by the Director. Section 6 requires the auctioneer to "deliver to" the Director a bond, which of course must be by someone other than the auctioneer.

[4] The Plaintiff agreed to be the bondsman for the company and it gave a bond for $25,000 to the Director. In May, 1994 the company entered into an indemnity agreement with the Plaintiff agreeing to hold the Plaintiff harmless for all loss that it might incur if the bond was called.

[5] In March 1998 the Defendant gave a guarantee to the Plaintiff. It recites that the Plaintiff is a surety for the company pursuant to the Public Auctions Act, that the company had entered into an indemnity agreement with the Plaintiff and that the Defendant was a shareholder of the company. The Defendant then:

> "... unconditionally guarantees payment to the [Plaintiff] of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the [company] to the [Plaintiff] now or hereafter incurred or arising from the said Agreement of Indemnity or any other agreement or obligation ... and ... agrees to indemnify and save harmless the [Plaintiff] from and in respect of any and all liability ... by reason of the said Bond ..."

[6] The guarantee is under seal and there is the mandatory compliance with the Guarantees Acknowledgment Act. The validity of the guarantee is not questioned.

[7] The Defendant assigned himself into bankruptcy on June 24, 1999. He did not list the Plaintiff as a contingent creditor. The Plaintiff was not aware of the bankruptcy. On May 12, 2000 the Defendant got an absolute order of discharge from his bankruptcy. The Plaintiff learned of the bankruptcy sometime after July, 2000 when it hired a lawyer to collect on the guarantee.

[8] The requirements of a license and a bond are for the public's protection, in particular the client of the auctioneer who gives it a chattel to sell and in limited situations the purchaser of a chattel at an auction.

[9] Section 6 Public Auctions Act deals with the forfeiture of a bond. It says:

> 6 (3) If

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(a) a judgment is obtained by any person against a licensee who is a principal under a bond referred to in subsection (1) or against an auctioneer acting for him.

(b) the judgment arises out of the failure of the licensee or his auctioneer to perform his obligations in accordance with the terms and conditions of the bond to the person who recovered the judgment, and

(c) the person who recovered the judgment delivers to the Director

(i) a certified copy of the judgment

(ii) notice that the judgment has become final by reason of lapse of time or of being confirmed by the highest court to which it may be appealed and has not been satisfied within 30 days after it became final, and

(iii) a statutory declaration setting out the particulars of the failure of the licensee or auctioneer to perform his obligations to the person who recovered the judgment.

the bond is forfeited on the Director notifying the surety in writing that the judgment remains unsatisfied 30 days after the date that it became final.

(4) If a bond is forfeited under subsection (3), the surety shall, within 30 days after receiving the notice from the Director under that subsection, pay to the Minister the principal sum of the bond.

(5) If the Minister receives money under subsection (4), he shall pay that money into the Court of Queen's Bench in trust for those persons who obtain judgments against the licensee or auctioneer and comply with this section, and the Court shall, not less than 1 year after the forfeiture of the bond, pay out that money to those persons.

(6) If the amount of money paid into Court under subsection (5) is insufficient to satisfy the judgments referred to in that subsection the Court shall pay out the money on a pro rata basis.

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(7) If, after paying out all judgments under subsection (5), there is a surplus of money, the Court shall pay that surplus to the surety.

(8) A licence terminates if the bond provided by the licensee under this Act

(a) is forfeited, or

(b) terminates, unless prior to the termination of the bond the licensee provides a new bond in accordance with this Act.

[10] Section 10 gives a measure of protection to purchasers at an auction in limited circumstances. It says:

10(1) If a person causes any goods valued at more than $500 to be offered for sale by public auction, the auction sales business shall, before the sale is held, obtain from that person a statutory declaration in writing made or signed by him or by some other person authorized by him and who has knowledge of the facts, setting out whether or not the goods offered for sale are subject to a mortgage, charge, lien or encumbrance and, if so, full particulars of the mortgage, charge, lien or encumbrance.

(2) No auction sales business shall sell by public auction any goods in respect of which it must obtain a statutory declaration under subsection (1) without first obtaining the statutory declaration.

(3) If an auction sales business

(a) sells by public auction goods valued at more than $500 without first obtaining the statutory declaration required under subsection (1), or

(b) sells by public auction goods valued at $500 or less without first obtaining a statutory declaration that complies with subsection (1).

it is liable to the purchaser of the goods for the losses sustained by the purchaser resulting from any mortgage, charge, lien or encumbrance to which the goods were subject at the time of sale.

[11] If an auctioneer sells a chattel he is supposed to give the net sale proceeds to his client and if he does not sell the chattel he is supposed to return it to the client. The bond provides some protection to clients from the occasional unscrupulous auctioneer.

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[12] By letter dated December 17, 1999 to the Plaintiff the Director "forfeited" the bond because a claim for $1,970.24 was filed with the Director. At that time the Defendant was in bankruptcy. The demand by the Director does not identify the claimantor or how the claim arose and when it arose.

[13] The Plaintiff paid the Director $25,000.

[14] On February 22, 2000 the Director told the Plaintiff of a second claim for $2,719.72. On March 24, 2000 the Director told the Plaintiff of a third claim for $440. On April 6, 2000 the Director told the Plaintiff of two more claims for $2,014.74 and $4,707. On April 17, 2000 the Director told the Plaintiff of a sixth claim for $12,584. During this time the Defendant was still in bankruptcy.

[15] On July 24, 2000 the Director told the Plaintiff of yet another claim for $726 and on January 2, 2001 he told the Plaintiff of a final claim for $14,468.12. These two claims were after the bankrupt got his discharge.

[16] The details of the claims are not before me. I conclude that all the claims are covered by the bond. There is no good reason for the Director to tell the Plaintiff of claims other than those covered by the bond. If it becomes necessary the details can be gotten either from the Director or the Court file of the Clerk to whom the Director paid the $25,000 pursuant to s. 6(5). There has to be a lawsuit by each claimant against the company and a judgment in favour of each claimant: s. 6(3) Public Auctions Act.

Issue

[17] The lawsuit was started January 31, 2001, which is after the date that the Defendant got his absolute discharge from bankruptcy.

[18] The sole issue is whether the Defendant's liability on the guarantee was released by the order of discharge: s. 178(2) BIA. The answer to that depends on whether the Plaintiff's claim is a claim "provable in bankruptcy". If it is not a claim provable in bankruptcy the BIA gives no protection to the Defendant.

[19] The relevant section is s. 121. It provides in part:

> 121.(1) All 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 shall be deemed to be claims provable in proceedings under this Act.

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> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[20] The Defendant's position is that because the guarantee was given before the date of bankruptcy his liability on it is a liability within the scope of s. 121(1).

[21] At the outset it must be emphasized that this is not the usual situation of a lender (creditor), a borrower (debtor) and a guarantor. In that situation the debtor must do a positive act, pay the debt, and if he does not do so the guarantor is obligated to do so.

[22] In the present lawsuit those are not the facts. The company's obligation is to reimburse the Plaintiff if the Director forfeits the bond and only to the extent that the Plaintiff suffers a loss, which is capped at $25,000.

[23] If the bond is not forfeited there is no loss by the Plaintiff. If the bond is forfeited but the total claims are less than $25,000 the Plaintiff's loss is just the total amount of the claims because what is left is paid by the Clerk to the Plaintiff.

[24] Whether the bond is forfeited depends on certain facts.

[25] In the usual guarantee situation there are three certain facts:

(a) there is a debt,

(b) the debt must be paid,

(c) the amount of the debt is certain.

The only uncertainty, for a guarantor, is whether the debtor will pay the debt.

[26] In the present lawsuit the uncertainties, for the Defendant as guarantor, are greater:

(a) will the company commit acts of default which would give claimants access to the bond,

(b) will claimants sue the company and get judgments against it,

(c) will claimants then give notice to the Director,

(d) will the Director forfeit the bond,

(e) what will the claims total,

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(f) will the company reimburse the Plaintiff.

[27] If facts (a) and (b) do exist fact (c) will probably exist and facts (d) and (e) will then certainly exist. But facts (a) to (c) are sequential. Facts (a) and (b) must exist before facts (c) exists. If facts (a) and (b) do exist fact (c) is a high probability and fact (d) is a certainty because the legislation requires the Director to forfeit the bond.

[28] The point of all this is that the uncertainties for the Defendant, as guarantor, are greater than in the usual situation. The contingencies are greater.

[29] Section 121(1) BIA refers to "claims provable". ***Farm Credit Corp. v. Holowach (Bankrupts)***, (1988) 86 A.R. 304 (C.A.) says that a provable claim must be one recoverable by legal process, para. 7. That is not to be taken as meaning that the creditor must have a cause of action at the date of bankruptcy. That was not the issue before the Court so of course the question remains whether a claim which is contingent at the date of bankruptcy is a claim provable in the bankruptcy.

[30] There is no evidence that anything happened prior to the date of bankruptcy that would have given the Plaintiff a cause of action at the date of bankruptcy. What is clear is that the bond was forfeited after the Defendant went into bankruptcy. Prior to the forfeiture the Plaintiff would not have had a cause of action against either the company or the Defendant.

[31] There is also no evidence before me of any facts prior to the date of bankruptcy to assist me in valuing the Plaintiff's claim if it is a provable claim. I refer here to the problem in applying s. 121(2).

[32] The Plaintiff's claim against the Defendant would be a contingent liability because of the six facts I have earlier identified.

[33] The indemnity agreement between the Plaintiff and the company provides that:

> ... the [company] does hereby agree to indemnify and save harmless the [Plaintiff] from and in respect of any and all liability, claims or demands to which the [Plaintiff] may be exposed or subject and all loss, costs, damages and expenses whatsoever or liability thereunder, which the [Plaintiff] may be called

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> upon to sustain or incur, or does sustain or incur by any reason of the said Bond ... and to immediately upon the demand of the [Plaintiff], pay to the [Plaintiff] a sufficient amount to meet the payment of any loss damage, costs, charges or expenses, that the [Plaintiff] may be called upon to sustain, or has sustained, by reason of the said Bond.

[34] The indemnity agreement also says:

> AND IT IS FURTHER AGREED THAT:
>
> . . . . .
>
> (e) The [company's] liability to the [Plaintiff] hereunder shall arise immediately when the [Plaintiff] has made any payment or has undertaken to incur any loss or expense in connection with the said Bond, or has been served with notice by the Director requiring payment under the said Bond pursuant to provisions of the said Public Auction Act.

[35] In this case the Defendant's liability to the Plaintiff is co-extensive to the company's liability to the Plaintiff: ***Meridian Developments Ltd. v. Nu-West Group Ltd.***, (1984) 52 A.R. 248 (C.A.), para. 27:

> ***Prima facie*** a guarantor's obligations are co-extensive with those of the principal debtor but the starting point must always be to analyze the nature of the guarantor's undertaking. . . . It is also important to an analysis of the problem to remember that though the obligations of surety and principal debtor are often co-extensive they are, nevertheless, separate and distinct obligations.

[36] I have earlier identified the relevant provision in the guarantee. For convenience I set it out again. The Defendant:

> "... unconditionally guarantees payment to the [Plaintiff] of all debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the [company] to the [Plaintiff] now or hereafter incurred or arising from the said Agreement of Indemnity or any other agreement or obligation ... and ... agrees to indemnify and save harmless the [Plaintiff] from and in respect of any and all liability ... by reason of the said Bond ..."

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[37] I am satisfied that the Defendant's liability is co-extensive to that of the company's liability.

[38] [At this point I will deal with a submission made by a prior counsel who appeared for the Plaintiff on the initial applications.] The guarantee also says in part:

> 10. No suit based on this guarantee and agreement shall be instituted until demand for payment has been made ...

The submission was that there is no liability by the Defendant until a demand is made.

[39] I do not agree. Clause 10 does not say that. The answer to that submission is found in ***Alberta Agricultural Development Corp. v. Smith***, 13 Alta. L.R. (3d) 338 (C.A.), paras. 44-46.

[40] I do not know if Mr. Heinz, who now appears for the Plaintiff, also supports that submission.

[41] Although clause (e) of the indemnity agreement says that the company's liability to the Plaintiff "shall arise immediately" when the Plaintiff has paid to the Director or has been served with a demand for payment by the Director that does not mean that there is no liability until one of those facts happens. That would confuse formation of a contract with performance of obligations under a contract. There is a liability by the company but it must perform its obligation to the Plaintiff only on the happening of certain facts. Performance is contingent on the happening of certain facts.

[42] Those facts are:

(a) the company commits acts of default which give claimants access to the bond,

(b) claimants sue the company and get judgments against it,

(c) claimants give claims to the Director.

If those facts occur the Director will demand that the Plaintiff pay $25,000 under the bond. The company's obligation to pay the Plaintiff is contingent on those facts happening and, as the Defendant's obligation to pay the Plaintiff is co-extensive to the company's obligation to pay, the Defendant's obligation to pay the Plaintiff is also contingent on those facts happening.

[43] In deciding if the Defendant's liability on the guarantee is a claim provable in the bankruptcy the relevant point in time is the date of the bankruptcy. Section 121(1) BIA also encompasses claims that might arise before the Defendant gets his discharge. However, the later forfeiture of the bond does not change the fact that at the date of bankruptcy the

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Plaintiff's claim would still be a contingent claim. That then brings s. 121(2) into play. I set out the sub-section again:

> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[44] In this case that is little assistance. Section 135 deals with the case where a claimant submits a claim in the bankruptcy. The section says in part:

> 135.(1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[45] Because s. 135 never came into play I am now asked to decide if the Plaintiff's claim on the guarantee is a contingent claim, which it is, and whether it can be valued, and if so what is its value. I must decide whether the claim can be valued because, it if cannot, it is not a provable claim in the bankruptcy and so the order of discharge is not a defence.

[46] ***Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.,*** [1992] 4 W.W.R. 309 (Alta. C.A.) holds that facts occurring after the date of bankruptcy based on a pre-bankruptcy contract can give rise to a claim provable in the bankruptcy. The issue was whether mortgagees could claim in the bankruptcy for costs incurred after the date of bankruptcy, where the claims for costs were based on indemnities by the bankrupt found in pre-bankruptcy mortgages. The trustee's position was that these costs were not provable claims.

[47] The Court starts out:

> ... Also, no rule of law forbids simpliciter the enforcement, for costs incurred by the creditor after bankruptcy, of a pre-bankruptcy cost indemnity given by the bankrupt.
>
> (p. 311)
>
> . . . . .
>
> It is common ground that no term in the statute clearly and unequivocally resolves either dispute, and no authority has yet reached precisely these topics. In my view, I stated the correct rules for the case at the start, and for the reasons that follow.

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(p. 312)

[48] In discussing the issue the Court says, pp. 316-319:

> In my view, the costs rule proposed by the trustee offers even greater difficulties.
>
> Again, the trustee relied upon s. 121(1) as prohibiting future claims. Again, it had to acknowledge that a demand for costs incurred after bankruptcy that invokes an agreement made before bankruptcy falls within the scope of entitlement under that section. The precise point came before Baron Pollock and Viscount Cave in 1886: see ***Re Smith; Ex parte Edwards*** (1886), 3 Morr. 179 (Div. Ct.), at pp. 183-85.
>
> In its factum, the trustee offered only an argument based upon the limit on future charges implied by operation of the valuation procedure in s. 121(2). In oral argument, Mr. Robinson expanded this by relying upon an analogy to the common law about post-bankruptcy interest.
>
> I will first deal with the argument based upon s. 121(2). It provides:
>
> (2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value the claim, and the claim shall after that valuation be deemed a proved claim to the amount of its valuation.
>
> The trustee argued that this rule limits future exactions to those that can be valued before they arise. Future costs, unlike future interest, cannot readily be calculated in advance.
>
> I agree that this rule can limit future claims that otherwise fall within the scope of entitlement. In fact, some may not be provable when the trustee calls for proof. The trustee cities two examples: ***Re Carling Acceptance Ltd.*** (1976), 22 C.B.R. (N.S.) 258 (Ont. S.C.), and ***Re Stone*** (1980), 34 C.B.R. (N.S.) 87 (Ont. S.C.). Both offer difficulties. In ***Carling***, the court first found that the challenged demand was, by its terms, conditional. It then found that the condition, in fact, would never be met during the bankruptcy. The condition required that the bankrupt have a large surplus! One might dismiss the decision as merely one where the claimant failed to prove its case. In ***Stone***, the bankrupt had guaranteed a debt payable by instalment. The primary debtor had defaulted, but, on the date of bankruptcy, only a portion of the debt had become due and payable. The claim of the primary creditor against the estate of the guarantor bankrupt was limited to what was due. That decision might be doubted because

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some contingent future liability existed to be valued: See, contra, ***Re Froment***, [1925] 2 W.W.R. 415, 5 C.B.R. 765, [1925] 3 D.L.R. 377 (Alta. T.D.), at p. 423 [W.W.R.]. Ironically, in that case the court did not discount the award for the contingency that the primary debtor might pay.

One must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process: see ***Smith v. Elliot Lake Ready-Mix Ltd.***, [1961] O.W.N. 285, 2 C.B.R. (N.S.) 187 (H.C.), at p. 190 [C.B.R.] and ***Manitoba Public Insurance Corp. v. Wallace*** (1988), 69 C.B.R. (N.S.) 56 (Man, Q.B.), at p.59:

The trustee asserted that all must be valued as at the date of bankruptcy. As this case can be decided without challenge to this assertion, I accept it for that purpose. But I note that judicial valuation occurs only when the trustee asks for it. The valuing court can have regard to events after bankruptcy, and before the hearing, to help it decide. I see nothing in the cases, or in common sense, to the opposite effect. The learned chambers judge here accepted the impossibility of valuation of the date of bankruptcy. I see no evidence to support that finding.

Indeed, I doubt the fairness of reliance on s. 121(2) in this case because the trustee here has yet to make an application and the court has yet to hear the evidence. If we treat this motion for directions as such an application, then the mortgagees can fairly say that, today, they can prove the sums they claim. The situation might have been very different had the trustee brought an application years ago. Of course, the mortgagees did not file a specific claim until 1989, after all securities were realized and a final deficiency calculation available.

. . . . .

In the result, I do not accept that s. 121(2) necessarily defeats the mortgagees in this case.

. . . . .

In conclusion, no rule of law forbids simpliciter the enforcement of a pre-bankruptcy cost indemnity given by the bankrupt to a creditor for expenses incurred after bankruptcy. But a bankruptcy court may refuse to enforce that indemnity. It might refuse when enforcement would countenance abuse of the bankruptcy process; or where a creditor incurred costs other than in a "commercially reasonable fashion."

[49] ***Re Carling Acceptance Ltd.***, referred to in ***Abacus Cities Ltd. (Trustee of)***, was affirmed on appeal, 23 C.B.R. (N.S.) 245 (Ont. C.A.).

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[50] The issue in ***In Re Froment***, referred to in ***Abacus Cities Ltd. (Trustee of),*** was whether a surety who had not been called on to pay by the creditor could still prove in the bankruptcy of the debtor. The Court says, p. 423:

> . . . given by *The Bankruptcy Act*. That Act extends the rights of persons who are subject to a contingent liability.
>
> Under subsec. (2) of sec. 44 of that Act "all debts and liabilities present and future, to which the debtor is subject at the date of the receiving order or the making of an authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment, if the claim is based upon a contract or promise as provided for in subsec. (1) of the same section. The provisions of these subsections are similar to those contained in *The Bankruptcy Acts* (Imp.) 46 & 47 Vict. ch. 52, sec. 37, and 4 & 5 George V., ch. 59, sec. 30, under which sections the right of proof on the part of a surety has arisen in numerous cases as a result of which "it is now established, notwithstanding the doubts expressed in ***In re Parrott; ex parte Whittaker***, 8 Morr. 49, 63 L.T. 777, that the contingent liability of a surety who has not been called upon to pay, or has not in fact paid, forms a debt provable in the bankruptcy of the principal debtor (***In re Paine; Ex parte Read***, [1897] 1 Q.B. 122, 66 L.J. Q.B. 71; ***In Herepath and Delamr; Ex parte Delmar***, 7 Morr. 129; ***In re Blackpool Motor Car Co. Ltd.*** [1901] a Ch. 77, 70 L.J. Ch. 61) and that one surety can prove in the bankruptcy of a co-surety for contribution, although the proving surety has not paid the creditor anything (***Wolmershausen v. Gullick*** [1893] 2 Ch. 514, 62 L.J. Ch. 773" [*Williams on Bankruptcy*, 10th ed., p. 161; 12th ed., p. 153.]

[51] As ***Re Abacus Cities Ltd. (Trustee of)*** points out, ***In re Froment*** did not discount the surety's claim.

[52] ***In re Froment*** was referred to and accepted as sound law in ***Cuchuran v. Dubitz*** [1945] 3 W.W.R. 541 (Alta. D.C.).

[53] ***Re Abacus Cities Ltd. (Trustee of)*** was referred to in ***Re Abacuas Cities Ltd. (Trustee of) v. Fidelity Trust Co.***, 63 Alta. L.R. (3d) 390 (Q.B.). It says, p. 392:

> I agree with an accept the obiter of Kerans J. in determining how to value these claims. The valuation in this case will be a two step process. First, pursuant to s. 121 the claim is to be fixed on the date of bankruptcy and , in this case, the measure will be the undischarged accumulated second mortgages at the date of bankruptcy. Secondly, the Court will take into consideration those

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> acts by the trustee which result in a decreased in the amounts owed to Fidelity which occur after the date of bankruptcy, and it will also take into consideration any acts by the claimant which would result in the mitigation of the claimant's own losses.
>
> (emphasis mine)

[54] ***Claude Resources Inc. (Trustee of) v. Dutton***, 22 C.B.R. (3d) 56, (Sask. Q.B.) says that if there are too many "ifs" to a contingent claim the claim is not a provable claim. It also says that if valuation is "speculative in the extreme" the claim is not provable under s. 121(2).

[55] ***Re Wiebe***, 30 C.B.R. (3d) 109 (Ont. S.C.) applies ***Claude Resources Inc. (Trustee of)*** and valued the contingent claim at 10% of its face value.

[56] ***Re Confederation Treasury Services Ltd.*** 43 C.B.R. (3d) 4 (Ont. C.A.) casts some doubt on ***Re Wiebe*** and ***Claude Resources Inc. (Trustee of)***. It says, pp. 6-7:

> We turn to the appeal itself. Section 121 of the BIA deems all 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 to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E&Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rebabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.
>
> In so far as the case of ***Claude Resources Inc. (Trustee of) v. Dutton*** (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.), and ***Re Wiebe*** (1995), 30 C.B.R. (3d) 109 (Ont. Bktcy.), relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the BIA.

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> Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the BIA, the matter is remitted to the Ontario Court (General Division) to value E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E& Y's claim shall be deemed a proved claim to the amount of its valuation.

[57] Counsel referred to only one decision, ***Ontario New Home Warranty Program v. Jiordan Homes Limited,*** 43 O.R.(3d) 756 (S.C.J.). The facts are these.

[58] The bankrupt was a shareholder of a house building company. He gave a guarantee to the plaintiff to indemnify it if it had to make good any obligations of the company under the new home warranty program. Some time later the bankrupt assigned himself into bankruptcy. The bankrupt was later discharged. A day later a claimant made a claim against the plaintiff and the plaintiff paid the claim. It then sued the bankrupt on the guarantee.

[59] The Court says: p. 758:

> The plaintiff is claiming the $8,000 from the defendant under his personal guarantee.
>
> There are two issues: first, did the bankruptcy terminate the guarantee? Second, if not, is the claim barred because of the defendant's bankruptcy?
>
> Counsel advise me there are no cases on point.
>
> (emphasis mine)

[60] This is the Court's analysis and decision, pp. 758-59:

> Section 69 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, states that a creditor has no remedy against an insolvent for a claim provable in bankruptcy.
>
> Section 121(1) states:
>
> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

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Subsection (2) provides that the court shall on application by the trustee determine whether any contingent claim is a provable claim. No such application was made.

It appears to me that when the defendant went bankrupt, the claim by the plaintiff against the defendant was a future liability to which the defendant might theoretically become subject before his discharge by reason of an obligation incurred before the date of the bankruptcy. The obligation was the indemnity agreement.

The theoretical risk was this: before the defendant's discharge, Jiordan had failed to close the sale, and if it did not repay the deposits, Ramos might claim the amount from the plaintiff, and the plaintiff might pay and claim the amount from the defendant. However, s. 121(1) makes the claim a provable claim only if the defendant "is subject" to a liability before his discharge; that is, it is a provable claim only if the defendant actually becomes liable before his discharge. While the section includes liabilities which may become due at a future time after discharge, it appears to me that it does not include liabilities which do not arise until after discharge.

Here, the defendant did not become subject to a liability until the plaintiff made the payment for which it claims indemnity and that payment was made after discharge.

Consequently, I conclude that the claim in this action was not a provable claim in the defendant's bankruptcy and this action is not barred by s. 69 of the *Bankruptcy and Insolvency Act*, as amended.

Did the Bankruptcy Terminate the Guarantee?

There appears to be no provision in the Act which governs this issue.

It may seem anomalous that where a person's wealth is erased by bankruptcy, and that wealth is the reason why he was asked for and gave a guarantee, that he should continue to be liable on the guarantee after bankruptcy for claims which were not provable in bankruptcy and therefore not erased by it. However, I can see no indication in the Act that the guarantee should somehow evaporate in the bankruptcy. If the bankrupt were a party to other kinds of contracts which imposes obligation on him then these would not evaporate because of the bankruptcy.

I conclude that the guarantee here survives the bankruptcy and that the Act does not bar this action.

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[61] First, on the facts, those are not the facts before me. The Director made the demand on the Plaintiff while the Defendant was in bankruptcy and the Plaintiff paid the Director $25,000 while the Defendant was still in bankruptcy.

[62] Second, I question the statement that the bankrupt is not "subject to a liability" until and unless the plaintiff paid a claim. That overlooks the fact that the bankrupt's liability is a contingent liability and s. 121 recognizes contingent liabilities.

[63] Third, the statement that counsel did not provide any "cases on point" invites the comments of McCardie J. in ***Abrahams v. Buckley***. [1924] 1 K.B. 903, p. 907:

> Half the bulk and much of the confusion of English case law springs from the fact that many decisions are given without adequate reference to the particular authorities which bear on the point at issue. If those authorities are before the Court then a decision, be it right or wrong, is, at all events, given with knowledge of the appropriate cases. If not before the Court, then obscurity and inconsistency take a new birth.

It is counsel's responsibility to research the law.

[64] Each party applies for summary judgment.

[65] On a summary judgment application the test is whether there is a genuine issue of material fact requiring a trial: ***Guarantee Co. of North America v. Gordon Capital Corp.***, (2000) 247 N.R. 97 (S.C.C.), para. 27; ***Kruetner v. Waterloo Oxford Co-operative Inc.***, 50 O.R. (3d) 140 (C.A.); ***Blackburn v. Lapkin***, 28 O.R. (3d) 292 (Ont. C.J.). That also applies when there is a genuine issue of law.

[66] Where a defendant applies for summary judgment the test is set out in ***Huet v. Lynch***, 184 D.L.R. (4th) 658 (Alta. C.A.), para. 20:

> The standard of proof applicable to a defendant under Rule 159 is high. It is not enough that the defendant shows a strong likelihood of success. There must be no reasonable prospect of success.

See ***Ghermezian v. Corey Developments Inc.***, Q.B. 9903 22832 and 0003 09356, Oct. 29, 2001 (Q.B.) for a more comprehensive analysis of the law on summary judgment applications.

[67] Each party adopts a position which ignores all the case law I have referred to except the one case cited by counsel, ***Ontario Home Warranty Program***. That case has no precedential value.

[68] Where a surety (regardless of the form that the suretyship take) goes bankrupt before the protected party claims on the suretyship contract the case law does treat the bankrupt's

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liability on the suretyship contract as a contingent liability. Section 121 BIA does give recognition to contingent liabilities. The issues then are whether that contingent liability can be valued and if so what value should be given to that liability.

[69] ***In Re Froment*** did not "discount" the surety's liability. That is, the contingent liability was valued for its full face value. I do not read the case as saying that as a matter of law a surety's contingent liability must be valued at its full face value. That would be contrary to s. 121(2), which requires a valuation. The full face valuation in ***In Re Froment*** is just a decision on the facts on what value should be given to the surety's contingent liability.

Decision

[70] I consider the present applications can be properly disposed of based on ***Abacus Cities Ltd. (Trustee of)*** and ***Re Confederation Treasury Services Ltd.***

[71] First, I conclude that the Defendant's liability is a contingent claim within s. 121 BIA.

[72] Second, I conclude that the only issue is the value of the liability. If the liability can be valued the amount of the value is caught by the order of discharge and the Defendant is released from liability to the extent of the valuation: s. 178(2) BIA. If the liability is valued at less than $25,000 the Defendant is not released from liability for the difference. If the liability cannot be valued the Defendant is not released from any liability based on the guarantee.

[73] I follow the thrust of ***Re Confederation Treasury Services Ltd.*** and direct that this lawsuit go to trial solely to determine amount: Rule 159(5).

[74] Costs of both applications will be in the cause.

HEARD on the 26th day of October, 2001.

DATED at Edmonton, Alberta this 9th day of January, 2002.

M. FUNDUK
M.C. C.Q.B.A.

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TAB 18

BCE Inc. and Bell Canada *Appellants/Respondents on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc.

A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

BCE Inc. et Bell Canada *Appelantes/Intimées aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

2008 SCC 69 (CanLII)

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

- and -

6796508 Canada Inc. *Appellant/Respondent on cross-appeals*

v.

A Group of 1976 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada, CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Manitoba Civil Service Superannuation Board, TD Asset Management Inc. and Manulife Financial Corporation

A Group of 1996 Debentureholders composed of: Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Insurance (Canada) Limited, CIBC Global Asset Management Inc., Manitoba Civil Service Superannuation Board and TD Asset Management Inc.

A Group of 1997 Debentureholders composed of: Addenda Capital Management Inc., Manulife Financial Corporation, Phillips, Hager & North Investment Management Ltd., Sun Life Assurance Company of Canada,

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

- et -

6796508 Canada Inc. *Appelante/Intimée aux pourvois incidents*

c.

Un groupe de détenteurs de débentures de 1976 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life du Canada, compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Régie de retraite de la fonction publique du Manitoba, Gestion de Placements TD inc. et Société Financière Manuvie

Un groupe de détenteurs de débentures de 1996 composé de : Aegon Capital Management Inc., Addenda Capital Inc., Phillips, Hager & North Investment Management Ltd., Sun Life Assurances (Canada) Limitée, Gestion globale d'actifs CIBC inc., Régie de retraite de la fonction publique du Manitoba et Gestion de Placements TD inc.

Un groupe de détenteurs de débentures de 1997 composé de : Addenda Capital Management Inc., Société Financière Manuvie, Phillips, Hager & North Investment Management Ltd., Sun Life du Canada,

2008 SCC 69 (CanLII)

CIBC Global Asset Management Inc., Her Majesty the Queen in Right of Alberta, as represented by the Minister of Finance, Wawanesa Life Insurance Company, TD Asset Management Inc., Franklin Templeton Investments Corp. and Barclays Global Investors Canada Limited *Respondents/Appellants on cross-appeals*

and

Computershare Trust Company of Canada and CIBC Mellon Trust Company *Respondents*

and

Director Appointed Pursuant to the *CBCA*, Catalyst Asset Management Inc. and Matthew Stewart *Interveners*

INDEXED AS: BCE INC. *v.* 1976 DEBENTUREHOLDERS

Neutral citation: 2008 SCC 69.

File No.: 32647.

2008: June 17; 2008: June 20.

Reasons delivered: December 19, 2008.

Present: McLachlin C.J. and Bastarache,* Binnie, LeBel, Deschamps, Abella and Charron JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Fiduciary duty of directors of corporation to act in accordance with best interests of corporation — Reasonable expectation of security holders of fair treatment — Directors approving change of control transaction which would affect economic interests of security holders — Whether evidence supported reasonable expectations

* Bastarache J. joined in the judgment of June 20, 2008, but took no part in these reasons for judgment.

compagnie d'assurance-vie, Gestion globale d'actifs CIBC inc., Sa Majesté la Reine du chef de l'Alberta, représentée par le ministre des Finances, Compagnie d'assurance-vie Wawanesa, Gestion de Placements TD inc., Société de Placements Franklin Templeton et Barclays Global Investors Canada Limited *Intimés/Appelants aux pourvois incidents*

et

Société de fiducie Computershare du Canada et Société de fiducie CIBC Mellon *Intimées*

et

Directeur nommé en vertu de la *LCSA*, Catalyst Asset Management Inc. et Matthew Stewart *Intervenants*

RÉPERTORIÉ : BCE INC. *c.* DÉTENTEURS DE DÉBENTURES DE 1976

Référence neutre : 2008 CSC 69.

N° du greffe : 32647.

2008 : 17 juin; 2008 : 20 juin.

Motifs déposés : 19 décembre 2008.

Présents : La juge en chef McLachlin et les juges Bastarache*, Binnie, LeBel, Deschamps, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Obligation fiduciaire des administrateurs envers la société d'agir au mieux des intérêts de la société — Attente raisonnable des détenteurs de valeurs mobilières d'être traités équitablement — Approbation par les administrateurs d'une opération de changement de contrôle qui porterait atteinte aux intérêts financiers de

* Le juge Bastarache a pris part au jugement du 20 juin 2008, mais n'a pas pris part aux présents motifs de jugement.

2008 SCC 69 (CanLII)

asserted by security holders — Whether reasonable expectation was violated by conduct found to be oppressive, unfairly prejudicial or that unfairly disregards a relevant interest — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 122(1)(a), 241.

Commercial law — Corporations — Plan of arrangement — Proposed plan of arrangement not arranging rights of security holders but affecting their economic interests — Whether plan of arrangement was fair and reasonable — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192.

At issue is a plan of arrangement that contemplates the purchase of the shares of BCE Inc. ("BCE") by a consortium of purchasers (the "Purchaser") by way of a leveraged buyout. After BCE was put "in play", an auction process was held and offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada, a wholly owned subsidiary of BCE, would be liable. BCE's board of directors found that the Purchaser's offer was in the best interests of BCE and BCE's shareholders. Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser represents a premium of approximately 40 percent over the market price of BCE shares at the relevant time. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

The plan of arrangement was approved by 97.93 percent of BCE's shareholders, but was opposed by a group of financial and other institutions that hold debentures issued by Bell Canada. These debentureholders sought relief under the oppression remedy under s. 241 of the *Canada Business Corporations Act* ("*CBCA*"). They also alleged that the arrangement was not "fair and reasonable" and opposed court approval of the arrangement under s. 192 of the *CBCA*. The crux of their complaints is that, upon the completion of the arrangement, the short-term trading value of the debentures would decline by an average of 20 percent and could lose investment grade status.

détenteurs de valeurs mobilières — Les attentes raisonnables invoquées par les détenteurs de valeurs mobilières étaient-elles étayées par la preuve? — Une attente raisonnable a-t-elle été frustrée par un comportement constituant un abus, un préjudice injuste ou une omission injuste de tenir compte d'un intérêt pertinent? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 122(1)a), 241.

Droit commercial — Sociétés par actions — Plan d'arrangement — Plan d'arrangement proposé ne visant pas les droits de détenteurs de valeurs mobilières, mais portant atteinte à leurs intérêts financiers — Le plan d'arrangement était-il équitable et raisonnable? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, ch. C-44, art. 192.

Le litige porte sur un plan d'arrangement concernant l'achat des actions de BCE Inc. (« BCE ») par un consortium (l'« acquéreur ») au moyen d'une acquisition par emprunt. BCE ayant été « mise en jeu », un processus d'enchères a été lancé et trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada, une filiale en propriété exclusive de BCE. Le conseil d'administration de BCE a conclu que l'offre d'achat de l'acquéreur servait les intérêts de BCE et des actionnaires de BCE. Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE. Le prix offert par l'acquéreur représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions de BCE à la date pertinente. Le capital requis pour l'opération s'élève au total à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. L'acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

Les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100, mais des détenteurs de débentures de Bell Canada, notamment des institutions financières, s'y sont opposés. Ces détenteurs de débentures ont intenté un recours pour abus prévu à l'art. 241 de la *Loi canadienne sur les sociétés par actions* (« *LCSA* »). Ils ont aussi allégué que l'arrangement n'était pas « équitable et raisonnable » et contesté l'approbation de l'arrangement exigée par l'art. 192 *LCSA*. Leur principal argument est que, une fois la transaction achevée, la valeur marchande à court terme de leurs débentures fléchirait de 20 p. 100 en moyenne, et leurs débentures ne seraient plus cotées comme admissibles pour des placements.

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The Quebec Superior Court approved the arrangement as fair and dismissed the claim for oppression. The Court of Appeal set aside that decision, finding the arrangement had not been shown to be fair and held that it should not have been approved. It held that the directors had not only the duty to ensure that the debentureholders' contractual rights would be respected, but also to consider their reasonable expectations which, in its view, required directors to consider whether the adverse impact on debentureholders' economic interests could be alleviated. Since the requirements of s. 192 of the *CBCA* were not met, the court found it unnecessary to consider the oppression claim. BCE and Bell Canada appealed the overturning of the trial judge's approval of the plan of arrangement, and the debentureholders cross-appealed the dismissal of the claims for oppression.

Held: The appeals should be allowed and the cross-appeals dismissed.

The s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. The Court of Appeal's decision rested on an approach that erroneously combined the substance of the s. 241 oppression remedy with the onus of the s. 192 arrangement approval process, resulting in a conclusion that could not have been sustained under either provision, read on its own terms. [47] [165]

1. *The Section 241 Oppression Remedy*

The oppression remedy focuses on harm to the legal and equitable interests of a wide range of stakeholders affected by oppressive acts of a corporation or its directors. This remedy gives a court a broad jurisdiction to enforce not just what is legal but what is fair. Oppression is also fact specific: what is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. [45] [58-59]

In assessing a claim of oppression, a court must answer two questions: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard"

La Cour supérieure du Québec a approuvé l'arrangement, le jugeant équitable, et elle a rejeté la demande de redressement pour abus. La Cour d'appel a annulé cette décision, jugeant que le caractère équitable de l'arrangement n'avait pas été démontré et qu'il n'aurait pas dû être approuvé. Elle a statué que les administrateurs avaient l'obligation non seulement de s'assurer du respect des droits contractuels des détenteurs de débentures, mais aussi de tenir compte de leurs attentes raisonnables, ce qui, selon elle, les obligeait à examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Les conditions fixées par l'art. 192 n'étant pas remplies, la cour a jugé inutile d'examiner la demande de redressement pour abus. BCE et Bell Canada ont interjeté appel de l'annulation de l'approbation du plan d'arrangement par le juge de première instance, et les détenteurs de débentures ont formé un appel incident contre le rejet des demandes de redressement pour abus.

Arrêt : Les pourvois sont accueillis et les pourvois incidents sont rejetés.

La demande de redressement pour abus prévue à l'art. 241 et l'approbation judiciaire d'une modification de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. La décision de la Cour d'appel s'appuie sur un raisonnement qui combine à tort les éléments substantiels de la demande de redressement pour abus de l'art. 241 et le fardeau de la preuve applicable à l'approbation d'un arrangement exigée par l'art. 192, ce qui l'a menée à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier. [47] [165]

1. *La demande de redressement pour abus prévue à l'art. 241*

La demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity d'un vaste éventail de parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours confère au tribunal un vaste pouvoir d'imposer le respect non seulement du droit, mais de l'équité. Le sort d'une demande de redressement pour abus dépend en outre des faits : ce qui est juste et équitable est fonction des attentes raisonnables des parties intéressées compte tenu du contexte et des rapports entre les parties. [45] [58-59]

Le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste

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of a relevant interest? For the first question, useful factors from the case law in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders. For the second question, a claimant must show that the failure to meet the reasonable expectation involved unfair conduct and prejudicial consequences under s. 241. [68] [72] [89] [95]

Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen. Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one. [81-83]

Here, the debentureholders did not establish that they had a reasonable expectation that the directors of BCE would protect their economic interests by putting forth a plan of arrangement that would maintain the investment grade trading value of their debentures. The trial judge concluded that this expectation was not made out on the evidence, given the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, the fact that the claimants could have protected themselves against reductions in market value by negotiating appropriate contractual terms, and that any statements by Bell Canada suggesting a commitment to retain investment grade ratings for the debentures were accompanied by warnings precluding such expectations. The trial judge recognized that the content of the directors' fiduciary duty to act in the best interests of the corporation was affected by the various interests at stake in the context of the auction process, and that they might have to approve transactions that were in the best interests of the corporation

de tenir compte » d'un intérêt pertinent? En ce qui a trait à la première question, les facteurs utiles d'appréciation d'une attente raisonnable qui ressortent de la jurisprudence incluent : les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées. En ce qui concerne la deuxième question, le plaignant doit prouver que le défaut de répondre à son attente raisonnable est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241. [68] [72] [89] [95]

Lorsque surgit un conflit d'intérêts, les administrateurs doivent le résoudre conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société. Dans son ensemble, la jurisprudence en matière d'abus confirme que cette obligation inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues ni de principe voulant que les intérêts d'un groupe doivent prévaloir sur ceux d'un autre groupe. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable. Lorsqu'il est impossible de satisfaire toutes les parties intéressées, il importe peu que les administrateurs aient écarté d'autres transactions qui n'étaient pas plus avantageuses que celle qui a été choisie. [81-83]

En l'espèce, les détenteurs de débentures n'ont pas démontré qu'ils s'attendaient raisonnablement à ce que les administrateurs de BCE protègent leurs intérêts financiers en proposant un plan d'arrangement qui maintiendrait la valeur marchande de leurs débentures cotées comme admissibles pour des placements. Le juge de première instance a conclu que la preuve de cette attente n'avait pas été établie compte tenu du contexte global de la relation, de la nature de la société, de sa situation en tant que cible de plusieurs offres d'achat, du fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées et que les déclarations de Bell Canada concernant son engagement à conserver aux débentures une cote de placements admissibles s'accompagnaient de mises en garde excluant pareilles attentes. Le juge de première instance a reconnu que le contenu de l'obligation fiduciaire des administrateurs d'agir au mieux des intérêts de la société dépendait des divers intérêts en jeu dans le contexte du processus

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but which benefited some groups at the expense of others. All three competing bids required Bell Canada to assume additional debt. Under the business judgment rule, deference should be accorded to the business decisions of directors acting in good faith in performing the functions they were elected to perform. In this case, there was no error in the principles applied by the trial judge nor in his findings of fact. [96-100]

The debentureholders had also argued that they had a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures. While the evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration, it is apparent that the directors considered the interests of debentureholders, and concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests and did not amount to "unfair disregard" of the interests of debentureholders. What the claimants contend is, in reality, an expectation that the directors would take positive steps to restructure the purchase in a way that would provide a satisfactory price to shareholders and preserve the high market value of the debentures. There was no evidence that it was reasonable to suppose this could be achieved, since all three bids involved a substantial increase in Bell Canada's debt. Commercial practice and reality also undermine their claim. Leveraged buyouts are not unusual or unforeseeable, and the debentureholders could have negotiated protections in their contracts. Given the nature and the corporate history of Bell Canada, it should not have been outside the contemplation of debentureholders that plans of arrangements could occur in the future. While the debentureholders rely on the past practice of maintaining the investment grade rating of the debentures, the events precipitating the leveraged buyout transaction were market realities affecting what were reasonable practices. No representations had been made to debentureholders upon which they could reasonably rely. [96] [102] [104-106] [108-110]

d'enchères et qu'ils pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada. La règle de l'appréciation commerciale commande la retenue à l'égard des décisions commerciales prises de bonne foi par les administrateurs dans l'exécution des fonctions pour lesquelles ils ont été élus. En l'espèce, le juge de première instance n'a pas commis d'erreur dans son application des principes ni dans ses conclusions de fait. [96-100]

Les détenteurs de débentures avaient aussi fait valoir qu'ils s'attendaient raisonnablement à ce que les administrateurs tiennent compte de leurs intérêts financiers en préservant la valeur marchande des débentures. La preuve, considérée objectivement, permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures dans leurs décisions sur les diverses offres à l'étude, mais ils ont manifestement pris en considération les intérêts des détenteurs de débentures et conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures et ne constituait pas une « omission injuste de tenir compte » de leurs intérêts. Ce que les plaignants font valoir en réalité, c'est qu'ils comptaient que les administrateurs adoptent des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint, puisque les trois offres comportaient toutes un accroissement substantiel de l'endettement de Bell Canada. Le réalité et les pratiques commerciales affaiblissent aussi leur prétention. Les acquisitions par emprunt n'ont rien d'inhabituel ou d'imprévisible, et les détenteurs de débentures auraient pu négocier des mesures de protection contractuelles. Compte tenu de la nature et de l'historique de Bell Canada, les détenteurs de débentures devaient savoir que des arrangements pouvaient être conclus dans l'avenir. Bien que les détenteurs de débentures invoquent les pratiques antérieures selon lesquelles la cote des débentures comme admissibles pour des placements avait toujours été maintenue, les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie des conditions du marché au gré desquelles les pratiques raisonnables peuvent changer. Aucune déclaration à laquelle les détenteurs de débentures auraient pu raisonnablement se fier ne leur avait été faite. [96] [102] [104-106] [108-110]

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With respect to the duty on directors to resolve the conflicting interests of stakeholders in a fair manner that reflected the best interests of the corporation, the corporation's best interests arguably favoured acceptance of the offer at the time. The trial judge accepted the evidence that Bell Canada needed to undertake significant changes to be successful, and the momentum of the market made a buyout inevitable. Considering all the relevant factors, the debentureholders failed to establish a reasonable expectation that could give rise to a claim for oppression. [111-113]

2. *The Section 192 Approval Process*

The s. 192 approval process is generally applicable to change of control transactions where the arrangement is sponsored by the directors of the target company and the goal is to require some or all shareholders to surrender their shares. The approval process focuses on whether the arrangement, viewed objectively, is fair and reasonable. Its purpose is to permit major changes in corporate structure to be made while ensuring that individuals whose rights may be affected are treated fairly, and its spirit is to achieve a fair balance between conflicting interests. In seeking court approval of an arrangement, the onus is on the corporation to establish that (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is "fair and reasonable". [119] [126] [128] [137]

To approve a plan of arrangement as fair and reasonable, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups. Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan. Courts must focus on the terms and impact of the arrangement itself, rather than the process by which it was reached, and must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. Courts on a

En ce qui a trait à l'obligation des administrateurs de résoudre les conflits entre parties intéressées de façon équitable conformément aux intérêts de la société, il est possible de soutenir que les intérêts de la société favorisaient à l'époque l'acceptation de l'offre. Le juge de première instance a retenu la preuve tendant à démontrer que Bell Canada devait procéder à des changements substantiels pour continuer à prospérer et la dynamique du marché rendait l'acquisition inévitable. Compte tenu de tous les facteurs pertinents, les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. [111-113]

2. *Le processus d'approbation prévu à l'art. 192*

Le processus d'approbation prévu à l'art. 192 s'applique en général aux changements de contrôle lorsque l'arrangement est appuyé par les administrateurs de la société ciblée et vise la remise d'une partie ou de la totalité des actions. Le processus d'approbation est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif. Il a pour but de permettre la réalisation de changements importants dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés, et l'esprit du processus consiste à établir un juste équilibre entre des intérêts opposés. La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est « équitable et raisonnable ». [119] [126] [128] [137]

Pour approuver un plan d'arrangement, parce qu'il le juge équitable et raisonnable, un tribunal doit être convaincu que l'arrangement a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. Pour décider si un arrangement répond à ces critères, on tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société, l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés. En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan. Le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir, et être convaincu que l'intérêt de la société justifie le fardeau imposé par

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s. 192 application should refrain from substituting their views of the "best" arrangement, but should not surrender their duty to scrutinize the arrangement. [136] [138] [145] [151] [154-155]

The purpose of s. 192 suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. It is the fact that the corporation is permitted to alter individual rights that places the matter beyond the power of the directors and creates the need for shareholder and court approval. However, in some circumstances, interests that are not strictly legal could be considered. The fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities generally does not, without more, constitute a circumstance where non-legal interests should be considered on a s. 192 application. [133-135]

Here, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192, and the trial judge was correct in concluding that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests, and he did not err in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The arrangement did not fundamentally alter the debentureholders' rights, as the investment and return they contracted for remained intact. It was well known that alteration in debt load could cause fluctuations in the trading value of the debentures, and yet the debentureholders had not contracted against this contingency. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada. No superior arrangement had been put forward and BCE had been assisted throughout by expert legal and financial advisors. Recognizing that there is no such thing as a perfect arrangement, the trial judge correctly concluded that the arrangement

l'arrangement aux détenteurs de valeurs mobilières. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception du « meilleur » arrangement, mais ne doivent pas renoncer pour autant à s'acquitter de leur obligation d'examiner l'arrangement. [136] [138] [145] [151] [154-155]

L'objet de l'art. 192 laisse croire qu'il ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. C'est le fait que la société puisse modifier les droits des parties qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Toutefois, dans certaines circonstances, des intérêts qui ne constituent pas des droits à strictement parler peuvent être pris en considération. Une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, une situation où de simples intérêts doivent être pris en compte pour l'examen d'une demande sous le régime de l'art. 192. [133-135]

En l'espèce, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat porte sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures ne constituaient pas une catégorie touchée pour l'application de cette disposition et le juge de première instance était fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures et il n'a pas commis d'erreur en concluant que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. L'arrangement ne modifiait pas fondamentalement les droits des détenteurs de débentures, l'investissement et le rendement prévus par leur contrat demeurant inchangés. Il était bien connu qu'une variation de l'endettement pouvait faire fluctuer la valeur marchande des débentures et les détenteurs de débentures ne se sont malgré tout pas prémunis contractuellement contre cette éventualité. Il était clair pour le juge que, pour la continuité de la société, l'approbation

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had been shown to be fair and reasonable. [157] [161] [163-164]

d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance. Reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu à bon droit que le caractère équitable et raisonnable de l'arrangement avait été démontré. [157] [161] [163-164]

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POURVOIS PRINCIPAUX et POURVOIS INCIDENTS contre des arrêts de la Cour d'appel du Québec (le juge en chef Robert et les juges Otis,

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R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] Q.J. No. 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] Q.J. No. 4170 (QL), 2008 QCCA 930; [2008] Q.J. No. 4171 (QL), 2008 QCCA 931; [2008] Q.J. No. 4172 (QL), 2008 QCCA 932; [2008] Q.J. No. 4174 (QL), 2008 QCCA 933; [2008] Q.J. No. 4175 (QL), 2008 QCCA 934, setting aside decisions by Silcoff J., [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] Q.J. No. 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] Q.J. No. 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] Q.J. No. 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] Q.J. No. 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] Q.J. No. 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Appeals allowed and cross-appeals dismissed.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* and *Steve Tenai*, for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* and *Christopher L. Richter*, for the appellant/respondent on cross-appeals 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* and *Mark Meland*, for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* and *Erin Cowling*, for the respondent/appellant on cross-appeals Group of 1997 Debentureholders.

Written submissions only by *Robert Tessier* and *Ronald Auclair*, for the respondent Computershare Trust Company of Canada.

Christian S. Tacit, for the intervener Catalyst Asset Management Inc.

Nuss, Pelletier et Dalphond), [2008] R.J.Q. 1298, 43 B.L.R. (4th) 157, [2008] J.Q. nº 4173 (QL), 2008 CarswellQue 4179, 2008 QCCA 935; [2008] J.Q. nº 4170 (QL), 2008 QCCA 930; [2008] J.Q. nº 4171 (QL), 2008 QCCA 931; [2008] J.Q. nº 4172 (QL), 2008 QCCA 932; [2008] J.Q. nº 4174 (QL), 2008 QCCA 933; [2008] J.Q. nº 4175 (QL), 2008 QCCA 934, qui ont infirmé des décisions du juge Silcoff, [2008] R.J.Q. 1029, 43 B.L.R. (4th) 39, [2008] J.Q. nº 4376 (QL), 2008 CarswellQue 1805, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, [2008] J.Q. nº 1728 (QL), 2008 CarswellQue 2226, 2008 QCCS 899; [2008] R.J.Q. 1097, 43 B.L.R. (4th) 1, [2008] J.Q. nº 1788 (QL), 2008 CarswellQue 2227, 2008 QCCS 905; (2008), 43 B.L.R. (4th) 135, [2008] J.Q. nº 1789 (QL), 2008 CarswellQue 2228, 2008 QCCS 906; [2008] R.J.Q. 1119, 43 B.L.R. (4th) 79, [2008] J.Q. nº 1790 (QL), 2008 CarswellQue 2229, 2008 QCCS 907. Pourvois principaux accueillis et pourvois incidents rejetés.

Guy Du Pont, *Kent E. Thomson*, *William Brock*, *James Doris*, *Louis-Martin O'Neill*, *Pierre Bienvenu* et *Steve Tenai*, pour les appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada.

Benjamin Zarnett, *Jessica Kimmel*, *James A. Woods* et *Christopher L. Richter*, pour l'appelante/intimée aux pourvois incidents 6796508 Canada Inc.

John Finnigan, *John Porter*, *Avram Fishman* et *Mark Meland*, pour les intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996.

Markus Koehnen, *Max Mendelsohn*, *Paul Macdonald*, *Julien Brazeau* et *Erin Cowling*, pour l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997.

Argumentation écrite seulement par *Robert Tessier* et *Ronald Auclair*, pour l'intimée la Société de fiducie Computershare du Canada.

Christian S. Tacit, pour l'intervenante Catalyst Asset Management Inc.

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Raynold Langlois, *Q.C.*, and *Gerald Apostolatos*, for the intervener Matthew Stewart.

The following is the judgment delivered by

THE COURT —

I. Introduction

[1] These appeals arise out of an offer to purchase all shares of BCE Inc. ("BCE"), a large telecommunications corporation, by a group headed by the Ontario Teachers Pension Plan Board ("Teachers"), financed in part by the assumption by Bell Canada, a wholly owned subsidiary of BCE, of a $30 billion debt. The leveraged buyout was opposed by debentureholders of Bell Canada on the ground that the increased debt contemplated by the purchase agreement would reduce the value of their bonds. Upon request for court approval of an arrangement under s. 192 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the debentureholders argued that it should not be found to be fair. They also opposed the arrangement under s. 241 of the *CBCA* on the ground that it was oppressive to them.

[2] The Quebec Superior Court, *per* Silcoff J., approved the arrangement as fair under the *CBCA* and dismissed the claims for oppression. The Quebec Court of Appeal found that the arrangement had not been shown to be fair and held that it should not have been approved. Thus, it found it unnecessary to consider the oppression claim.

[3] On June 20, 2008, this Court allowed the appeals from the Court of Appeal's disapproval of the arrangement and dismissed two cross-appeals from the dismissal of the claims for oppression, with reasons to follow. These are those reasons.

Raynold Langlois, *c.r.*, et *Gerald Apostolatos*, pour l'intervenant Matthew Stewart.

Version française du jugement rendu par

LA COUR —

I. Introduction

[1] Les pourvois ont pour origine une offre d'acquisition visant la totalité des actions d'une grande société de télécommunications, BCE Inc. (« BCE »), offre émanant d'un groupe mené par le Conseil du régime de retraite des enseignantes et des enseignants de l'Ontario (« RREO ») et financée en partie par la prise en charge d'une dette de 30 milliards de dollars par Bell Canada, filiale en propriété exclusive de BCE. Les détenteurs de débentures de Bell Canada se sont opposés à l'acquisition par emprunt, soutenant que l'augmentation de la dette prévue par la convention d'acquisition réduirait la valeur de leurs obligations. Lors de l'examen de la demande d'approbation d'un arrangement exigée par l'art. 192 de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, ch. C-44 (« *LCSA* »), ils ont fait valoir que l'arrangement ne devait pas être jugé équitable. Ils ont également plaidé qu'il constituait un abus de leurs droits au sens de l'art. 241 de la *LCSA*.

[2] Le juge Silcoff de la Cour supérieure du Québec a conclu au caractère équitable de l'arrangement, l'a approuvé et a rejeté les demandes de redressement pour abus. La Cour d'appel du Québec a jugé que le caractère équitable de l'arrangement n'avait pas été démontré et que l'arrangement n'aurait pas dû être approuvé. Elle n'a donc pas jugé utile d'examiner la demande de redressement pour abus.

[3] Le 20 juin 2008, notre Cour a accueilli les pourvois interjetés contre le refus de la Cour d'appel d'approuver l'arrangement et elle a rejeté deux pourvois incidents formés à l'encontre du rejet des demandes de redressement pour abus, avec motifs à suivre. Voici maintenant ces motifs.

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II. Facts

[4] At issue is a plan of arrangement valued at approximately $52 billion, for the purchase of the shares of BCE by way of a leveraged buyout. The arrangement was opposed by a group, comprised mainly of financial institutions, that hold debentures issued by Bell Canada. The crux of their complaints is that the arrangement would diminish the trading value of their debentures by an average of 20 percent, while conferring a premium of approximately 40 percent on the market price of BCE shares.

[5] Bell Canada was incorporated in 1880 by a special Act of the Parliament of Canada. The corporation was subsequently continued under the *CBCA*. BCE, a management holding company, was incorporated in 1970 and continued under the *CBCA* in 1979. Bell Canada became a wholly owned subsidiary of BCE in 1983 pursuant to a plan of arrangement under which Bell Canada's shareholders surrendered their shares in exchange for shares of BCE. BCE and Bell Canada are separate legal entities with separate charters, articles and bylaws. Since January 2003, however, they have shared a common set of directors and some senior officers.

[6] At the time relevant to these proceedings, Bell Canada had $7.2 billion in outstanding long-term debt comprised of debentures issued pursuant to three trust indentures: the 1976, the 1996 and the 1997 trust indentures. The trust indentures contain neither change of control nor credit rating covenants, and specifically allow Bell Canada to incur or guarantee additional debt subject to certain limitations.

[7] Bell Canada's debentures were perceived by investors to be safe investments and, up to the time of the proposed leveraged buyout, had maintained an investment grade rating. The debentureholders are some of Canada's largest and most reputable financial institutions, pension funds and insurance

II. Les faits

[4] Le litige porte sur un plan d'arrangement d'une valeur approximative de 52 milliards de dollars concernant l'achat des actions de BCE au moyen d'une acquisition par emprunt. Un groupe de détenteurs de débentures, composé principalement d'institutions financières, s'est opposé à l'arrangement. Son principal argument est que l'arrangement ferait fléchir la valeur marchande de leurs débentures de 20 p. 100 en moyenne, tout en permettant aux actionnaires de toucher une prime d'environ 40 p. 100 par rapport au cours des actions de BCE.

[5] Bell Canada a été constituée en société en 1880 par une loi spéciale du Parlement du Canada. Elle a ensuite été prorogée en vertu de la *LCSA*. BCE est une société de portefeuille de gestion qui a été constituée en 1970, puis prorogée en vertu de la *LCSA* en 1979. Bell Canada est devenue une filiale en propriété exclusive de BCE en 1983, conformément à un plan d'arrangement en vertu duquel les actionnaires de Bell Canada ont reçu des actions de BCE en échange de leurs actions. BCE et Bell Canada sont des entités juridiques distinctes possédant chacune leurs propres chartes, statuts constitutifs et règlements administratifs. Depuis janvier 2003, elles ont les mêmes administrateurs et quelques hauts dirigeants en commun.

[6] À l'époque pertinente pour l'examen des pourvois, Bell Canada avait une dette à long terme de 7,2 milliards de dollars composée de débentures émises en vertu de trois actes de fiducie établis respectivement en 1976, 1996 et 1997. Ces actes ne comportent aucune disposition concernant le changement de contrôle ou la cote financière et ils autorisent expressément Bell Canada à contracter ou à garantir de nouvelles dettes sous réserve de certaines restrictions.

[7] Les débentures de Bell Canada étaient considérées comme des placements sûrs par les investisseurs et, jusqu'à la proposition d'acquisition par emprunt, elles étaient cotées admissibles pour des placements. Les détenteurs de débentures sont des institutions financières, des caisses de retraite et

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companies. They are major participants in the debt markets and possess an intimate and historic knowledge of the financial markets.

[8] A number of technological, regulatory and competitive changes have significantly altered the industry in which BCE operates. Traditionally highly regulated and focused on circuit-switch line telephone service, the telecommunication industry is now guided primarily by market forces and characterized by an ever-expanding group of market participants, substantial new competition and increasing expectations regarding customer service. In response to these changes, BCE developed a new business plan by which it would focus on its core business, telecommunications, and divest its interest in unrelated businesses. This new business plan, however, was not as successful as anticipated. As a result, the shareholder returns generated by BCE remained significantly less than the ones generated by its competitors.

[9] Meanwhile, by the end of 2006, BCE had large cash flows and strong financial indicators, characteristics perceived by market analysts to make it a suitable target for a buyout. In November 2006, BCE was made aware that Kohlberg Kravis Roberts & Co. ("KKR"), a United States private equity firm, might be interested in a transaction involving BCE. Mr. Michael Sabia, President and Chief Executive Officer of BCE, contacted KKR to inform them that BCE was not interested in pursuing such a transaction at that time.

[10] In February 2007, new rumours surfaced that KKR and the Canada Pension Plan Investment Board were arranging financing to initiate a bid for BCE. Shortly thereafter, additional rumours began to circulate that an investment banking firm was assisting Teachers with a potential transaction involving BCE. Mr. Sabia, after meeting with

des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada. Ce sont des participants d'envergure dans les marchés de la dette, qui ont une expérience approfondie et une connaissance historique des marchés financiers.

[8] Le secteur d'activité de BCE a connu des changements d'ordre technologique, réglementaire et concurrentiel qui en ont profondément modifié le cadre. Auparavant très réglementée et axée sur la téléphonie classique par ligne téléphonique, l'industrie des télécommunications obéit aujourd'hui principalement aux forces du marché et se caractérise par l'augmentation continue des participants, l'arrivée de nouveaux concurrents et des attentes croissantes en matière de services aux consommateurs. Pour s'ajuster à ces changements, BCE a établi un nouveau plan d'entreprise mettant l'accent sur son activité centrale, les télécommunications, et prévoyant l'abandon de sa participation dans des entreprises non liées à ce secteur. Ce plan, toutefois, n'a pas donné les résultats escomptés, de sorte que les gains des actionnaires de BCE sont demeurés beaucoup moindres que ceux des actionnaires de ses concurrents.

[9] En outre, à la fin de 2006, BCE disposait d'un important flux de trésorerie et ses indicateurs financiers étaient très positifs, caractéristiques qui en faisaient une cible toute désignée pour une acquisition aux yeux des analystes financiers. Au mois de novembre 2006, BCE a appris que Kohlberg Kravis Roberts & Co. (« KKR »), une société américaine gérant un fonds privé d'investissement, pouvait être intéressée par une transaction visant BCE. Monsieur Michael Sabia, président et chef de la direction de BCE, a pris contact avec KKR pour lui indiquer que BCE n'était alors pas intéressée par une telle transaction.

[10] Au mois de février 2007, la rumeur que KKR et l'Office d'investissement du régime de pensions du Canada préparaient le montage financier d'une offre d'achat de BCE a recommencé à courir. Peu après, d'autres rumeurs se sont propagées, selon lesquelles une société bancaire d'investissement assistait le RREO relativement à une éventuelle

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BCE's board of directors ("Board"), contacted the representatives of both KKR and Teachers to reiterate that BCE was not interested in pursuing a "going-private" transaction at the time because it was set on creating shareholder value through the execution of its 2007 business plan.

[11] On March 29, 2007, after an article appeared on the front page of the *Globe and Mail* that inaccurately described BCE as being in discussions with a consortium comprised of KKR and Teachers, BCE issued a press release confirming that there were no ongoing discussions being held with private equity investors with respect to a "going-private" transaction for BCE.

[12] On April 9, 2007, Teachers filed a report (Schedule 13D) with the United States Securities and Exchange Commission reflecting a change from a passive to an active holding of BCE shares. This filing heightened press speculation concerning a potential privatization of BCE.

[13] Faced with renewed speculation and BCE having been put "in play" by the filing by Teachers of the Schedule 13D report, the Board met with its legal and financial advisors to assess strategic alternatives. It decided that it would be in the best interests of BCE and its shareholders to have competing bidding groups and to guard against the risk of a single bidding group assembling such a significant portion of available debt and equity that the group could preclude potential competing bidding groups from participating effectively in an auction process.

[14] In a press release dated April 17, 2007, BCE announced that it was reviewing its strategic alternatives with a view to further enhancing shareholder value. On the same day, a Strategic Oversight Committee ("SOC") was created. None of its members had ever been part of management at BCE. Its

transaction visant BCE. Après avoir rencontré le conseil d'administration de BCE (« Conseil d'administration »), M. Sabia a communiqué avec les représentants de KKR et avec ceux du RREO et leur a réitéré que BCE n'était pas intéressée à une « opération de fermeture » parce que BCE avait pour objectif de créer une valeur actionnariale par la réalisation de son plan d'entreprise de 2007.

[11] Le 29 mars 2007, à la suite de la parution à la une du *Globe and Mail* d'un article faisant incorrectement état de discussions entre BCE et un consortium constitué de KKR et du RREO, BCE a publié un communiqué de presse dans lequel elle affirmait qu'aucune discussion n'était en cours avec des fonds privés d'investissement au sujet d'une « opération de fermeture » de BCE.

[12] Le 9 avril 2007, le RREO a déposé un formulaire 13D auprès de la Securities and Exchange Commission des États-Unis, dans lequel il indiquait que, de passive, sa participation comme actionnaire de BCE devenait active. Le dépôt de ce formulaire est venu renforcer l'hypothèse, véhiculée par les médias, de la transformation possible de BCE en société fermée.

[13] Devant la recrudescence des conjectures et la « mise en jeu » de BCE résultant du dépôt du formulaire 13D par le RREO, le Conseil d'administration a convoqué ses conseillers juridiques et financiers afin d'examiner différentes options stratégiques. Il en est venu à la conclusion qu'il était dans l'intérêt de BCE et de ses actionnaires de bénéficier de la concurrence entre plusieurs groupes soumissionnaires et de parer au risque qu'un groupe soumissionnaire mobilise à lui seul une telle part des prêts et des capitaux disponibles qu'il empêcherait les groupes concurrents potentiels de participer efficacement au processus d'enchères.

[14] Dans un communiqué de presse daté du 17 avril 2007, BCE a annoncé qu'elle examinait les options stratégiques qui s'offraient à elle en vue d'améliorer davantage la valeur actionnariale. Le même jour, elle a mis sur pied un comité de surveillance stratégique (« CSS »), dont aucun des

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mandate was, notably, to set up and supervise the auction process.

[15] Following the April 17 press release, several debentureholders sent letters to the Board voicing their concerns about a potential leveraged buyout transaction. They sought assurance that their interests would be considered by the Board. BCE replied in writing that it intended to honour the contractual terms of the trust indentures.

[16] On June 13, 2007, BCE provided the potential participants in the auction process with bidding rules and the general form of a definitive transaction agreement. The bidders were advised that, in evaluating the competitiveness of proposed bids, BCE would consider the impact that their proposed financing arrangements would have on BCE and on Bell Canada's debentureholders and, in particular, whether their bids respected the debentureholders' contractual rights under the trust indentures.

[17] Offers were submitted by three groups. All three offers contemplated the addition of a substantial amount of new debt for which Bell Canada would be liable. All would have likely resulted in a downgrade of the debentures below investment grade. The initial offer submitted by the appellant 6796508 Canada Inc. (the "Purchaser"), a corporation formed by Teachers and affiliates of Providence Equity Partners Inc. and Madison Dearborn Partners LLC, contemplated an amalgamation of Bell Canada that would have triggered the voting rights of the debentureholders under the trust indentures. The Board informed the Purchaser that such an amalgamation made its offer less competitive. The Purchaser submitted a revised offer with an alternative structure for the transaction that did not involve an amalgamation of Bell Canada. Also, the Purchaser's revised offer increased the initial price per share from $42.25 to $42.75.

membres n'avait déjà fait partie de la direction de BCE. Le mandat du CSS consistait notamment à mettre en marche et à surveiller le processus d'enchères.

[15] À la suite du communiqué de presse du 17 avril, plusieurs détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant la possibilité d'une acquisition par emprunt. Ils voulaient recevoir l'assurance que le Conseil d'administration tiendrait compte de leurs intérêts. BCE leur a répondu par écrit qu'elle avait l'intention de respecter les dispositions contractuelles des actes de fiducie.

[16] Le 13 juin 2007, BCE a communiqué aux soumissionnaires potentiels les règles de soumission des propositions ainsi qu'une ébauche générale d'entente définitive. Elle les a informés que, lorsqu'elle étudierait les offres, elle tiendrait compte de l'incidence du mécanisme de financement proposé sur BCE et sur les détenteurs de débentures de Bell Canada et, en particulier, du fait que leurs offres respectent ou non les droits contractuels que les actes de fiducie conféraient aux détenteurs de débentures.

[17] Trois groupes ont présenté des offres. Chaque offre prévoyait une hausse sensible du niveau d'endettement de Bell Canada. Les trois offres auraient probablement pour effet d'abaisser la cote des débentures au-dessous de celle requise pour qu'elles constituent un placement admissible. L'offre initiale présentée par l'appelante 6796508 Canada Inc. (l'« Acquéreur »), une société constituée par le RREO, et des membres du groupe de Providence Equity Partners Inc. et de Madison Dearborn Partners LLC, prévoyait une fusion de Bell Canada qui aurait déclenché l'exercice des droits de vote des détenteurs de débentures en vertu des actes de fiducie. Le Conseil d'administration a informé l'Acquéreur que ce projet de fusion rendait son offre moins attrayante. L'Acquéreur a donc présenté une nouvelle offre dans laquelle il proposait une structure différente pour la transaction qui n'impliquait pas de fusion de Bell Canada. De plus, il haussait à 42,75 $ le prix de 42,25 $ initialement offert pour chaque action.

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[18] The Board, after a review of the three offers and based on the recommendation of the SOC, found that the Purchaser's revised offer was in the best interests of BCE and BCE's shareholders. In evaluating the fairness of the consideration to be paid to the shareholders under the Purchaser's offer, the Board and the SOC received opinions from several reputable financial advisors. In the meantime, the Purchaser agreed to cooperate with the Board in obtaining a solvency certificate stating that BCE would still be solvent (and hence in a position to meet its obligations after completion of the transaction). The Board did not seek a fairness opinion in respect of the debentureholders, taking the view that their rights were not being arranged.

[19] On June 30, 2007, the Purchaser and BCE entered into a definitive agreement. On September 21, 2007, BCE's shareholders approved the arrangement by a majority of 97.93 percent.

[20] Essentially, the arrangement provides for the compulsory acquisition of all of BCE's outstanding shares. The price to be paid by the Purchaser is $42.75 per common share, which represents a premium of approximately 40 percent to the closing price of the shares as of March 28, 2007. The total capital required for the transaction is approximately $52 billion, $38.5 billion of which will be supported by BCE. Bell Canada will guarantee approximately $30 billion of BCE's debt. The Purchaser will invest nearly $8 billion of new equity capital in BCE.

[21] As a result of the announcement of the arrangement, the credit ratings of the debentures by the time of trial had been downgraded from investment grade to below investment grade. From the perspective of the debentureholders, this downgrade was problematic for two reasons. First, it caused the debentures to decrease in value by an average of approximately 20 percent. Second, the downgrade could oblige debentureholders with credit-rating restrictions on their holdings to sell their debentures at a loss.

[18] Après avoir étudié les trois offres, le Conseil d'administration a conclu, suivant la recommandation du CSS, que l'offre révisée de l'Acquéreur servait les intérêts de BCE et des actionnaires de BCE. Pour évaluer le caractère équitable de la contrepartie qui serait versée aux actionnaires selon cette offre, le Conseil d'administration et le CSS ont sollicité l'avis de plusieurs conseillers financiers réputés. Par ailleurs, l'Acquéreur a accepté de prêter son concours au Conseil d'administration pour l'obtention d'un certificat de solvabilité attestant que BCE demeurerait solvable (et serait donc en mesure de respecter ses obligations une fois la transaction achevée). Le Conseil d'administration n'a pas sollicité l'avis d'experts sur le caractère équitable de la transaction pour les détenteurs de débentures, estimant que l'arrangement ne visait pas leurs droits.

[19] Le 30 juin 2007, l'Acquéreur et BCE ont conclu une entente définitive. Le 21 septembre suivant, les actionnaires de BCE ont approuvé l'entente dans une proportion de 97,93 p. 100.

[20] Essentiellement, l'entente prévoit l'acquisition forcée de toutes les actions en circulation de BCE au prix de 42,75 $ l'action ordinaire, ce qui représente une prime d'environ 40 p. 100 par rapport au cours de clôture des actions en date du 28 mars 2007. Le capital requis pour la transaction s'élève à environ 52 milliards de dollars, dont 38,5 milliards de dollars sont à la charge de BCE. Bell Canada fournira une garantie d'emprunt d'environ 30 milliards de dollars pour la dette de BCE. Enfin, l'Acquéreur investira près de 8 milliards de dollars de nouveaux capitaux propres dans BCE.

[21] L'annonce de cette entente a entraîné une baisse de la cote de crédit des débentures de sorte que, lors du procès, elles n'étaient plus considérées comme des placements admissibles. Du point de vue des détenteurs de débentures, cette décote pose problème à deux égards. Premièrement, elle a entraîné une diminution de la valeur des débentures de l'ordre d'environ 20 p. 100 en moyenne. Deuxièmement, elle risque d'obliger les détenteurs de débentures qui sont assujettis à des restrictions concernant la cote de crédit des titres qu'ils détiennent à vendre leurs débentures à perte.

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[22] The debentureholders at trial opposed the arrangement on a number of grounds. First, the debentureholders sought relief under the oppression provision in s. 241 of the *CBCA*. Second, they opposed court approval of the arrangement, as required by s. 192 of the *CBCA*, alleging that the arrangement was not "fair and reasonable" because of the adverse effect on their economic interests. Finally, the debentureholders brought motions for declaratory relief under the terms of the trust indentures, which are not before us: (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

III. Judicial History

[23] The trial judge reviewed the s. 241 oppression claim as lying against both BCE and Bell Canada, since s. 241 refers to actions by the "corporation or any of its affiliates". He dismissed the claims for oppression on the grounds that the debt guarantee to be assumed by Bell Canada had a valid business purpose; that the transaction did not breach the reasonable expectations of the debentureholders; that the transaction was not oppressive by reason of rendering the debentureholders vulnerable; and that BCE and its directors had not unfairly disregarded the interests of the debentureholders: (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[24] In arriving at these conclusions, the trial judge proceeded on the basis that the BCE directors had a fiduciary duty under s. 122 of the *CBCA* to act in the best interests of the corporation. He held that while the best interests of the corporation are not to be confused with the interests of the shareholders or other stakeholders, corporate law recognizes fundamental differences between shareholders and debt security holders. He held that these differences affect the content of the directors' fiduciary duty. As a result, the directors' duty to act in the best interests of the corporation might require them to approve transactions that, while in the interests

[22] En première instance, les détenteurs de débentures ont invoqué plusieurs motifs d'opposition à l'arrangement. Ils ont d'abord invoqué la disposition de la *LCSA* applicable en cas d'abus, l'art. 241. Ils ont ensuite contesté la demande d'approbation de l'arrangement exigée par l'art. 192 de la *LCSA* en alléguant que l'arrangement n'était pas « équitable et raisonnable » en raison de ses effets préjudiciables sur leurs intérêts financiers. Enfin, ils ont présenté des demandes de jugement déclaratoire fondées sur les actes de fiducie, sur lesquelles la Cour n'est pas appelée à se prononcer : (2008), 43 B.L.R. (4th) 39, 2008 QCCS 898; (2008), 43 B.L.R. (4th) 69, 2008 QCCS 899.

III. Historique judiciaire

[23] Le juge de première instance a examiné les demandes de redressement pour abus à la fois contre Bell Canada et contre BCE, puisque l'art. 241 vise la situation provoquée par « la société ou l'une des personnes morales de son groupe ». Il a rejeté ces recours parce que, selon lui, la garantie d'emprunt fournie par Bell Canada poursuivait un objectif commercial légitime, la transaction ne frustrait pas les attentes raisonnables des détenteurs de débentures, la prétention que la transaction constituait un abus parce qu'elle rendait les détenteurs de débentures vulnérables n'était pas fondée et celle selon laquelle BCE et ses administrateurs s'étaient montrés injustes en ne tenant pas compte des intérêts des détenteurs de débentures ne pouvait être retenue : (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907; (2008), 43 B.L.R. (4th) 135, 2008 QCCS 906.

[24] Pour parvenir à ces conclusions, le juge a considéré que l'art. 122 de la *LCSA* imposait aux administrateurs de BCE l'obligation fiduciaire d'agir au mieux des intérêts de la société. Selon lui, bien que les intérêts de la société ne doivent pas être confondus avec ceux des actionnaires ou d'autres parties intéressées, le droit des sociétés reconnaît l'existence de différences fondamentales entre les actionnaires et les détenteurs de titres de créance. À son avis, ces différences ont une incidence sur le contenu de l'obligation fiduciaire des administrateurs. Ainsi, leur devoir d'agir au mieux des intérêts de la société pourrait les obliger à

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of the corporation, might also benefit some or all shareholders at the expense of other stakeholders. He also noted that in accordance with the business judgment rule, Canadian courts tend to accord deference to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by shareholders.

[25] The trial judge held that the debentureholders' reasonable expectations must be assessed on an objective basis and, absent compelling reasons, must derive from the trust indentures and the relevant prospectuses issued in connection with the debt offerings. Statements by Bell Canada indicating a commitment to retaining investment grade ratings did not assist the debentureholders, since these statements were accompanied by warnings, repeated in the prospectuses pursuant to which the debentures were issued, that negated any expectation that this policy would be maintained indefinitely. The reasonableness of the alleged expectation was further negated by the fact that the debentureholders could have guarded against the business risks arising from a change of control by negotiating protective contract terms. The fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that the bidders were prepared to treat the debentureholders any differently. The materialization of certain risks as a result of decisions taken by the directors in accordance with their fiduciary duty to the corporation did not constitute oppression against the debentureholders or unfair disregard of their interests.

[26] Having dismissed the claim for oppression, the trial judge went on to consider BCE's application for approval of the transaction under s. 192 of the *CBCA*: (2008), 43 B.L.R. (4th) 1, 2008 QCCS

approuver des transactions qui, tout en servant les intérêts de la société, privilégient une partie ou la totalité des actionnaires au détriment d'autres parties intéressées. Le juge a aussi indiqué que, suivant la règle de l'appréciation commerciale, les tribunaux canadiens ont tendance à faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi et dans l'exécution des fonctions que les actionnaires leur ont confiées en les élisant.

[25] Le juge de première instance a statué que les attentes raisonnables des détenteurs de débentures doivent être évaluées objectivement et qu'elles doivent, à moins de motifs impérieux, découler des actes de fiducie et des prospectus d'émission des débentures. Les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles n'ont été d'aucun secours pour les détenteurs de débentures, car ces déclarations étaient accompagnées de mises en garde, réitérées dans les prospectus d'émission des débentures, qui excluaient toute attente quant au maintien indéfini de cette politique. En outre, le fait que les détenteurs de débentures auraient pu se protéger contractuellement contre les risques associés à un changement de contrôle en négociant des clauses de protection rendait leurs prétendues attentes déraisonnables. Le fait que la transaction serait profitable pour les actionnaires alors qu'elle désavantagerait les détenteurs de débentures ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que leurs auteurs étaient disposés à traiter les détenteurs de débentures différemment. Par conséquent, la réalisation de certains risques par suite des décisions prises par les administrateurs en conformité avec leur obligation fiduciaire envers la société ne constituait ni un abus des droits des détenteurs de débentures ni une omission injuste de tenir compte de leurs intérêts.

[26] Après avoir rejeté les demandes de redressement pour abus, le juge de première instance a examiné la demande d'approbation de la transaction exigée par l'art. 192 de la *LCSA* : (2008), 43 B.L.R.

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905. He dismissed the debentureholders' claim for voting rights on the arrangement on the ground that their legal interests were not compromised by the arrangement and that it would be unfair to allow them in effect to veto the shareholder vote. However, in determining whether the arrangement was fair and reasonable — the main issue on the application for approval — he considered the fairness of the transaction with respect to both the shareholders and the debentureholders, and concluded that the arrangement was fair and reasonable. He considered the necessity of the arrangement for Bell Canada's continued operations; that the Board, comprised almost entirely of independent directors, had determined the arrangement was fair and reasonable and in the best interests of BCE and the shareholders; that the arrangement had been approved by over 97 percent of the shareholders; that the arrangement was the culmination of a robust strategic review and auction process; the assistance the Board received throughout from leading legal and financial advisors; the absence of a superior proposal; and the fact that the proposal did not alter or arrange the debentureholders' legal rights. While the proposal stood to alter the debentureholders' economic interests, in the sense that the trading value of their securities would be reduced by the added debt load, their contractual rights remained intact. The trial judge noted that the debentureholders could have protected themselves against this eventuality through contract terms, but had not. Overall, he concluded that taking all relevant matters into account, the arrangement was fair and reasonable and should be approved.

(4th) 1, 2008 QCCS 905. Il a refusé aux détenteurs de débentures le droit de voter sur l'arrangement, estimant que celui-ci ne compromettait pas leurs droits et qu'il serait injuste de leur permettre en fait d'opposer leur veto au vote des actionnaires. Toutefois, pour déterminer si l'arrangement était équitable et raisonnable — la question déterminante pour l'octroi de l'approbation — le juge a examiné le caractère équitable de la transaction à l'égard à la fois des actionnaires et des détenteurs de débentures, et il a conclu que l'arrangement était équitable et raisonnable. Il a pris en compte la nécessité de l'arrangement pour la continuité des activités de Bell Canada; le fait que le Conseil d'administration — constitué presque entièrement d'administrateurs indépendants — avait déterminé que l'arrangement était équitable et raisonnable et qu'il servait au mieux les intérêts de BCE et des actionnaires; l'approbation de l'arrangement par plus de 97 p. 100 des actionnaires; le fait que l'arrangement était l'aboutissement d'un processus rigoureux d'analyse stratégique et d'enchères; l'aide de conseillers juridiques et financiers renommés reçue par le Conseil d'administration pendant tout le processus; l'absence d'offre supérieure; et le fait que l'offre ne modifiait ni ne visait les droits contractuels des détenteurs de débentures. Bien que l'offre modifie les intérêts financiers des détenteurs de débentures, au sens où l'accroissement de l'endettement ferait fléchir la valeur marchande de leurs titres, leurs droits contractuels demeuraient intacts. Le juge de première instance a souligné que les détenteurs de débentures auraient pu se protéger contractuellement contre ce risque, mais qu'ils ne l'avaient pas fait. Il a conclu dans l'ensemble que, compte tenu de tous les facteurs pertinents, l'arrangement était équitable et raisonnable et devait être approuvé.

[27] The Court of Appeal allowed the appeals on the ground that BCE had failed to meet its onus on the test for approval of an arrangement under s. 192, by failing to show that the transaction was fair and reasonable to the debentureholders. Basing its analysis on this Court's decision in *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, the Court of Appeal found that the directors were required to consider

[27] La Cour d'appel a accueilli les appels, jugeant que BCE n'avait pas démontré que la transaction était équitable et raisonnable pour les détenteurs de débentures, de sorte qu'elle ne satisfaisait pas au critère d'approbation d'un arrangement en vertu de l'art. 192. S'appuyant sur nos motifs dans l'affaire *Magasins à rayons Peoples inc. (Syndic de) c. Wise*, [2004] 3 R.C.S. 461, 2004 CSC 68, elle a conclu que les administrateurs avaient l'obligation

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the non-contractual interests of the debentureholders. It held that representations made by Bell Canada over the years could have created reasonable expectations above and beyond the contractual rights of the debentureholders. In these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on the debentureholders. In the absence of such efforts, BCE had not discharged its onus under s. 192 of showing that the arrangement was fair and reasonable. The Court of Appeal therefore overturned the trial judge's order approving the plan of arrangement: (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

[28] The Court of Appeal found it unnecessary to consider the s. 241 oppression claim, holding that its rejection of the s. 192 approval application effectively disposed of the oppression claim. In its view, where approval is sought under s. 192 and opposed, there is generally no need for an affected security holder to assert an oppression remedy under s. 241.

[29] BCE and Bell Canada appeal to this Court arguing that the Court of Appeal erred in overturning the trial judge's approval of the plan of arrangement. While formally cross-appealing on s. 241, the debentureholders argue that the Court of Appeal was correct to consider their complaints under s. 192, such that their appeals under s. 241 became moot.

IV. Issues

[30] The issues, briefly stated, are whether the Court of Appeal erred in dismissing the debentureholders' s. 241 oppression claim and in overturning the Superior Court's s. 192 approval of the plan

d'examiner les intérêts non contractuels des détenteurs de débentures. À son avis, les déclarations que Bell Canada avaient faites au cours des années pouvaient avoir créé des attentes raisonnables qui s'ajoutaient aux droits contractuels des détenteurs de débentures. Les administrateurs n'avaient donc pas simplement l'obligation d'accepter la meilleure offre, mais aussi celle de déterminer si l'arrangement pouvait être restructuré de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures. Comme cet examen n'avait pas été fait, BCE ne s'était pas acquittée de son obligation d'établir le caractère équitable et raisonnable de l'arrangement pour l'application de l'art. 192. La Cour d'appel a donc infirmé l'ordonnance d'approbation rendue par le juge de première instance : (2008), 43 B.L.R. (4th) 157, 2008 QCCA 930, 2008 QCCA 931, 2008 QCCA 932, 2008 QCCA 933, 2008 QCCA 934, 2008 QCCA 935.

[28] La Cour d'appel a jugé inutile d'examiner les demandes de redressement pour abus fondées sur l'art. 241, estimant que le rejet de la demande d'approbation visée à l'art. 192 en scellait en fait le sort. Selon elle, lorsqu'une demande d'approbation présentée en vertu de l'art. 192 est contestée, les détenteurs de valeurs mobilières touchés n'ont généralement nullement besoin de présenter une demande de redressement pour abus sous le régime de l'art. 241.

[29] BCE et Bell Canada se pourvoient devant notre Cour, soutenant que la Cour d'appel a infirmé à tort l'approbation du plan d'arrangement par le juge de première instance. Bien qu'ils aient officiellement formé un pourvoi incident fondé sur l'art. 241, les détenteurs de débentures font valoir que la Cour d'appel a statué à bon droit sur leurs prétentions sous le régime de l'art. 192, ce qui rendait théoriques leurs appels fondés sur l'art. 241.

IV. Les questions en litige

[30] En résumé, la Cour doit décider si la Cour d'appel a commis une erreur en rejetant les demandes de redressement pour abus des détenteurs de débentures fondée sur l'art. 241 et en infirmant

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of arrangement. These questions raise the issue of what is required to establish oppression of debentureholders in a situation where a corporation is facing a change of control, and how a judge on an application for approval of an arrangement under s. 192 of the *CBCA* should treat claims such as those of the debentureholders in these actions. These reasons will consider both issues.

[31] In order to situate these issues in the context of Canadian corporate law, it may be useful to offer a preliminary description of the remedies provided by the *CBCA* to shareholders and stakeholders in a corporation facing a change of control.

[32] Accordingly, these reasons will consider:

(1) the rights, obligations and remedies under the *CBCA* in overview;

(2) the debentureholders' entitlement to relief under the s. 241 oppression remedy;

(3) the debentureholders' entitlement to relief under the requirement for court approval of an arrangement under s. 192.

[33] We note that it is unnecessary for the purposes of these appeals to distinguish between the conduct of the directors of BCE, the holding company, and the conduct of the directors of Bell Canada. The same directors served on the boards of both corporations. While the oppression remedy was directed at both BCE and Bell Canada, the courts below considered the entire context in which the directors of BCE made their decisions, which included the obligations of Bell Canada in relation to its debentureholders. It was not found by the lower courts that the directors of BCE and Bell Canada should have made different decisions with respect to the two corporations. Accordingly, the

l'ordonnance d'approbation du plan d'arrangement prononcée par la Cour supérieure en vertu de l'art. 192. Pour ce faire, la Cour doit déterminer quelle preuve doit être faite pour établir l'existence d'un abus des droits des détenteurs de débentures dans le contexte du changement de contrôle d'une société et comment le juge saisi d'une demande d'approbation d'un arrangement en vertu de l'art. 192 de la *LCSA* doit traiter des prétentions de la nature de celles formulées en l'espèce par les détenteurs de débentures. Les présents motifs traitent de ces deux questions.

[31] Pour situer ces questions dans le contexte du droit canadien des sociétés, il peut être utile de décrire d'abord les recours que peuvent exercer les actionnaires et les autres parties intéressées sous le régime de la *LCSA* devant la perspective d'un changement de contrôle de la société.

[32] Par conséquent, les présents motifs comportent :

(1) un aperçu des droits, obligations et recours prévus par la *LCSA*;

(2) un examen du droit des détenteurs de débentures à un redressement en cas d'abus en application de l'art. 241;

(3) une analyse du droit des détenteurs de débentures à un redressement dans le contexte de l'approbation d'un arrangement exigée par l'art. 192.

[33] Il n'est pas nécessaire pour trancher les pourvois de faire une distinction entre le comportement des administrateurs de BCE, la société de portefeuille, et celui des administrateurs de Bell Canada. Les mêmes administrateurs siégeaient aux conseils d'administration de l'une et l'autre de ces sociétés. Bien que la demande de redressement pour abus ait été dirigée à la fois contre Bell Canada et contre BCE, les juridictions inférieures ont tenu compte de toutes les circonstances dans lesquelles les administrateurs ont été appelés à prendre leurs décisions, ce qui incluait les obligations de Bell Canada envers ses détenteurs de débentures. Elles n'ont pas conclu que les administrateurs de BCE et de Bell

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distinct corporate character of the two entities does not figure in our analysis.

V. Analysis

A. *Overview of Rights, Obligations and Remedies Under the CBCA*

[34] An essential component of a corporation is its capital stock, which is divided into fractional parts, the shares: *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), at p. 767; *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438. While the corporation is ongoing, shares confer no right to its underlying assets.

[35] A share "is not an isolated piece of property . . . [but] a 'bundle' of interrelated rights and liabilities": *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1025, *per* La Forest J. These rights include the right to a proportionate part of the assets of the corporation upon winding-up and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings.

[36] The directors are responsible for the governance of the corporation. In the performance of this role, the directors are subject to two duties: a fiduciary duty to the corporation under s. 122(1)(*a*) (the fiduciary duty); and a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances under s. 122(1)(*b*) (the duty of care). The second duty is not at issue in these proceedings as this is not a claim against the directors of the corporation for failing to meet their duty of care. However, this case does involve the fiduciary duty of the directors to the corporation, and particularly the "fair treatment" component of this duty, which, as will be seen, is fundamental to the reasonable expectations of stakeholders claiming an oppression remedy.

Canada auraient dû prendre des décisions différentes relativement aux deux sociétés. Par conséquent, le caractère distinct des deux entités ne sera pas pris en considération dans notre analyse.

V. Analyse

A. *Aperçu des droits, obligations et recours prévus par la LCSA*

[34] Une composante essentielle d'une société est son capital social, qui est fractionné en actions : *Bradbury c. English Sewing Cotton Co.*, [1923] A.C. 744 (H.L.), p. 767; *Zwicker c. Stanbury*, [1953] 2 R.C.S. 438. Tant que la société continue d'exister, les actions ne confèrent aucun droit sur ses éléments d'actifs.

[35] Une action « n'est pas un bien pris isolément [. . .] [mais] un "ensemble" de droits et d'obligations étroitement liés entre eux » : *Sparling c. Québec (Caisse de dépôt et placement du Québec)*, [1988] 2 R.C.S. 1015, p. 1025, le juge La Forest. Ces droits comprennent le droit à une part proportionnelle des éléments d'actif de la société lors de sa liquidation et un droit de regard sur la façon dont le conseil d'administration gère la société, qui s'exprime par l'exercice du droit de vote lors des assemblées des actionnaires.

[36] Les administrateurs sont responsables de la gouvernance de la société. À ce titre, ils doivent s'acquitter de deux obligations : leur obligation fiduciaire envers la société prévue à l'al. 122(1)*a*) (l'obligation fiduciaire) et l'obligation d'agir avec le soin, la diligence et la compétence dont ferait preuve une personne prudente en pareilles circonstances, prévue à l'al. 122(1)*b*) (l'obligation de diligence). Cette deuxième obligation n'est pas en cause en l'espèce, car on ne reproche pas aux administrateurs d'avoir manqué à leur obligation de diligence. L'obligation fiduciaire des administrateurs envers la société est toutefois en cause, plus particulièrement en ce qui concerne l'une de ses composantes, soit l'obligation de « traitement équitable » qui, comme on le verra, est fondamentale pour ce qui est des attentes raisonnables des parties intéressées qui présentent une demande de redressement pour abus.

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[37] The fiduciary duty of the directors to the corporation originated in the common law. It is a duty to act in the best interests of the corporation. Often the interests of shareholders and stakeholders are co-extensive with the interests of the corporation. But if they conflict, the directors' duty is clear — it is to the corporation: *Peoples Department Stores*.

[38] The fiduciary duty of the directors to the corporation is a broad, contextual concept. It is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation. The content of this duty varies with the situation at hand. At a minimum, it requires the directors to ensure that the corporation meets its statutory obligations. But, depending on the context, there may also be other requirements. In any event, the fiduciary duty owed by directors is mandatory; directors must look to what is in the best interests of the corporation.

[39] In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:

> We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

As will be discussed, cases dealing with claims of oppression have further clarified the content of the fiduciary duty of directors with respect to the range of interests that should be considered in determining what is in the best interests of the corporation, acting fairly and responsibly.

[37] L'obligation fiduciaire des administrateurs envers la société tire son origine de la common law. Elle leur impose d'agir au mieux des intérêts de la société. Souvent les intérêts des actionnaires et des parties intéressées concordent avec ceux de la société. Toutefois, lorsque ce n'est pas le cas, l'obligation des administrateurs est claire : elle est envers la société (*Magasins à rayons Peoples*).

[38] L'obligation fiduciaire des administrateurs est un concept large et contextuel. Elle ne se limite pas à la valeur des actions ou au profit à court terme. Dans le contexte de la continuité de l'entreprise, cette obligation vise les intérêts à long terme de la société. Son contenu varie selon la situation. Elle exige à tous le moins des administrateurs qu'ils veillent à ce que la société s'acquitte de ses obligations légales mais, selon le contexte, elle peut aussi englober d'autres exigences. Quoi qu'il en soit, l'obligation fiduciaire des administrateurs est de nature impérative; ils sont tenus d'agir au mieux des intérêts de la société.

[39] Selon l'arrêt *Magasins à rayons Peoples* de notre Cour, bien que les administrateurs *doivent* agir au mieux des intérêts de la société, il peut également être opportun, *sans être obligatoire*, qu'ils tiennent compte de l'effet des décisions concernant la société sur l'actionnariat ou sur un groupe particuliers de parties intéressées. Comme l'ont indiqué les juges Major et Deschamps au par. 42 :

> Nous considérons qu'il est juste d'affirmer en droit que, pour déterminer s'il agit au mieux des intérêts de la société, il peut être légitime pour le conseil d'administration, vu l'ensemble des circonstances dans un cas donné, de tenir compte notamment des intérêts des actionnaires, des employés, des fournisseurs, des créanciers, des consommateurs, des gouvernements et de l'environnement.

On verra plus loin que la jurisprudence sur les recours en cas d'abus a clarifié davantage le contenu de l'obligation fiduciaire des administrateurs quant à l'éventail des intérêts qu'ils doivent prendre en compte pour déterminer ce qui est au mieux des intérêts de la société, en agissant de façon équitable et responsable.

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[40] In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives: see *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331, 2007 SCC 44. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

[41] Normally only the beneficiary of a fiduciary duty can enforce the duty. In the corporate context, however, this may offer little comfort. The directors who control the corporation are unlikely to bring an action against themselves for breach of their own fiduciary duty. The shareholders cannot act in the stead of the corporation; their only power is the right to oversee the conduct of the directors by way of votes at shareholder assemblies. Other stakeholders may not even have that.

[42] To meet these difficulties, the common law developed a number of special remedies to protect the interests of shareholders and stakeholders of the corporation. These remedies have been affirmed, modified and supplemented by the *CBCA*.

[43] The first remedy provided by the *CBCA* is the s. 239 derivative action, which allows stakeholders to enforce the directors' duty to the corporation when the directors are themselves unwilling

[40] En déterminant ce qui sert au mieux les intérêts de la société, les administrateurs peuvent examiner notamment les intérêts des actionnaires, des employés, des créanciers, des consommateurs, des gouvernements et de l'environnement. Les tribunaux doivent faire preuve de la retenue voulue à l'égard de l'appréciation commerciale des administrateurs qui tiennent compte de ces intérêts connexes, comme le veut la « règle de l'appréciation commerciale ». Cette règle appelle les tribunaux à respecter une décision commerciale, pourvu qu'elle s'inscrive dans un éventail de solutions raisonnables possibles : voir *Maple Leaf Foods Inc. c. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.); *Kerr c. Danier Leather Inc.*, [2007] 3 R.C.S. 331, 2007 CSC 44. Elle rend compte du fait que les administrateurs qui, aux termes du par. 102(1) de la *LCSA*, ont pour fonction de gérer les activités commerciales et les affaires internes de la société, sont souvent plus à même de déterminer ce qui sert au mieux ses intérêts. Cela vaut tant pour les décisions touchant les intérêts des parties intéressées que pour d'autres décisions relevant des administrateurs.

[41] Normalement, seul le bénéficiaire d'une obligation fiduciaire peut en réclamer l'exécution. Toutefois, dans le contexte du droit des sociétés, suivre cette règle se révélerait souvent illusoire. Il est en effet invraisemblable que les administrateurs qui contrôlent la société intentent contre eux-mêmes une action pour manquement à leur propre obligation fiduciaire. Les actionnaires ne peuvent agir à la place de la société. Leur seul pouvoir réside dans leur droit de regard sur le comportement des administrateurs qui s'exprime par l'exercice de leur droit de vote aux assemblées des actionnaires. D'autres parties intéressées n'ont même pas ce pouvoir.

[42] Pour pallier ces difficultés, la common law a élaboré des recours spéciaux visant à protéger les intérêts des actionnaires et des parties intéressées. La *LCSA* a maintenu, modifié et complété ces recours.

[43] Le premier recours prévu par la *LCSA* est l'action oblique, décrite à l'art. 239, qui permet aux parties intéressées de forcer les administrateurs récalcitrants à s'acquitter de leurs obligations

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to do so. With leave of the court, a complainant may bring (or intervene in) a derivative action in the name and on behalf of the corporation or one of its subsidiaries to enforce a right of the corporation, including the rights correlative with the directors' duties to the corporation. (The requirement of leave serves to prevent frivolous and vexatious actions, and other actions which, while possibly brought in good faith, are not in the interest of the corporation to litigate.)

[44] A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(*b*) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(*a*) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores*. Section 122(1)(*b*) does not provide an independent foundation for claims. However, applying the principles of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

[45] A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.

[46] Additional "remedial" provisions are found in provisions of the *CBCA* providing for court

envers la société. Le plaignant peut, avec l'autorisation du tribunal, intenter une action oblique au nom et pour le compte de la société ou de l'une de ses filiales (ou y intervenir) pour faire respecter un droit de la société, et notamment un droit corrélatif à une obligation des administrateurs envers la société. (L'obligation d'obtenir une autorisation vise à prévenir les actions frivoles ou vexatoires ainsi que les actions qui, même intentées de bonne foi, ne servent pas les intérêts de la société.)

[44] Deuxièmement, les administrateurs peuvent faire l'objet d'une action civile pour manquement à leur obligation de diligence. Comme il en a été fait mention, l'al. 122(1)*b*) de la *LCSA* oblige les administrateurs et les dirigeants d'une société à agir « avec le soin, la diligence et la compétence dont ferait preuve, en pareilles circonstances, une personne prudente ». Cette obligation, à la différence de l'obligation fiduciaire énoncée à l'al. 122(1)*a*), n'est pas uniquement envers la société. Elle peut donc engager la responsabilité des administrateurs envers les autres parties intéressées, conformément aux principes régissant la responsabilité délictuelle et extracontractuelle : *Magasins à rayons Peoples*. L'alinéa 122(1)*b*) ne peut servir de fondement indépendant à un recours, mais les tribunaux peuvent s'en inspirer, conformément aux principes énoncés dans *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205, pour définir la norme de conduite à laquelle on peut raisonnablement s'attendre.

[45] Un troisième recours de common law codifié par la *LCSA* est la demande de redressement pour abus prévue à l'art. 241. Contrairement à l'action oblique, qui a pour objet le respect d'un droit de la société proprement dite, la demande de redressement pour abus vise la réparation d'une atteinte aux intérêts en law ou en equity des parties intéressées touchées par le comportement abusif d'une société ou de ses administrateurs. Ce recours est ouvert à un large éventail de parties intéressées — détenteurs de valeurs mobilières, créanciers, administrateurs et dirigeants.

[46] Enfin, les dispositions de la *LCSA* qui exigent l'obtention d'une approbation judiciaire

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approval in certain cases. An arrangement under s. 192 of the *CBCA* is one of these. While s. 192 cannot be described as a remedy *per se*, it has remedial-like aspects. It is directed at the situation of corporations seeking to effect fundamental changes to the corporation that affects stakeholder rights. The Act provides that such arrangements require the approval of the court. Unlike the civil action and oppression, which focus on the conduct of the directors, a s. 192 review requires a court approving a plan of arrangement to be satisfied that: (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is fair and reasonable. If the corporation fails to discharge its burden of establishing these elements, approval will be withheld and the proposed change will not take place. In assessing whether the arrangement should be approved, the court will hear arguments from opposing security holders whose rights are being arranged. This provides an opportunity for security holders to argue against the proposed change.

dans certains cas ont aussi une vocation réparatrice. L'article 192, relatif aux arrangements, en est un exemple. Bien que cet article ne puisse pas être décrit comme une disposition qui établit un recours à proprement parler, il comporte des aspects qui s'y apparentent. Il vise les situations où une société envisage des changements fondamentaux qui modifient les droits d'une partie intéressée. La *LCSA* prévoit que de tels arrangements doivent être approuvés par le tribunal. Contrairement à l'action civile et à la demande de redressement pour abus, qui mettent l'accent sur le comportement des administrateurs, l'examen prévu à l'art. 192 exige simplement que le tribunal qui approuve un plan d'arrangement soit convaincu que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable. Si la société ne s'acquitte pas de son fardeau de prouver ces éléments, sa demande d'approbation sera rejetée et elle ne pourra procéder au changement proposé. Pour décider s'il approuvera l'arrangement, le tribunal entend les détenteurs de valeurs mobilières dont les droits sont visés par l'arrangement et qui s'y opposent, ce qui leur donne la possibilité de faire valoir leurs objections au changement proposé.

[47] Two of these remedies are in issue in these actions: the action for oppression and approval of an arrangement under s. 192. The trial judge treated these remedies as involving distinct considerations and concluded that the debentureholders had failed to establish entitlement to either remedy. The Court of Appeal, by contrast, viewed the two remedies as substantially overlapping, holding that both turned on whether the directors had properly considered the debentureholders' expectations. Having found on this basis that the requirements of s. 192 were not met, the Court of Appeal concluded that the action for oppression was moot. As will become apparent, we do not endorse this approach. In our view, the s. 241 oppression action and the s. 192 requirement for court approval of a change to the corporate structure are different types of proceedings, engaging different inquiries. Accordingly, we find it necessary to consider both the claims

[47] Deux de ces recours sont en cause en l'espèce : la demande de redressement pour abus et l'approbation d'un arrangement sous le régime de l'art. 192. Le juge de première instance a appliqué des considérations distinctes à chacun de ces recours, et conclu que les détenteurs de débentures n'avaient établi le bien-fondé ni de l'un ni de l'autre. La Cour d'appel a considéré, au contraire, que les recours se chevauchaient de façon importante, en ce qu'ils posaient tous deux la question de savoir si les administrateurs avaient suffisamment tenu compte des attentes des détenteurs de débentures. Ayant conclu, à cet égard, que les exigences de l'art. 192 n'avaient pas été respectées, elle a considéré la demande de redressement pour abus comme théorique. La Cour ne souscrit pas à ce raisonnement, comme elle l'expliquera plus loin. À notre avis, la demande de redressement pour abus et l'approbation judiciaire d'une modification

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for oppression and the s. 192 application for approval.

[48] The debentureholders have formally cross-appealed on the oppression remedy. However, due to the Court of Appeal's failure to consider this issue, the debentureholders did not advance separate arguments before this Court. As certain aspects of their position are properly addressed within the context of an analysis of oppression under s. 241, we have considered them here.

[49] Against this background, we turn to a more detailed consideration of the claims.

B. *The Section 241 Oppression Remedy*

[50] The debentureholders in these appeals claim that the directors acted in an oppressive manner in approving the sale of BCE, contrary to s. 241 of the *CBCA*.

[51] Security holders of a corporation or its affiliates fall within the class of persons who may be permitted to bring a claim for oppression under s. 241 of the *CBCA*. The trial judge permitted the debentureholders to do so, although in the end he found the claim had not been established. The question is whether the trial judge erred in dismissing the claim.

[52] We will first set out what must be shown to establish the right to a remedy under s. 241, and then review the conduct complained of in the light of those requirements.

de structure exigée par l'art. 192 sont des recours différents qui soulèvent des questions différentes. Par conséquent, la Cour estime nécessaire d'examiner tant les demandes de redressement pour abus que la demande d'approbation fondée sur l'art. 192.

[48] Les détenteurs de débentures ont formé officiellement un pourvoi incident relativement à la demande de redressement pour abus. Toutefois, la Cour d'appel ne s'étant pas prononcée sur ce recours, ils n'ont pas présenté d'argumentation distincte à cet égard devant notre Cour. Néanmoins, comme certains aspects de leur position sont traités à bon droit dans le cadre de l'analyse de la demande de redressement pour abus en vertu de l'art. 241, ils seront examinés dans les présents motifs.

[49] À la lumière de ce qui précède, la Cour passe maintenant à l'examen plus approfondi des demandes.

B. *La demande de redressement pour abus prévue à l'art. 241*

[50] Les détenteurs de débentures soutiennent que les administrateurs ont agi de façon abusive en l'espèce en approuvant la vente de BCE, contrevenant ainsi à l'art. 241 de la *LCSA*.

[51] Les détenteurs de valeurs mobilières d'une société ou de l'une des personnes morales de son groupe appartiennent à la catégorie des personnes qui peuvent être autorisées à demander un redressement pour abus en vertu de l'art. 241 de la *LCSA*. Le juge de première instance a autorisé les détenteurs de débentures à présenter une telle demande, mais il a conclu en bout de ligne qu'ils n'en avaient pas établi le bien-fondé. Il faut maintenant déterminer si le juge de première instance a commis une erreur en rejetant cette demande.

[52] La Cour décrira d'abord la preuve exigée pour que soit établi le droit à un redressement en vertu de l'art. 241, puis elle examinera le comportement visé à la lumière de ces exigences.

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(1) The Law

[53] Section 241(2) provides that a court may make an order to rectify the matters complained of where

> (*a*) any act or omission of the corporation or any of its affiliates effects a result,
>
> (*b*) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (*c*) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

[54] Section 241 jurisprudence reveals two possible approaches to the interpretation of the oppression provisions of the *CBCA*: M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 79-80 and 84. One approach emphasizes a strict reading of the three types of conduct enumerated in s. 241 (oppression, unfair prejudice and unfair disregard): see *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.); *Stech v. Davies*, [1987] 5 W.W.R. 563 (Alta. Q.B.). Cases following this approach focus on the precise content of the categories "oppression", "unfair prejudice" and "unfair disregard". While these cases may provide valuable insight into what constitutes oppression in particular circumstances, a categorical approach to oppression is problematic because the terms used cannot be put into watertight compartments or conclusively defined. As Koehnen puts it (at p. 84), "[t]he three statutory components of oppression are really adjectives that try to describe inappropriate conduct. . . . The difficulty with adjectives is they provide no assistance in formulating principles that should underlie court intervention."

(1) L'état du droit

[53] Le paragraphe 241(2) permet au tribunal de redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

> *a*) soit en raison de son comportement;
>
> *b*) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;
>
> *c*) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[54] Deux façons différentes d'aborder les dispositions de la *LCSA* applicables en cas d'abus se dégagent de la jurisprudence relative à l'art. 241 : M. Koehnen, *Oppression and Related Remedies* (2004), p. 79-80 et 84. L'une d'elles appelle à une interprétation stricte des trois types de comportement énumérés à l'art. 241 (abus, préjudice injuste et omission injuste de tenir compte des intérêts) : voir *Scottish Co-operative Wholesale Society Ltd. c. Meyer*, [1959] A.C. 324 (H.L.); *Diligenti c. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (C.S.); *Stech c. Davies*, [1987] 5 W.W.R. 563 (B.R. Alb.). Les arrêts guidés par cette interprétation s'intéressent à la teneur exacte d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » des intérêts en cause. Bien que ces décisions puissent fournir des indications valables sur ce qui constitue un abus dans une situation donnée, envisager la notion d'abus à partir de catégories définies pose problème parce que les termes utilisés ne peuvent être classés dans des compartiments étanches ni définis une fois pour toutes. Comme le dit Koehnen (p. 84) : [TRADUCTION] « Les trois composantes légales de l'abus sont en fait des qualificatifs destinés à décrire un comportement incorrect. [. . .] Le problème lié aux qualificatifs tient à ce qu'ils ne sont d'aucun secours pour la formulation des principes qui doivent fonder l'intervention du tribunal. »

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[55] Other cases have focused on the broader principles underlying and uniting the various aspects of oppression: see *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 45 B.L.R. 110 (Alta. C.A.); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Westfair Foods Ltd. v. Watt* (1991), 79 D.L.R. (4th) 48 (Alta. C.A.).

[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

[57] We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.

[58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.

[59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the

[55] D'autres décisions sont axées sur les principes plus larges qui sous-tendent et unifient les différents aspects de la notion d'abus : voir *First Edmonton Place Ltd. c. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (B.R. Alb.), mod. par (1989), 45 B.L.R. 110 (C.A. Alb.); *820099 Ontario Inc. c. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (C. div. Ont.); *Westfair Foods Ltd. c. Watt* (1991), 79 D.L.R. (4th) 48 (C.A. Alb.).

[56] À notre avis, la meilleure façon d'interpréter le par. 241(2) est de combiner les deux approches exposées dans la jurisprudence. Il faut d'abord considérer les principes sur lesquels repose la demande de redressement pour abus et, en particulier, le concept des attentes raisonnables. S'il est établi qu'une attente raisonnable a été frustrée, il faut déterminer si le comportement reproché constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause au sens du par. 241(2) de la *LCSA*.

[57] En guise d'introduction aux deux volets de l'examen d'une allégation d'abus, la Cour formulera deux remarques préliminaires issues de l'ensemble de la jurisprudence.

[58] Premièrement, la demande de redressement pour abus est un recours en equity. Elle vise à rétablir la justice — ce qui est « juste et équitable ». Elle confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité : *Wright c. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (C. Ont. (Div. gén.)), p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (C.A. Alb.), p. 374; voir, de façon plus générale, Koehnen, p. 78-79. Par conséquent, les tribunaux saisis d'une demande de redressement pour abus doivent tenir compte de la réalité commerciale, et pas seulement de considérations strictement juridiques : *Scottish Co-operative Wholesale Society*, p. 343.

[59] Deuxièmement, comme beaucoup de recours en equity, le sort d'une demande de redressement pour abus dépend des faits en cause. On détermine ce qui est juste et équitable selon les

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relationships at play. Conduct that may be oppressive in one situation may not be in another.

attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu. Un comportement abusif dans une situation donnée ne sera pas nécessairement abusif dans une situation différente.

[60] Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:

[60] À partir de ces considérations générales, la Cour passe maintenant au premier volet de l'analyse, soit à l'examen des principes qui sous-tendent la demande de redressement pour abus. Dans *Ebrahimi c. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), p. 379, lord Wilberforce, qui interprétait l'art. 222 de la *Companies Act, 1948* du Royaume-Uni, a décrit la demande de redressement pour abus en ces termes novateurs :

The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.

[TRADUCTION] Par ces mots [« juste et équitable »] on reconnaît le fait qu'une société à responsabilité limitée est davantage qu'une simple entité légale dotée d'une personnalité morale propre. Il y a place, en droit des sociétés, pour la reconnaissance du fait que, derrière cette société, ou au sein de celle-ci, il y a des individus et que ces individus ont des droits, des attentes et des obligations entre eux qui ne se dissolvent pas nécessairement dans la structure de la société.

[61] Lord Wilberforce spoke of the equitable remedy in terms of the "rights, expectations and obligations" of individuals. "Rights" and "obligations" connote interests enforceable at law without recourse to special remedies, for example, through a contractual suit or a derivative action under s. 239 of the *CBCA*. It is left for the oppression remedy to deal with the "expectations" of affected stakeholders. The reasonable expectations of these stakeholders is the cornerstone of the oppression remedy.

[61] Lord Wilberforce a présenté le recours en equity en faisant référence aux « droits », « attentes » et « obligations » des individus. Les mots « droits » et « obligations » renvoient à des intérêts dont on peut exiger le respect en droit sans faire appel à des recours spéciaux, par exemple, au moyen d'un recours contractuel ou de l'action oblique prévue à l'art. 239 de la *LCSA*. Restent donc les « attentes » des parties intéressées comme objet de la demande de redressement pour abus. Les attentes raisonnables de ces parties intéressées constituent la pierre angulaire de la demande de redressement pour abus.

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

[62] Comme le suggère le mot « raisonnable », le concept d'attentes raisonnables est objectif et contextuel. Les attentes réelles d'une partie intéressée en particulier ne sont pas concluantes. Lorsqu'il s'agit de déterminer s'il serait « juste et équitable » d'accueillir un recours, la question est de savoir si ces attentes sont raisonnables compte tenu des faits propres à l'espèce, des rapports en cause et de l'ensemble du contexte, y compris la possibilité d'attentes et de demandes opposées.

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[63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.

[64] Determining whether a particular expectation is reasonable is complicated by the fact that the interests and expectations of different stakeholders may conflict. The oppression remedy recognizes that a corporation is an entity that encompasses and affects various individuals and groups, some of whose interests may conflict with others. Directors or other corporate actors may make corporate decisions or seek to resolve conflicts in a way that abusively or unfairly maximizes a particular group's interest at the expense of other stakeholders. The corporation and shareholders are entitled to maximize profit and share value, to be sure, but not by treating individual stakeholders unfairly. Fair treatment — the central theme running through the oppression jurisprudence — is most fundamentally what stakeholders are entitled to "reasonably expect".

[65] Section 241(2) speaks of the "act or omission" of the corporation or any of its affiliates, the conduct of "business or affairs" of the corporation and the "powers of the directors of the corporation or any of its affiliates". Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression: see Koehnen, at pp. 109-10; *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Ct. (Gen. Div.)). In the appeals before us, the claims for oppression are based on allegations that the directors of BCE and Bell Canada failed to comply with the reasonable

[63] Des circonstances particulières suscitent des attentes particulières. Les parties intéressées entretiennent des rapports entre elles et avec la société, sur le fondement de perceptions et d'attentes sur lesquelles elles sont en droit de miser, sous réserve de leur caractère raisonnable dans les circonstances : voir *820099 Ontario*; *Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (C.S.J. Ont.). Le recours en cas d'abus vise précisément à assurer le respect de ces attentes.

[64] La possibilité d'un conflit entre les intérêts et les attentes de différentes parties intéressées ajoute à la complexité de l'appréciation du caractère raisonnable d'une attente particulière. La demande de redressement pour abus reconnaît qu'une société est une entité qui comprend et touche différents groupes et individus dont les intérêts peuvent être opposés. Les administrateurs ou d'autres parties impliquées dans les affaires de la société peuvent, en prenant des décisions à son égard ou en tentant de résoudre des conflits, retenir des solutions qui maximisent abusivement ou injustement les intérêts d'un groupe en particulier au détriment d'autres parties intéressées. Certes, la société et les actionnaires ont le droit de maximiser les bénéfices et la valeur des actions, mais ils ne peuvent le faire en traitant des parties intéressées inéquitablement. Un traitement équitable est, fondamentalement, ce à quoi les parties intéressées peuvent « raisonnablement s'attendre » — et le thème central récurrent de toute la jurisprudence en matière d'abus.

[65] Le paragraphe 241(2) parle du « comportement » de la société ou de l'une des personnes morales de son groupe, de la conduite de « ses activités commerciales ou ses affaires internes » et de l'exercice par « ses administrateurs » de leurs « pouvoirs ». La situation dont on se plaint est souvent provoquée par le comportement de la société ou de ses administrateurs, qui sont responsables de la gouvernance de la société. Une demande de redressement pour abus peut toutefois découler du comportement d'autres parties impliquées dans les affaires de la société, comme des actionnaires : voir Koehnen, p. 109-110; *GATX Corp. c. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (C. Ont. (Div. gén.)). Dans les présents pourvois,

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expectations of the debentureholders, and it is unnecessary to go beyond this.

les demandes de redressement pour abus sont fondées sur des allégations selon lesquelles les administrateurs de BCE et de Bell Canada ont frustré les attentes raisonnables des détenteurs de débentures et il est inutile d'étendre notre examen au-delà de ces allégations.

[66] The fact that the conduct of the directors is often at the centre of oppression actions might seem to suggest that directors are under a direct duty to individual stakeholders who may be affected by a corporate decision. Directors, acting in the best interests of the corporation, may be obliged to consider the impact of their decisions on corporate stakeholders, such as the debentureholders in these appeals. This is what we mean when we speak of a director being required to act in the best interests of the corporation viewed as a good corporate citizen. However, the directors owe a fiduciary duty to the corporation, and only to the corporation. People sometimes speak in terms of directors owing a duty to both the corporation and to stakeholders. Usually this is harmless, since the reasonable expectations of the stakeholder in a particular outcome often coincide with what is in the best interests of the corporation. However, cases (such as these appeals) may arise where these interests do not coincide. In such cases, it is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.

[66] Le fait que le comportement des administrateurs soit souvent au centre des actions pour abus peut sembler indiquer que les administrateurs sont assujettis à une obligation directe envers les parties intéressées qui risquent d'être touchées par une décision de la société. En agissant au mieux des intérêts de la société, les administrateurs peuvent être obligés de considérer les effets de leurs décisions sur les parties intéressées, comme les détenteurs de débentures en l'espèce. C'est ce qu'on entend lorsqu'on affirme qu'un administrateur doit agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable. Toutefois, les administrateurs ont une obligation fiduciaire envers la société, et uniquement envers la société. Certes, on parle parfois de l'obligation des administrateurs envers la société et envers les parties intéressées. Cela ne porte habituellement pas à conséquence, puisque les attentes raisonnables d'une partie intéressée quant à un résultat donné coïncident souvent avec les intérêts de la société. Il peut néanmoins arriver (comme en l'espèce) que ce ne soit pas le cas. Il importe de préciser que l'obligation des administrateurs est alors envers la société et non envers les parties intéressées, et que les parties intéressées ont pour seule attente raisonnable celle que les administrateurs agissent au mieux des intérêts de la société.

[67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of

[67] Après avoir examiné le concept des attentes raisonnables qui sous-tend la demande de redressement pour abus, la Cour passe au second volet du recours prévu à l'art. 241. Toutes les attentes déçues, même lorsqu'elles sont raisonnables, ne donnent pas ouverture à une demande sous le régime de l'art. 241. Cette disposition exige que le comportement visé constitue un « abus », un « préjudice injuste » ou une « omission injuste de tenir compte » des intérêts en cause. Le terme « abus » désigne un comportement coercitif et excessif et évoque la mauvaise foi. Le « préjudice injuste »

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interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

peut impliquer un état d'esprit moins coupable, mais dont les conséquences sont néanmoins injustes. Enfin, l'« omission injuste de tenir compte » d'intérêts donnés étend l'application de ce recours à une situation où un intérêt n'est pas pris en compte parce qu'il est perçu comme sans importance, contrairement aux attentes raisonnables des parties intéressées : voir Koehnen, p. 81-88. Ces expressions décrivent, à l'aide de qualificatifs, des façons dont les parties impliquées dans les affaires d'une société peuvent frustrer les attentes raisonnables des parties intéressées.

[68] In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[68] En résumé, les considérations qui précèdent indiquent que le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions interreliées : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement qui correspond à la définition d'un « abus », d'un « préjudice injuste » ou d'une « omission injuste de tenir compte » d'un intérêt pertinent?

[69] Against the background of this overview, we turn to a more detailed discussion of these inquiries.

[69] C'est sur cette toile de fond que la Cour examinera maintenant ces questions de façon plus approfondie.

(a) *Proof of a Claimant's Reasonable Expectations*

a) *La preuve de l'attente raisonnable*

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

[70] L'auteur de la demande de redressement doit d'abord préciser quelles attentes ont censément été frustrées par le comportement en cause et en établir le caractère raisonnable. Comme cela a déjà été mentionné, on peut d'emblée déduire qu'une partie intéressée s'attend raisonnablement à être traitée équitablement. Toutefois, comme on l'a vu, l'abus touche généralement une attente particulière propre à une situation donnée. Il faut dès lors établir l'existence de cette attente raisonnable de la partie intéressée. La preuve d'une attente peut se faire de différentes façons selon les faits.

[71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is

[71] Il est impossible de dresser une liste exhaustive des situations qui peuvent susciter une attente raisonnable, compte tenu de leur nature circonstancielle. Il est toutefois possible d'énoncer quelques

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not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": Dickerson Committee (R. W. V. Dickerson, J. L. Howard and L. Getz), *Proposals for a New Business Corporations Law for Canada* (1971), vol. I, at p. 163. The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: *Re Keho Holdings Ltd. and Noble*. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.

principes généraux. Le recours prévu par l'art. 241 n'exige pas qu'il y ait illégalité; cet article entre en jeu « lorsque la conduite attaquée est [fautive], même si elle n'est pas en fait illégale » : Comité Dickerson (R. W. V. Dickerson, J. L. Howard et L. Getz), *Propositions pour un nouveau droit des corporations commerciales canadiennes* (1971), vol. I, p. 188. Ce recours est axé sur les notions de justice et d'équité plutôt que sur les droits. Pour déterminer si des intérêts ou attentes raisonnables doivent être pris en considération, les tribunaux vont au-delà de la légalité et se demandent ce qui est équitable compte tenu de tous les intérêts en jeu : *Re Keho Holdings Ltd. and Noble*. Il s'ensuit que toute conduite préjudiciable pour une partie intéressée ne donnera pas nécessairement ouverture à une demande de redressement pour abus contre la société.

[72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[72] Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

(i) Commercial Practice

(i) Les pratiques commerciales

[73] Commercial practice plays a significant role in forming the reasonable expectations of the parties. A departure from normal business practices that has the effect of undermining or frustrating the complainant's exercise of his or her legal rights will generally (although not inevitably) give rise to a remedy: *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J.); *SCI Systems Inc. v. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (Ont. Ct. (Gen. Div.)), var'd (1998), 110 O.A.C. 160 (Div. Ct.); *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont. C.A.), leave to appeal refused, [2002] 1 S.C.R. vi.

[73] Les pratiques commerciales jouent un rôle important dans la formation des attentes raisonnables des parties. Une dérogation aux pratiques commerciales habituelles qui entrave ou rend impossible l'exercice de ses droits par le plaignant donnera généralement (mais pas inévitablement) ouverture à un recours : *Adecco Canada Inc. c. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (C.S.J. Ont.); *SCI Systems Inc. c. Gornitzki Thompson & Little Co.* (1997), 147 D.L.R. (4th) 300 (C. Ont. (Div. gén.)), mod. par (1998), 110 O.A.C. 160 (C. div.); *Downtown Eatery (1993) Ltd. c. Ontario* (2001), 200 D.L.R. (4th) 289 (C.A. Ont.), autorisation d'appel refusée, [2002] 1 R.C.S. vi.

(ii) The Nature of the Corporation

(ii) La nature de la société

[74] The size, nature and structure of the corporation are relevant factors in assessing reasonable

[74] La taille, la nature et la structure de la société constituent également des facteurs pertinents

expectations: *First Edmonton Place*; G. Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), 10 *N.Z. Univ. L. Rev.* 134, at pp. 138 and 145-46. Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

(iii) Relationships

[75] Reasonable expectations may emerge from the personal relationships between the claimant and other corporate actors. Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

(iv) Past Practice

[76] Past practice may create reasonable expectations, especially among shareholders of a closely held corporation on matters relating to participation of shareholders in the corporation's profits and governance: *Gibbons v. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario*. For instance, in *Gibbons*, the court found that the shareholders had a legitimate expectation that all monies paid out of the corporation would be paid to shareholders in proportion to the percentage of shares they held. The authorization by the new directors to pay fees to themselves, for which the shareholders would not receive any comparable payments, was in breach of those expectations.

[77] It is important to note that practices and expectations can change over time. Where valid commercial reasons exist for the change and the

dans l'appréciation d'une attente raisonnable : *First Edmonton Place*; G. Shapira, « Minority Shareholders' Protection — Recent Developments » (1982), 10 *N.Z. Univ. L. Rev.* 134, p. 138 et 145-146. Il est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille.

(iii) Les rapports existants

[75] Les rapports personnels entre le plaignant et d'autres parties impliquées dans les affaires de la société peuvent également donner naissance à des attentes raisonnables. Par exemple, il se peut que les rapports entre actionnaires fondés sur des liens familiaux ou des liens d'amitié n'obéissent pas aux mêmes normes que les rapports entre actionnaires sans lien de dépendance d'une société ouverte. Pour reprendre les propos tenus dans l'affaire *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (C.A. Ont.), [TRADUCTION] « lorsqu'une société fermée est en cause, le tribunal peut tenir compte du rapport entre les actionnaires et non simplement des droits » (p. 727).

(iv) Les pratiques antérieures

[76] Les pratiques antérieures peuvent faire naître des attentes raisonnables, plus particulièrement chez les actionnaires d'une société fermée quant à leur participation aux profits et à la gouvernance de la société : *Gibbons c. Medical Carriers Ltd.* (2001), 17 B.L.R. (3d) 280, 2001 MBQB 229; *820099 Ontario.* Dans *Gibbons*, par exemple, la Cour a jugé que les actionnaires pouvaient légitimement s'attendre à ce que tous les versements faits aux actionnaires par la société soient proportionnels au pourcentage d'actions qu'ils détenaient. La décision des nouveaux administrateurs de se verser des honoraires, pour lesquels les actionnaires ne recevraient pas de paiements correspondants, était contraire à ces attentes.

[77] Il importe de souligner que les pratiques et les attentes peuvent changer avec le temps. Lorsqu'un changement est motivé par des raisons

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change does not undermine the complainant's rights, there can be no reasonable expectation that directors will resist a departure from past practice: *Alberta Treasury Branches v. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (Alta. Q.B.), aff'd (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

(v) Preventive Steps

[78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

(vi) Representations and Agreements

[79] Shareholder agreements may be viewed as reflecting the reasonable expectations of the parties: *Main*; *Lyall v. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (B.C.C.A.).

[80] Reasonable expectations may also be affected by representations made to stakeholders or to the public in promotional material, prospectuses, offering circulars and other communications: *Tsui v. International Capital Corp.*, [1993] 4 W.W.R. 613 (Sask. Q.B.), aff'd (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada v. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (Ont. Ct. (Gen. Div.)); *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Gen. Div.), var'd (1998), 38 O.R. (3d) 749 (C.A.).

(vii) Fair Resolution of Conflicting Interests

[81] As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary

commerciales valides et qu'il ne porte pas atteinte aux droits du plaignant, il ne saurait exister d'attente raisonnable que les administrateurs s'abstiendront de déroger aux pratiques antérieures : *Alberta Treasury Branches c. SevenWay Capital Corp.* (1999), 50 B.L.R. (2d) 294 (B.R. Alb.), conf. par (2000), 8 B.L.R. (3d) 1, 2000 ABCA 194.

(v) Les mesures préventives

[78] Lorsqu'il apprécie le caractère raisonnable d'une attente d'une partie intéressée, le tribunal peut se demander si le plaignant aurait pu prendre des mesures pour se protéger contre le préjudice qu'il allègue avoir subi. Ainsi, il peut être pertinent de déterminer si un créancier garanti qui se plaint d'un abus aurait pu négocier des mesures de protection contre le préjudice en cause : *First Edmonton Place*; *SCI Systems*.

(vi) Les déclarations et conventions

[79] On peut considérer une convention d'actionnaires comme l'expression des attentes raisonnables des parties : *Main*; *Lyall c. 147250 Canada Ltd.* (1993), 106 D.L.R. (4th) 304 (C.A.C.-B.).

[80] Les déclarations faites à des parties intéressées ou au public dans des documents promotionnels, des prospectus, des circulaires d'offre et d'autres communications peuvent également influer sur les attentes raisonnables : *Tsui c. International Capital Corp.*, [1993] 4 W.W.R. 613 (B.R. Sask.), conf. par (1993), 113 Sask. R. 3 (C.A.); *Deutsche Bank Canada c. Oxford Properties Group Inc.* (1998), 40 B.L.R. (2d) 302 (C. Ont. (Div. gén.)); *Themadel Foundation c. Third Canadian Investment Trust Ltd.* (1995), 23 O.R. (3d) 7 (Div. gén.), mod. par (1998), 38 O.R. (3d) 749 (C.A.).

(vii) La conciliation équitable d'intérêts opposés

[81] Comme cela a été souligné, des conflits peuvent surgir soit entre les intérêts de différentes parties intéressées, soit entre les intérêts des parties intéressées et ceux de la société. Lorsque le conflit touche les intérêts de la société, il revient aux administrateurs de la société de le résoudre

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duty to act in the best interests of the corporation, viewed as a good corporate citizen.

[82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

[83] Directors may find themselves in a situation where it is impossible to please all stakeholders. The "fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction": *Maple Leaf Foods*, *per* Weiler J.A., at p. 192.

[84] There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.

[85] On these appeals, it was suggested on behalf of the corporations that the "*Revlon* line" of cases from Delaware support the principle that where the interests of shareholders conflict with the interests of creditors, the interests of shareholders should prevail.

[86] The "*Revlon* line" refers to a series of Delaware corporate takeover cases, the two most important of which are *Revlon, Inc. v. MacAndrews*

conformément à leur obligation fiduciaire d'agir au mieux des intérêts de la société en tant qu'entreprise socialement responsable.

[82] Dans son ensemble, la jurisprudence en matière d'abus confirme que l'obligation des administrateurs d'agir au mieux des intérêts de la société inclut le devoir de traiter de façon juste et équitable chaque partie intéressée touchée par les actes de la société. Il n'existe pas de règles absolues. Il faut se demander chaque fois si, dans les circonstances, les administrateurs ont agi au mieux des intérêts de la société, en prenant en considération tous les facteurs pertinents, ce qui inclut, sans s'y limiter, la nécessité de traiter les parties intéressées qui sont touchées de façon équitable, conformément aux obligations de la société en tant qu'entreprise socialement responsable.

[83] Les administrateurs peuvent se retrouver dans une situation où il leur est impossible de satisfaire toutes les parties intéressées. [TRADUCTION] « Il importe peu que les administrateurs aient écarté d'autres transactions, sauf si on peut démontrer que l'une de ces autres transactions pouvait effectivement être réalisée et était manifestement plus avantageuse pour l'entreprise que celle qui a été choisie » : *Maple Leaf Foods*, la juge Weiler, p. 192.

[84] Aucun principe n'établit que les intérêts d'un groupe — ceux des actionnaires, par exemple — doivent prévaloir sur ceux d'un autre groupe. Tout dépend des particularités de la situation dans laquelle se trouvent les administrateurs et de la question de savoir si, dans les circonstances, ils ont agi de façon responsable dans leur appréciation commerciale.

[85] En l'espèce, les appelantes ont fait valoir que le courant jurisprudentiel émanant du Delaware et représenté par l'arrêt *Revlon* appuie le principe voulant qu'un conflit entre les intérêts des actionnaires et ceux des créanciers doive être résolu en faveur des actionnaires.

[86] Le courant jurisprudentiel dit *Revlon* regroupe une série de décisions rendues au Delaware dans le contexte d'offres publiques d'achat (« OPA ») et

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& Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). In both cases, the issue was how directors should react to a hostile takeover bid. *Revlon* suggests that in such circumstances, shareholder interests should prevail over those of other stakeholders, such as creditors. *Unocal* tied this approach to situations where the corporation will not continue as a going concern, holding that although a board facing a hostile takeover "may have regard for various constituencies in discharging its responsibilities, . . . such concern for non-stockholder interests is inappropriate when . . . the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder" (p. 182).

dont les deux plus importantes sont *Revlon, Inc. c. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), et *Unocal Corp. c. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). Dans ces deux décisions, il s'agissait de déterminer comment les administrateurs devaient réagir à une OPA hostile. L'arrêt *Revlon* donne à croire que, dans ce contexte, les intérêts des actionnaires doivent l'emporter sur ceux des autres parties intéressées, comme les créanciers. L'arrêt *Unocal* a appliqué cette approche aux situations dans lesquelles la société ne poursuivra pas ses activités et précisé que, bien que le conseil d'administration d'une société visée par une OPA hostile [TRADUCTION] « puisse tenir compte de diverses parties intéressées lorsqu'il s'acquitte de ses fonctions [. . .] il n'est pas approprié de prendre ainsi en compte les intérêts des non-actionnaires lorsque [. . .] l'objectif n'est plus de protéger la société ou d'en poursuivre les activités, mais de la vendre au plus offrant » (p. 182).

[87] What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces. In a review of trends in Delaware corporate jurisprudence, former Delaware Supreme Court Chief Justice E. Norman Veasey put it this way:

[87] Ce qui est clair, c'est que le courant jurisprudentiel dit *Revlon* n'a pas remplacé la règle fondamentale selon laquelle l'obligation des administrateurs ne peut se réduire à l'application de règles de priorité particulières, mais relève plutôt de l'appréciation commerciale de ce qui sert le mieux les intérêts de la société, dans la situation où elle se trouve. L'ancien juge en chef de la Cour suprême du Delaware, E. Norman Veasey, s'est exprimé ainsi dans une analyse des tendances jurisprudentielles en droit des sociétés au Delaware :

> [I]t is important to keep in mind the precise content of this "best interests" concept — that is, to whom this duty is owed and when. Naturally, one often thinks that directors owe this duty to both the corporation and the stockholders. That formulation is harmless in most instances because of the confluence of interests, in that what is good for the corporate entity is usually derivatively good for the stockholders. There are times, of course, when the focus is directly on the interests of stockholders [i.e., as in *Revlon*]. But, in general, the directors owe fiduciary duties to the *corporation*, not to the stockholders. [Emphasis in original.]

> [TRADUCTION] [I]l faut garder à l'esprit le contenu précis du concept « d'obligation d'agir au mieux des intérêts » — c'est-à-dire envers qui et quand s'applique cette obligation. Naturellement, on pense souvent que les administrateurs sont ainsi obligés tant envers la société qu'envers les actionnaires. Cette façon de voir est le plus souvent inoffensive parce qu'il y a concordance des intérêts, puisque ce qui est bon pour la société est habituellement bon pour les actionnaires. Il arrive bien sûr que l'accent soit mis directement sur les intérêts des actionnaires [comme dans *Revlon*]. En général, cependant, les administrateurs sont obligés envers la *société*, et non envers les actionnaires. [En italique dans l'original.]

(E. Norman Veasey with Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on

(E. Norman Veasey, assisté de Christine T. Di Guglielmo, « What Happened in Delaware Corporate Law and Governance from 1992-2004?

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Some Key Developments" (2005), 153 *U. Pa. L. Rev.* 1399, at p. 1431)

[88] Nor does this Court's decision in *Peoples Department Stores* suggest a fixed rule that the interests of creditors must prevail. In *Peoples Department Stores*, the Court had to consider whether, in the case of a corporation under threat of bankruptcy, creditors deserved special consideration (para. 46). The Court held that the fiduciary duty to the corporation did not change in the period preceding the bankruptcy, but that if the directors breach their duty of care to a stakeholder under s. 122(1)(*b*) of the *CBCA*, such a stakeholder may act upon it (para. 66).

(b) *Conduct Which Is Oppressive, Is Unfairly Prejudicial or Unfairly Disregards the Claimant's Relevant Interests*

[89] Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

A Retrospective on Some Key Developments » (2005), *153 U. Pa. L. Rev.* 1399, p. 1431)

[88] Par ailleurs, l'arrêt *Magasins à rayons Peoples* n'établit pas non plus de règle fixe qui ferait prévaloir les droits des créanciers. Dans cet arrêt, la Cour devait décider s'il fallait accorder une attention particulière aux créanciers d'une société menacée de faillite (par. 46). Elle a statué que l'obligation fiduciaire envers la société ne change pas au cours de la période précédant la faillite, mais qu'une partie intéressée peut intenter un recours en cas de manquement des administrateurs à l'obligation de diligence que leur impose l'al. 122(1)*b*) de la *LCSA* (par. 66).

b) *La conduite abusive ou injuste à l'égard des intérêts du plaignant en ce qu'elle lui porte préjudice ou ne tient pas compte de ses intérêts*

[89] Jusqu'à maintenant, la Cour a examiné la façon dont le plaignant doit établir la preuve du premier élément de la demande de redressement pour abus — à savoir qu'il s'attendait raisonnablement à être traité d'une certaine manière. Or, pour parfaire sa demande de redressement pour abus, le plaignant doit prouver que le défaut de répondre à cette attente est imputable à une conduite injuste et qu'il en a résulté des conséquences préjudiciables au sens de l'art. 241 de la *LCSA*. Ce ne sont pas, en effet, tous les cas où une attente raisonnable a été frustrée qui commandent la prise en compte des considérations en equity sur lesquelles repose la demande de redressement pour abus. Le tribunal doit être convaincu que la conduite en cause relève des notions d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » des intérêts du plaignant, au sens de l'art. 241 de la *LCSA*. Dans cette perspective, l'analyse des attentes raisonnables qui constitue l'assise théorique de la demande de redressement pour abus et les types particuliers de comportement décrits à l'art. 241 apparaissent comme des approches complémentaires, et non des approches distinctes, comme on l'a parfois supposé. Ensemble, ces approches offrent un tableau complet de ce qui constitue une conduite injuste et inéquitable, pour reprendre les termes de l'arrêt *Ebrahimi*.

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[90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

[91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

[93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees

[90] Dans la plupart des cas, la preuve d'une attente raisonnable sera liée aux notions d'abus, de préjudice injuste ou d'omission injuste de tenir compte des intérêts, ainsi que le prévoit l'art. 241, et les deux volets de la preuve se trouveront dans les faits réunis. Il faut néanmoins souligner que, comme dans toute action en equity, la demande de redressement pour abus requiert que l'on prouve la conduite fautive, le lien de causalité et le préjudice indemnisable.

[91] Les notions d'abus, de préjudice injuste et d'omission injuste de tenir compte des intérêts pertinents sont de nature descriptive. Elles indiquent le type de faute ou de comportement visé par le recours prévu à l'art. 241 de la *LCSA*. Toutefois, il ne s'agit pas de compartiments étanches. Ces notions se chevauchent et s'enchevêtrent souvent.

[92] À l'origine, la jurisprudence décrivait simplement l'acte fautif comme un abus, généralement associé à une conduite qualifiée selon les cas d'[TRADUCTION] « accablante, dure et illégitime », d'« écart marqué par rapport aux normes de traitement équitable », ou d'« abus de pouvoir » mettant en cause la probité dans la conduite des affaires de la société : voir Koehnen, p. 81. C'est de cet acte fautif que le recours tire son nom, lequel sert dorénavant à désigner de façon générale tous les recours fondés sur l'art. 241. Toutefois, ce terme sous-entend également un type particulier de préjudice relevant de la conception moderne de l'abus au sens général, soit un acte fautif très grave.

[93] À la notion initiale de la common law, la *LCSA* a ajouté les notions de « préjudice injuste » et d'« omission injuste de tenir compte » des intérêts, indiquant ainsi clairement que les actes fautifs qui ne peuvent être qualifiés d'abusifs peuvent néanmoins tomber sous le coup de l'art. 241. Règle générale, le « préjudice injuste » est considéré comme supposant une conduite moins grave que l'« abus », par exemple l'éviction d'un actionnaire minoritaire, l'omission de divulguer des transactions avec des apparentés, la modification de la structure de la société pour changer radicalement les ratios d'endettement, l'adoption d'une « pilule

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and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

empoisonnée » pour éviter une OPA, le versement de dividendes sans déclaration formelle, le fait de privilégier certains actionnaires par le paiement d'honoraires de gestion et le paiement aux administrateurs d'honoraires plus élevés que la norme appliquée dans le secteur d'activité en cause : voir Koehnen, p. 82-83.

[94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

[94] L'« omission injuste de tenir compte » des intérêts est considérée comme le moins grave des trois préjudices ou actes fautifs mentionnés à l'art. 241. Favoriser un administrateur en omettant d'engager une poursuite, réduire indûment le dividende d'un actionnaire ou ne pas remettre au plaignant un bien lui appartenant en sont autant d'exemples : voir Koehnen, p. 83-84.

(2) Application to These Appeals

(2) Application aux présents pourvois

[95] As discussed above (at para. 68), in assessing a claim for oppression a court must answer two questions: (1) Does the evidence support the reasonable expectation the claimant asserts? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[95] Comme cela a déjà été expliqué (au par. 68), le tribunal saisi d'une demande de redressement pour abus doit répondre à deux questions : (1) La preuve étaye-t-elle l'attente raisonnable invoquée par le plaignant? (2) La preuve établit-elle que cette attente raisonnable a été frustrée par un comportement pouvant être qualifié d'« abus », de « préjudice injuste » ou d'« omission injuste de tenir compte » d'un intérêt pertinent?

[96] The debentureholders in this case assert two alternative expectations. Their highest position is that they had a reasonable expectation that the directors of BCE would protect their economic interests as debentureholders in Bell Canada by putting forward a plan of arrangement that would maintain the investment grade trading value of their debentures. Before this Court, however, they argued a softer alternative — a reasonable expectation that the directors would consider their economic interests in maintaining the trading value of the debentures.

[96] En l'espèce, les détenteurs de débentures soutiennent avoir eu deux attentes distinctes. Leur position première est qu'ils avaient des motifs raisonnables de s'attendre à ce que les administrateurs de BCE protègent leurs intérêts financiers comme détenteurs de débentures de Bell Canada en proposant un plan d'arrangement qui maintiendrait la cote de leurs débentures comme admissibles pour des placements. Devant notre Cour, cependant, ils ont plaidé subsidiairement avoir eu une attente plus limitée — l'attente raisonnable que les administrateurs tiendraient compte de leurs intérêts financiers en préservant la valeur marchande des débentures.

[97] As summarized above (at para. 25), the trial judge proceeded on the debentureholders' alleged expectation that the directors would act in a way that would preserve the investment grade status of their debentures. He concluded that this expectation

[97] Ainsi que la Cour l'a exposé brièvement plus haut (au par. 25), le juge de première instance a étudié la prétention des détenteurs de débentures qu'ils s'attendaient à ce que les administrateurs agissent de façon à préserver la cote de placements

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was not made out on the evidence, since the statements by Bell Canada suggesting a commitment to retaining investment grade ratings were accompanied by warnings that explicitly precluded investors from reasonably forming such expectations, and the warnings were included in the prospectuses pursuant to which the debentures were issued.

[98] The absence of a reasonable expectation that the investment grade of the debentures would be maintained was confirmed, in the trial judge's view, by the overall context of the relationship, the nature of the corporation, its situation as the target of a bidding war, as well as by the fact that the claimants could have protected themselves against reduction in market value by negotiating appropriate contractual terms.

[99] The trial judge situated his consideration of the relevant factors in the appropriate legal context. He recognized that the directors had a fiduciary duty to act in the best interests of the corporation and that the content of this duty was affected by the various interests at stake in the context of the auction process that BCE was undergoing. He emphasized that the directors, faced with conflicting interests, might have no choice but to approve transactions that, while in the best interests of the corporation, would benefit some groups at the expense of others. He held that the fact that the shareholders stood to benefit from the transaction and that the debentureholders were prejudiced did not in itself give rise to a conclusion that the directors had breached their fiduciary duty to the corporation. All three competing bids required Bell Canada to assume additional debt, and there was no evidence that bidders were prepared to accept less leveraged debt. Under the business judgment rule, deference should be accorded to business decisions of directors taken in good faith and in the performance of the functions they were elected to perform by the shareholders.

admissibles de leurs débentures. Il a conclu que la preuve de cette attente n'avait pas été établie étant donné que les déclarations de Bell Canada concernant son engagement à conserver une cote de placements admissibles s'accompagnaient de mises en garde faisant explicitement en sorte que les investisseurs ne pourraient former de telles attentes, mises en garde qui figuraient aussi dans les prospectus d'émission des débentures.

[98] L'absence d'une attente raisonnable quant au maintien de la cote de placements admissibles des débentures trouvait confirmation, selon le juge de première instance, dans le contexte global de la relation entre la société et les détenteurs de débentures, la nature de la société, sa situation en tant que cible de plusieurs offres d'achat, de même que dans le fait que les plaignants auraient pu se protéger eux-mêmes contre le fléchissement de la valeur marchande en négociant des clauses contractuelles appropriées.

[99] Le juge de première instance a procédé à l'examen des facteurs pertinents en utilisant le cadre juridique approprié. Il a reconnu que les administrateurs avaient l'obligation fiduciaire d'agir au mieux des intérêts de la société et que le contenu de cette obligation dépendait des divers intérêts en jeu dans le contexte du processus d'enchères dont BCE faisait l'objet. Il a souligné que, face à des intérêts opposés, les administrateurs pouvaient n'avoir d'autre choix que d'approuver des transactions qui, bien qu'elles servent au mieux les intérêts de la société, privilégieraient certains groupes au détriment d'autres groupes. Il a conclu que le fait que les actionnaires puissent réaliser un gain alors que les détenteurs de débentures subiraient un préjudice ne permettait pas en soi de conclure à un manquement à l'obligation fiduciaire des administrateurs envers la société. Les trois offres concurrentes comportaient toutes un endettement supplémentaire de Bell Canada, et rien dans la preuve n'indiquait que les soumissionnaires étaient disposés à accepter un endettement moindre. Selon la règle de l'appréciation commerciale, il faut faire preuve de retenue à l'égard des décisions commerciales que les administrateurs prennent de bonne foi dans l'exécution des fonctions pour lesquelles ils ont été élus par les actionnaires.

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[100] We see no error in the principles applied by the trial judge nor in his findings of fact, which were amply supported by the evidence. We accordingly agree that the first expectation advanced in this case — that the investment grade status of the debentures would be maintained — was not established.

[101] The alternative, softer, expectation advanced is that the directors would consider the interests of the bondholders in maintaining the trading value of the debentures. The Court of Appeal, albeit in the context of its reasons on the s. 192 application, accepted this as a reasonable expectation. It held that the representations made over the years, while not legally binding, created expectations beyond contractual rights. It went on to state that in these circumstances, the directors were under a duty, not simply to accept the best offer, but to consider whether the arrangement could be restructured in a way that provided a satisfactory price to the shareholders while avoiding an adverse effect on debentureholders.

[102] The evidence, objectively viewed, supports a reasonable expectation that the directors would consider the position of the debentureholders in making their decisions on the various offers under consideration. As discussed above, reasonable expectations for the purpose of a claim of oppression are not confined to legal interests. Given the potential impact on the debentureholders of the transactions under consideration, one would expect the directors, acting in the best interests of the corporation, to consider their short and long-term interests in the course of making their ultimate decision.

[103] Indeed, the evidence shows that the directors did consider the interests of the debentureholders. A number of debentureholders sent letters to the Board, expressing concern about the proposed leveraged buyout and seeking assurances that their interests would be considered. One of the directors, Mr. Pattison, met with Phillips, Hager & North,

[100] La Cour estime que le juge de première instance n'a commis aucune erreur dans son application des principes ni dans ses conclusions de fait, qui étaient amplement étayées par la preuve. La Cour est donc d'accord pour dire que la première attente alléguée en l'espèce — soit le maintien de la cote de placements admissibles des débentures — n'a pas été établie.

[101] L'attente subsidiaire, plus limitée, avancée par les plaignants, est que les administrateurs prendraient en compte les intérêts des créanciers obligataires en maintenant la valeur marchande des débentures. Dans le contexte de ses motifs concernant l'application de l'art. 192, la Cour d'appel a reconnu qu'il s'agissait là d'une attente raisonnable. Elle a conclu que les déclarations faites au cours des années, bien que non juridiquement contraignantes, avaient créé des attentes qui s'ajoutaient aux droits contractuels. Elle a ajouté que, dans ces circonstances, il incombait aux administrateurs non seulement de retenir la meilleure offre, mais encore d'examiner s'il était possible de restructurer l'arrangement de façon à assurer un prix satisfaisant aux actionnaires tout en évitant de causer un préjudice aux détenteurs de débentures.

[102] Considérée objectivement, la preuve permet de conclure qu'il était raisonnable de s'attendre à ce que les administrateurs tiennent compte de la position des détenteurs de débentures pour prendre leurs décisions concernant les diverses offres à l'étude. Comme cela a été mentionné, dans le cadre d'une demande de redressement pour abus, les attentes raisonnables ne se limitent pas aux droits. Étant donné les répercussions potentielles des transactions proposées sur les détenteurs de débentures, on s'attendrait à ce que les administrateurs, agissant au mieux des intérêts de la société, tiennent compte de leurs intérêts à court et à long termes dans leur décision ultime.

[103] De fait, la preuve indique que les administrateurs ont effectivement tenu compte des intérêts des détenteurs de débentures. Un certain nombre de détenteurs de débentures ont écrit au Conseil d'administration pour exprimer leurs craintes concernant l'acquisition par emprunt proposée et demander l'assurance que leurs intérêts seraient pris en

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representatives of the debentureholders. The directors' response to these overtures was that the contractual terms of the debentures would be met, but no additional assurances were given.

[104] It is apparent that the directors considered the interests of the debentureholders and, having done so, concluded that while the contractual terms of the debentures would be honoured, no further commitments could be made. This fulfilled the duty of the directors to consider the debentureholders' interests. It did not amount to "unfair disregard" of the interests of the debentureholders. As discussed above, it may be impossible to satisfy all stakeholders in a given situation. In this case, the Board considered the interests of the claimant stakeholders. Having done so, and having considered its options in the difficult circumstances it faced, it made its decision, acting in what it perceived to be the best interests of the corporation.

[105] What the claimants contend for on this appeal, in reality, is not merely an expectation that their interests be considered, but an expectation that the Board would take further positive steps to restructure the purchase in a way that would provide a satisfactory purchase price to the shareholders and preserve the high market value of the debentures. At this point, the second, softer expectation asserted approaches the first alleged expectation of maintaining the investment grade rating of the debentures.

[106] The difficulty with this proposition is that there is no evidence that it was reasonable to suppose it could have been achieved. BCE, facing certain takeover, acted reasonably to create a competitive bidding process. The process attracted three bids. All of the bids were leveraged, involving a substantial increase in Bell Canada's debt. It was this factor that posed the risk to the trading value

compte. L'un des administrateurs, M. Pattison, a rencontré les représentants des détenteurs de débentures, Phillips, Hager & North. Les administrateurs ont répondu à l'expression de ces inquiétudes en affirmant qu'ils respecteraient les dispositions contractuelles rattachées aux débentures, mais aucune autre assurance n'a été donnée.

[104] Les administrateurs ont manifestement pris en considération les intérêts des détenteurs de débentures et, cela fait, ils ont conclu qu'ils ne pouvaient prendre aucun autre engagement que celui de respecter les dispositions contractuelles rattachées aux débentures. Cela répondait à l'obligation des administrateurs de tenir compte des intérêts des détenteurs de débentures. Cela ne constituait pas une « omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme nous l'avons vu, il peut s'avérer impossible de satisfaire toutes les parties intéressées dans une situation donnée. En l'espèce, le Conseil d'administration a pris en compte les intérêts des plaignants. Cela fait, et après avoir examiné ses options dans les circonstances difficiles auxquelles il faisait face, il a pris la décision qui lui paraissait servir le mieux des intérêts de la société.

[105] Ce que les plaignants font valoir en réalité dans le présent pourvoi, ce n'est pas simplement qu'ils s'attendaient à ce qu'on tienne compte de leurs intérêts, mais bien qu'ils comptaient que le Conseil d'administration adopte des mesures concrètes pour restructurer l'acquisition de manière à assurer un prix d'achat satisfaisant pour les actionnaires et à préserver la valeur marchande élevée des débentures. Sur ce point, la seconde attente, plus limitée, rejoint la première attente alléguée, soit le maintien de la cote de placements admissibles des débentures.

[106] La difficulté rattachée à cette prétention est que rien dans la preuve n'indique qu'il était raisonnable de supposer que ce résultat pouvait être atteint. Dans la perspective d'une prise de contrôle certaine, BCE a agi de façon raisonnable pour créer un processus de soumissions concurrentiel. Le processus a suscité trois offres. Toutes les offres comportaient un emprunt, qui accroîtrait substantiellement

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of the debentures. There is no evidence that BCE could have done anything to avoid that risk. Indeed, the evidence is to the contrary.

[107] We earlier discussed the factors to consider in determining whether an expectation is reasonable on a s. 241 oppression claim. These include commercial practice; the size, nature and structure of the corporation; the relationship between the parties; past practice; the failure to negotiate protections; agreements and representations; and the fair resolution of conflicting interests. In our view, all these factors weigh against finding an expectation beyond honouring the contractual obligations of the debentures in this particular case.

[108] Commercial practice — indeed commercial reality — undermines the claim that a way could have been found to preserve the trading position of the debentures in the context of the leveraged buyout. This reality must have been appreciated by reasonable debentureholders. More broadly, two considerations are germane to the influence of general commercial practice on the reasonableness of the debentureholders' expectations. First, leveraged buyouts of this kind are not unusual or unforeseeable, although the transaction at issue in this case is noteworthy for its magnitude. Second, trust indentures can include change of control and credit rating covenants where those protections have been negotiated. Protections of that type would have assured debentureholders a right to vote, potentially through their trustee, on the leveraged buyout, as the trial judge pointed out. This failure to negotiate protections was significant where the debentureholders, it may be noted, generally represent some of Canada's largest and most reputable financial institutions, pension funds and insurance companies.

l'endettement de Bell Canada. C'est ce facteur qui mettait à risque la valeur des débentures. Rien dans la preuve n'indique que BCE aurait pu faire quoi que ce soit pour écarter ce risque. En fait, la preuve démontrait le contraire.

[107] Il a déjà été fait mention de facteurs à prendre en considération pour déterminer si une attente est raisonnable dans le cadre d'une demande de redressement pour abus fondée sur l'art. 241, notamment les pratiques commerciales, la taille, la nature et la structure de la société, les rapports entre les parties, les pratiques antérieures, l'omission de négocier une protection, les conventions et déclarations, ainsi que la conciliation des intérêts opposés. De l'avis de la Cour, tous ces facteurs militent contre la conclusion qu'il existait en l'espèce une attente allant au-delà du respect des obligations contractuelles rattachées aux débentures.

[108] Les pratiques commerciales — en fait la réalité commerciale — affaiblissent la prétention qu'il aurait été possible de trouver une façon de préserver la valeur marchande des débentures dans le cadre d'une acquisition par emprunt. Des détenteurs de débentures raisonnables auraient eu conscience de cette réalité. Plus généralement, deux considérations sont pertinentes en ce qui concerne l'influence des pratiques commerciales générales sur le caractère raisonnable des attentes des détenteurs de débentures. Premièrement, les acquisitions par emprunt de ce type n'ont rien d'inhabituel ou d'imprévisible, bien que la transaction en cause en l'espèce se démarque par son ampleur. Deuxièmement, les actes de fiducie peuvent inclure des dispositions concernant un changement de contrôle et la cote financière dans les cas où ces protections ont été négociées. Des protections de ce type auraient assuré aux détenteurs de débentures un droit de vote, peut-être par l'intermédiaire de leur fiduciaire, sur l'acquisition par emprunt, comme l'a souligné le juge de première instance. Le défaut de négocier des mesures de protection revêtait de l'importance dans un cas où, soulignons-le, les détenteurs de débentures étaient en règle générale des institutions financières, des caisses de retraite et des sociétés d'assurance comptant parmi les plus importantes et les plus renommées du Canada.

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[109] The nature and size of the corporation also undermine the reasonableness of any expectation that the directors would reject the offers that had been presented and seek an arrangement that preserved the investment grade rating of the debentures. As discussed above (at para. 74), courts may accord greater latitude to the reasonableness of expectations formed in the context of a small, closely held corporation, rather than those relating to interests in a large, public corporation. Bell Canada had become a wholly owned subsidiary of BCE in 1983, pursuant to a plan of arrangement which saw the shareholders of Bell Canada surrender their shares in exchange for shares of BCE. Based upon the history of the relationship, it should not have been outside the contemplation of debentureholders acquiring debentures of Bell Canada under the 1996 and 1997 trust indentures, that arrangements of this type had occurred and could occur in the future.

[110] The debentureholders rely on past practice, suggesting that investment grade ratings had always been maintained. However, as noted, reasonable practices may reflect changing economic and market realities. The events that precipitated the leveraged buyout transaction were such realities. Nor did the trial judge find in this case that representations had been made to debentureholders upon which they could have reasonably relied.

[111] Finally, the claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.

[112] The best interests of the corporation arguably favoured acceptance of the offer at the time. BCE had been put in play, and the momentum of the market made a buyout inevitable. The evidence, accepted by the trial judge, was that Bell Canada needed to undertake significant changes to continue to be successful, and that privatization

[109] La nature et la taille de la société viennent également ébranler la prétention selon laquelle il aurait été raisonnable de s'attendre à ce que les administrateurs rejettent les offres présentées et recherchent un arrangement susceptible de préserver la cote de placements admissibles des débentures. On a déjà signalé (au par. 74) qu'il est possible que les tribunaux accordent plus de latitude quant aux attentes raisonnables dans le cas d'une petite société fermée que dans celui d'une société ouverte de plus grande taille. Bell Canada était devenue une filiale en propriété exclusive de BCE en 1983, en vertu d'un plan d'arrangement par lequel les actionnaires de Bell Canada cédaient leurs actions en échange d'actions de BCE. Compte tenu de l'historique du rapport en cause, les détenteurs de débentures de Bell Canada de 1996 et 1997 devaient savoir, lorsqu'ils les ont acquises, que des arrangements de ce type avaient déjà été conclus et pouvaient l'être dans l'avenir.

[110] Les détenteurs de débentures invoquent les pratiques antérieures, affirmant que la cote de placements admissibles avait toujours été maintenue. Rappelons toutefois que les pratiques raisonnables peuvent changer au gré des fluctuations de l'économie et des conditions du marché. Les événements qui ont conduit à la transaction d'acquisition par emprunt faisaient partie de ces conditions. Le juge de première instance n'a pas non plus conclu que des déclarations auxquelles les détenteurs de débentures auraient pu raisonnablement se fier leur avaient été faites.

[111] Enfin, il faut examiner la demande sous l'angle de l'obligation des administrateurs de résoudre les conflits entre les parties intéressées de façon équitable, au mieux des intérêts de la société.

[112] À l'époque, les intérêts de la société concordaient sans doute avec l'acceptation de l'offre. BCE avait été mise en jeu, et la dynamique du marché rendait l'acquisition inévitable. La preuve, acceptée par le juge de première instance, indiquait que Bell Canada devait procéder à des changements substantiels pour continuer à

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would provide greater freedom to achieve its long-term goals by removing the pressure on short-term public financial reporting, and bringing in equity from sophisticated investors motivated to improve the corporation's performance. Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one.

prospérer, et que la fermeture de la société élargirait la marge de manœuvre nécessaire à l'atteinte de ses objectifs à long terme en supprimant la pression à court terme créée par les obligations de communication de l'information financière au public et en permettant l'injection de capitaux propres par des investisseurs avisés soucieux d'améliorer le rendement de la société. Dans la mesure où il conclut que la décision des administrateurs se situe dans l'éventail des solutions raisonnables qu'ils auraient pu choisir en soupesant des intérêts opposés, le tribunal ne poursuivra pas son examen pour déterminer si cette décision est la solution parfaite.

[113] Considering all the relevant factors, we conclude that the debentureholders have failed to establish a reasonable expectation that could give rise to a claim for oppression. As found by the trial judge, the alleged expectation that the investment grade of the debentures would be maintained is not supported by the evidence. A reasonable expectation that the debentureholders' interests would be considered is established, but was fulfilled. The evidence does not support a further expectation that a better arrangement could be negotiated that would meet the exigencies that the corporation was facing, while better preserving the trading value of the debentures.

[113] Considérant tous les facteurs pertinents, la Cour conclut que les détenteurs de débentures n'ont pas démontré qu'ils avaient une attente raisonnable pouvant donner ouverture à une demande de redressement pour abus. Comme l'a dit le juge de première instance, l'allégation selon laquelle on pouvait s'attendre au maintien de la cote de placements admissibles des débentures n'est pas étayée par la preuve. On a démontré que les détenteurs de débentures pouvaient raisonnablement s'attendre à ce que leurs intérêts soient pris en compte, mais cette attente a trouvé satisfaction. La preuve ne permet pas de conclure à une attente plus grande, à savoir qu'il était possible de négocier un meilleur arrangement répondant aux exigences auxquelles la société faisait face, tout en préservant mieux la valeur marchande des débentures.

[114] Given that the debentureholders have failed to establish that the expectations they assert were reasonable, or that they were not fulfilled, it is unnecessary to consider in detail whether conduct complained of was oppressive, unfairly prejudicial, or unfairly disregarded the debentureholders' interests within the terms of s. 241 of the *CBCA*. Suffice it to say that "oppression" in the sense of bad faith and abuse was not alleged, much less proved. At best, the claim was for "unfair disregard" of the interests of the debentureholders. As discussed, the evidence does not support this claim.

[114] Les détenteurs de débentures n'ayant pas démontré que leurs prétendues attentes étaient raisonnables, ou qu'elles avaient été frustrées, il n'est pas utile d'examiner en détail la question de savoir si le comportement dont ils se plaignent constituait un abus, un préjudice injuste ou une omission injuste de tenir compte de leurs intérêts au sens de l'art. 241 de la *LCSA*. Disons simplement que l'« abus », dans son sens où il implique la mauvaise foi, n'a pas été allégué et encore moins prouvé. Au mieux, on a plaidé l'« omission injuste de tenir compte » des intérêts des détenteurs de débentures. Comme cela a été dit plus tôt, cette prétention n'est pas étayée par la preuve.

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C. *The Section 192 Approval Process*

[115] The second remedy relied on by the debentureholders is the approval process for complex corporate arrangements set out under s. 192 of the *CBCA*. BCE brought a petition for court approval of the plan under s. 192. At trial, the debentureholders were granted standing to contest such approval. The trial judge concluded that "[i]t seem[ed] only logical and 'fair' to conduct this analysis having regard to the interests of BCE and those of its shareholders and other stakeholders, if any, whose interests are being arranged or affected": (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 151. On the basis of Corporations Canada's *Policy concerning Arrangements Under Section 192 of the CBCA*, November 2003 ("Policy Statement 15.1"), the trial judge held that the s. 192 approval did not require the Board to afford the debentureholders the right to vote. He nonetheless considered their interests in assessing the fairness of the arrangement. After a full hearing, he approved the arrangement as "fair and reasonable", despite the debentureholders' objections that the arrangement would adversely affect the trading value of their securities.

[116] The Court of Appeal reversed this decision, essentially on the ground that the directors had not given adequate consideration to the debentureholders' reasonable expectations. These expectations, in its view, extended beyond the debentureholders' legal rights and required the directors to consider whether the adverse impact on the debentureholders' economic interests could be alleviated or attenuated. The court held that the corporation had failed to discharge the burden of showing that it was impossible to structure the sale in a manner that avoided the adverse economic effect on debentureholdings, and consequently had failed to establish that the proposed plan of arrangement was fair and reasonable.

C. *Le processus d'approbation prévu à l'art. 192*

[115] La seconde voie de droit empruntée par les détenteurs de débentures est le processus d'approbation des arrangements complexes établi par l'art. 192 de la *LCSA*. BCE a présenté une demande d'approbation sous le régime de cette disposition. À l'instruction, les détenteurs de débentures ont été autorisés à contester la demande. Le juge de première instance a conclu qu'[TRADUCTION] « [i]l n'est que logique et "équitable" de procéder à cette analyse en tenant compte des intérêts de BCE et des intérêts de ses actionnaires et autres parties intéressées, le cas échéant, dont les intérêts sont visés ou touchés par l'arrangement » : (2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 151). En se fondant sur la *Politique à l'égard des arrangements pris en vertu de l'article 192 de la LCSA* de Corporations Canada, datant de novembre 2003 (« Énoncé de politique 15.1 »), le juge de première instance a conclu que le processus d'approbation prévu à l'art. 192 n'obligeait pas le Conseil d'administration à accorder un droit de vote aux détenteurs de débentures. Il a néanmoins pris leurs intérêts en compte dans l'évaluation du caractère équitable de l'arrangement. Après une audition complète, il a approuvé l'arrangement, l'estimant « équitable et raisonnable » en dépit des objections des détenteurs de débentures selon lesquelles il aurait un effet préjudiciable sur la valeur marchande de leurs titres.

[116] La Cour d'appel a infirmé cette décision, concluant essentiellement que les administrateurs n'avaient pas suffisamment tenu compte des attentes raisonnables des détenteurs de débentures, lesquelles ne s'arrêtaient pas, selon elle, à leurs droits, mais commandaient aux administrateurs d'examiner s'il était possible d'atténuer l'effet préjudiciable de l'arrangement sur les intérêts financiers des détenteurs de débentures. Elle a jugé que la société ne s'était pas acquittée du fardeau de prouver qu'il était impossible de structurer la vente de façon à éviter les effets financiers préjudiciables sur les débentures et, par suite, qu'elle n'avait pas établi que le plan d'arrangement proposé était équitable et raisonnable.

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[117] Before considering what must be shown to obtain approval of an arrangement under s. 192, it may be helpful to briefly return to the differences between an action for oppression under s. 241 of the *CBCA* and a motion for approval of an arrangement under s. 192 of the *CBCA* alluded to earlier.

[118] As we have discussed (at para. 47), the reasoning of the Court of Appeal effectively incorporated the s. 241 oppression claim into the s. 192 approval proceeding, converting it into an inquiry based on reasonable expectations.

[119] As we view the matter, the s. 241 oppression remedy and the s. 192 approval process are different proceedings, with different requirements. While a conclusion that the proposed arrangement has an oppressive result may support the conclusion that the arrangement is not fair and reasonable under s. 192, it is important to keep in mind the differences between the two remedies. The oppression remedy is a broad and equitable remedy that focuses on the reasonable expectations of stakeholders, while the s. 192 approval process focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged. Moreover, in an oppression proceeding, the onus is on the claimant to establish oppression or unfairness, while in a s. 192 proceeding, the onus is on the corporation to establish that the arrangement is "fair and reasonable".

[120] These differences suggest that it is possible that a claimant might fail to show oppression under s. 241, but might succeed under s. 192 by establishing that the corporation has not discharged its onus of showing that the arrangement in question is fair and reasonable. For this reason, it is necessary to consider the debentureholders' s. 192 claim on these appeals, notwithstanding our earlier conclusion that the debentureholders have not established oppression.

[117] Avant d'examiner la question de la preuve exigée pour l'approbation d'un arrangement en vertu de l'art. 192, il peut être utile de revenir brièvement à la question, déjà abordée, des différences entre la demande de redressement pour abus prévue à l'art. 241 de la *LCSA* et la demande d'approbation d'un arrangement fondée sur l'art. 192.

[118] Comme on l'a vu (au par. 47), le raisonnement de la Cour d'appel a eu pour effet d'amalgamer la demande de redressement pour abus de l'art. 241 et la procédure d'approbation prévue à l'art. 192 et de convertir cette dernière en un examen axé sur les attentes raisonnables.

[119] La Cour estime que la demande de redressement pour abus de l'art. 241 et le processus d'approbation de l'art. 192 constituent des recours différents comportant des exigences différentes. Bien que la conclusion que l'arrangement proposé a des conséquences abusives puisse étayer celle qu'il ne s'agit pas d'un arrangement équitable et raisonnable au sens de l'art. 192, il importe de garder à l'esprit les différences entre les deux recours. La demande de redressement pour abus est un recours en equity, d'une grande portée, qui met l'accent sur les attentes raisonnables des parties intéressées, alors que le processus d'approbation prévu à l'art. 192 est axé sur la question de savoir si l'arrangement est équitable et raisonnable, d'un point de vue objectif, et tient principalement compte des intérêts des parties dont les droits sont visés par l'arrangement. De plus, dans le cadre d'une demande de redressement pour abus, c'est au plaignant qu'il incombe de prouver l'abus ou l'injustice, tandis que c'est à la société qu'il appartient d'établir que l'arrangement est « équitable et raisonnable » dans le cadre de la procédure prévue à l'art. 192.

[120] Il ressort de ces différences qu'un plaignant pourrait ne pas réussir à prouver l'abus au sens de l'art. 241, mais néanmoins avoir gain de cause sous le régime de l'art. 192 en établissant que la société ne s'est pas acquittée du fardeau de prouver que l'arrangement est équitable et raisonnable. C'est pourquoi la Cour doit examiner les prétentions soumises par les détenteurs de débentures dans le cadre de l'art. 192, en dépit de sa conclusion antérieure selon laquelle ils n'ont pas établi l'abus.

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[121] Whether the converse is true is not at issue in these proceedings and need not detain us. It might be argued that in theory, a finding of s. 241 oppression could be coupled with approval of an arrangement as fair and reasonable under s. 192, given the different allocations of burden of proof in the two actions and the different perspectives from which the assessment is made. On the other hand, common sense suggests, as did the Court of Appeal, that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable. We leave this interesting question to a case where it arises.

(1) The Requirements for Approval Under Section 192

[122] We will first describe the nature and purpose of the s. 192 approval process. We will then consider the philosophy that underlies s. 192 approval; the interests at play in the process; and the criteria to be applied by the judge on a s. 192 proceeding.

(a) *The Nature and Purpose of the Section 192 Procedure*

[123] The s. 192 approval process has its genesis in 1923 legislation designed to permit corporations to modify their share capital: *Companies Act Amending Act, 1923*, S.C. 1923, c. 39, s. 4. The legislation's concern was to permit changes to shareholders' rights, while offering shareholders protection. In 1974, plans of arrangements were omitted from the *CBCA* because Parliament considered them superfluous and feared that they could be used to squeeze out minority shareholders. Upon realizing that arrangements were a practical and flexible way to effect complicated transactions, an arrangement provision was reintroduced in the *CBCA* in 1978: Consumer and Corporate Affairs Canada, *Detailed background paper for an Act to amend the Canada Business Corporations Act* (1977), p. 5 ("Detailed Background Paper").

[121] La Cour n'a pas à se demander en l'espèce si l'inverse est vrai. Compte tenu des différences entre les deux recours en ce qui concerne le fardeau de la preuve et la perspective dans laquelle l'examen est effectué, on pourrait soutenir qu'il est possible, en théorie, de conclure à l'existence d'un abus au sens de l'art. 241 tout en approuvant l'arrangement en application de l'art. 192. Par contre, le bon sens donne à penser, comme l'a fait la Cour d'appel, qu'on peut difficilement conclure à la fois qu'il y a abus et que l'arrangement est équitable et raisonnable. Cette intéressante question devra toutefois être résolue dans le cadre d'une affaire où elle se posera.

(1) La preuve exigée pour l'approbation selon l'art. 192

[122] La Cour commencera par décrire la nature et l'objet du processus prévu à l'art. 192. Elle examinera ensuite la philosophie sous-jacente à l'approbation requise par cette disposition, les circonstances dans lesquelles elle s'applique, les intérêts en jeu dans le processus et les critères que le juge doit appliquer pour trancher une demande présentée en vertu de l'art. 192.

a) *La nature et l'objet de la procédure prévue par l'art. 192*

[123] Le processus d'approbation établi à l'art. 192 remonte à une loi de 1923 qui visait à permettre aux sociétés de modifier leur capital-actions : *Loi de 1923 modifiant la Loi des compagnies*, S.C. 1923, ch. 39, art. 4. Cette loi avait pour but de permettre des modifications aux droits des actionnaires tout en protégeant les actionnaires. En 1974, les plans d'arrangement n'ont pas été inclus dans la *LCSA*, parce que le législateur les jugeait superflus et craignait qu'ils puissent être utilisés pour évincer les actionnaires minoritaires. Après avoir constaté que ces plans offraient un moyen pratique et souple de réaliser des transactions complexes, le législateur a ajouté à la *LCSA* une disposition les régissant, en 1978 : Consommation et Corporations Canada, *Exposé détaillé d'une Loi modifiant la Loi sur les corporations commerciales canadiennes* (1977), p. 5 (« Exposé détaillé »).

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[124] In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.

[125] This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76. One of these advantages is that it permits the purchaser to buy shares of the target company without the need to comply with provincial takeover bid rules.

[126] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company.

[127] Fundamentally, the s. 192 procedure rests on the proposition that where a corporate transaction will alter the rights of security holders, this impact takes the decision out of the scope of management of the corporation's affairs, which is the responsibility of the directors. Section 192 overcomes this impediment through two mechanisms. First, proposed arrangements generally can be submitted to security holders for approval. Although there is no explicit requirement for a security holder vote in s. 192, as will be discussed below, these votes are an important feature of the process for approval of plans of arrangement. Second, the plan of arrangement must receive court approval after a hearing in which parties whose rights are being affected may partake.

[124] La souplesse de cette disposition lui a valu d'être élargie pour s'appliquer, non seulement à la réorganisation du capital-actions, mais plus généralement aux réaménagements d'une société. Suivant le par. 192(1) de la loi actuelle, un arrangement s'entend de la modification des statuts d'une société, de la fusion de deux sociétés ou plus, du fractionnement de l'activité commerciale d'une société, d'une opération de fermeture ou d'éviction, de la liquidation ou de la dissolution d'une société ou de toute combinaison de ces transactions.

[125] Il ne s'agit pas là d'une liste exhaustive, et les tribunaux lui ont donné une interprétation large. L'article 192 est de plus en plus utilisé dans le cadre d'un changement de contrôle en raison des avantages qu'il comporte pour l'acquéreur : C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), p. 76. Il permet notamment à l'acquéreur d'acheter des actions de la société ciblée sans avoir à se conformer aux règles provinciales régissant une OPA.

[126] Le processus prévu à l'art. 192 s'applique, en général, aux changements de contrôle qui présentent deux caractéristiques : l'arrangement est appuyé par les administrateurs de la société ciblée et il vise la remise, à l'acquéreur ou à la société ciblée, d'une partie ou de la totalité des actions.

[127] Fondamentalement, la procédure prévue à l'art. 192 repose sur le principe selon lequel la décision sur une transaction qui modifiera les droits des détenteurs de valeurs mobilières ne constitue pas une décision de simple gestion des affaires de la société, qui relève des administrateurs. L'article 192 crée deux mécanismes pour surmonter cet obstacle. Premièrement, les propositions d'arrangement peuvent généralement être soumises aux détenteurs de valeurs mobilières pour approbation. Bien que l'art. 192 n'exige pas expressément un vote des détenteurs de valeurs mobilières, comme on le verra, leur vote constitue une caractéristique importante du processus d'approbation des plans d'arrangement. Deuxièmement, les plans d'arrangement doivent être approuvés par le tribunal à la suite d'une audience à laquelle peuvent participer les parties dont les droits sont touchés.

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(b) *The Philosophy Underlying Section 192*

[128] The purpose of s. 192, as we have seen, is to permit major changes in corporate structure to be made, while ensuring that individuals and groups whose rights may be affected are treated fairly. In conducting the s. 192 inquiry, the judge must keep in mind the spirit of s. 192, which is to achieve a fair balance between conflicting interests. In discussing the objective of the arrangement provision introduced into the *CBCA* in 1978, the Minister of Consumer and Corporate Affairs stated:

> . . . the Bill seeks to achieve a fair balance between flexible management and equitable treatment of minority shareholders in a manner that is consonant with the other fundamental change institutions set out in Part XIV.
>
> (Detailed Background Paper, at p. 6)

[129] Although s. 192 was initially conceived as permitting and has principally been used to permit useful restructuring while protecting minority shareholders against adverse effects, the goal of ensuring a fair balance between different constituencies applies with equal force when considering the interests of non-shareholder security holders recognized under s. 192. Section 192 recognizes that major changes may be appropriate, even where they have an adverse impact on the rights of particular individuals or groups. It seeks to ensure that the interests of these rights holders are considered and treated fairly, and that in the end the arrangement is one that should proceed.

(c) *Interests Protected by Section 192*

[130] The s. 192 procedure originally was aimed at protecting shareholders affected by corporate restructuring. That remains a fundamental concern. However, this aim has been subsequently broadened to protect other security holders in some circumstances.

[131] Section 192 clearly contemplates the participation of security holders in certain situations.

b) *La philosophie qui sous-tend l'art. 192*

[128] Comme cela a été mentionné, l'art. 192 a pour but de permettre la réalisation de changements substantiels dans la structure d'une société tout en assurant un traitement équitable aux personnes dont les droits peuvent être touchés. Le juge qui procède à l'examen exigé par l'art. 192 ne doit pas perdre de vue l'esprit de cette disposition, qui consiste à établir un juste équilibre entre des intérêts opposés. Le ministre de Consommation et Corporations Canada a présenté ainsi l'objectif de la disposition relative aux arrangements introduite dans la *LCSA* en 1978 :

> . . . le projet de loi tente d'atteindre un juste équilibre entre une gestion souple et le traitement équitable des actionnaires minoritaires, d'une façon qui corresponde aux autres pratiques de modification de structure stipulées dans la Partie XIV.
>
> (Exposé détaillé, p. 5-6)

[129] Bien que l'art. 192 ait été conçu initialement et utilisé principalement pour permettre des restructurations utiles tout en protégeant les actionnaires minoritaires contre leurs effets préjudiciables, l'objectif du maintien d'un juste équilibre entre les différentes parties touchées s'applique avec autant de force lorsqu'il s'agit des droits de détenteurs de valeurs mobilières non-actionnaires visés à l'art. 192. L'article 192 reconnaît que des changements substantiels peuvent être opportuns même s'ils ont des effets préjudiciables sur les droits de personnes ou groupes particuliers. Il vise à garantir le traitement équitable et la prise en compte des intérêts de ces titulaires de droits et, en définitive, à confirmer que l'arrangement devrait être mis en œuvre.

c) *Les intérêts protégés par l'art. 192*

[130] La procédure prévue à l'art. 192 visait initialement à protéger les actionnaires touchés par la restructuration de la société. Bien que cet objet demeure fondamental, cette protection s'est par la suite étendue à d'autres détenteurs de valeurs mobilières, dans certaines circonstances.

[131] L'article 192 envisage clairement la participation des détenteurs de valeurs mobilières dans

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Section 192(1)(*f*) specifies that an arrangement may include an exchange of securities for property. Section 192(4)(*c*) provides that a court can make an interim order "requiring a corporation to call, hold and conduct a meeting of holders of securities". The Director appointed under the *CBCA* takes the view that, at a minimum, all security holders whose legal rights stand to be affected by the transaction should be permitted to vote on the arrangement: Policy Statement 15.1, s. 3.08.

[132] A difficult question is whether s. 192 applies only to security holders whose *legal rights* stand to be affected by the proposal, or whether it applies to security holders whose legal rights remain intact but whose *economic interests* may be prejudiced.

[133] The purpose of s. 192, discussed above, suggests that only security holders whose legal rights stand to be affected by the proposal are envisioned. As we have seen, the s. 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval. The distinction between the focus on legal rights under arrangement approval and reasonable expectations under the oppression remedy is a crucial one. The oppression remedy is grounded in unfair treatment of stakeholders, rather than on legal rights in their strict sense.

[134] This general rule, however, does not preclude the possibility that in some circumstances, for example threat of insolvency or claims by certain minority shareholders, interests that are not strictly legal should be considered: see Policy Statement 15.1, s. 3.08, referring to "extraordinary circumstances".

[135] It is not necessary to decide on these appeals precisely what would amount to "extraordinary

certaines situations. L'alinéa 192(1)*f*) précise qu'un arrangement peut inclure l'échange de valeurs mobilières contre des biens. L'alinéa 192(4)*c*) énonce que le tribunal peut rendre une ordonnance enjoignant à la société « de convoquer et de tenir une assemblée des détenteurs de valeurs mobilières ». Le directeur nommé en vertu de la *LCSA* est d'avis, au moins, que tous les détenteurs de valeurs mobilières dont les droits sont touchés par la transaction doivent être autorisés à voter sur l'arrangement : Énoncé de politique 15.1, par. 3.08.

[132] Une question difficile se pose toutefois : l'art. 192 s'applique-t-il uniquement aux détenteurs de valeurs mobilières dont les *droits* sont touchés par la proposition ou aussi à ceux dont les droits demeurent intacts, mais dont les *intérêts financiers* risquent de subir un préjudice.

[133] L'objet de l'art. 192, exposé précédemment, laisse croire que cette disposition ne vise que les détenteurs de valeurs mobilières dont les droits sont touchés par la proposition. La procédure établie par l'art. 192 a été conçue et généralement perçue comme visant à permettre aux sociétés d'effectuer des changements qui ont une incidence sur des *droits* des parties. C'est la modification des droits qui place la transaction hors du ressort des administrateurs et engendre la nécessité d'obtenir l'approbation des actionnaires et du tribunal. Le fait que le processus d'approbation d'un arrangement soit axé sur les droits et la demande de redressement pour abus sur les attentes raisonnables de parties est une distinction cruciale. La demande de redressement pour abus est fondée sur le traitement inéquitable des parties intéressées, plutôt que sur leurs droits au sens strict.

[134] Toutefois, cette règle générale n'écarte pas la possibilité que, dans certaines circonstances — par exemple en présence d'un risque d'insolvabilité ou de réclamations de certains actionnaires minoritaires —, des intérêts qui ne constituent pas des droits à strictement parler soient pris en considération : Énoncé de politique 15.1, par. 3.08, faisant état de « circonstances particulières ».

[135] Il n'est pas nécessaire pour trancher les pourvois de statuer sur ce qui constituerait exactement

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circumstances" permitting consideration of non-legal interests on a s. 192 application. In our view, the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not, without more, constitute such a circumstance.

(d) *Criteria for Court Approval*

[136] Section 192(3) specifies that the corporation must obtain court approval of the plan. In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval.

[137] In seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable: see *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Q.B.), at p. 444. This may be contrasted with the s. 241 oppression action, where the onus is on the claimant to establish its case. On these appeals, it is conceded that the corporation satisfied the first two requirements. The only question is whether the arrangement is fair and reasonable.

[138] In reviewing the directors' decision on the proposed arrangement to determine if it is fair and reasonable under s. 192, courts must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. It is through this two-pronged framework that courts can determine whether a plan is fair and reasonable.

[139] In the past, some courts have answered the question of whether an arrangement is fair and reasonable by applying what is referred to as the

des « circonstances particulières » autorisant la prise en compte de simples intérêts dans l'examen d'une demande fondée sur l'art. 192. La Cour est d'avis qu'une diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits demeurent par ailleurs intacts ne constitue généralement pas, à elle seule, ce type de circonstances.

d) *Les critères d'approbation*

[136] Le paragraphe 192(3) exige que la société fasse approuver le plan par un tribunal. Pour statuer sur la demande d'approbation, le tribunal doit s'attacher aux modalités et aux effets de l'arrangement lui-même plutôt qu'au processus suivi pour y parvenir. Il faut que l'arrangement lui-même, considéré substantiellement et objectivement, soit de nature à pouvoir être approuvé.

[137] La société qui demande l'approbation d'un arrangement doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande a été soumise de bonne foi et (3) l'arrangement est équitable et raisonnable : voir *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (B.R.), p. 444. En comparaison, c'est le plaignant qui doit prouver ses prétentions dans le cas de la demande de redressement pour abus prévue par l'art. 241. Le respect des deux premières conditions n'est pas contesté en l'espèce. La seule question en litige est celle du caractère équitable et raisonnable de l'arrangement.

[138] Pour conclure, sous le régime de l'art. 192, que la décision des administrateurs au sujet de l'arrangement proposé est équitable et raisonnable, le tribunal doit être convaincu que l'arrangement : a) poursuit un objectif commercial légitime et b) répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés. C'est en appliquant ce cadre d'analyse à deux volets que les tribunaux peuvent établir si un plan est équitable et raisonnable.

[139] Certains tribunaux ont déjà statué sur le caractère équitable et raisonnable d'un arrangement en appliquant le test dit de l'appréciation

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business judgment test, that is whether an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest would reasonably approve the arrangement: see *Trizec*, at p. 444; *Pacifica Papers Inc. v. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. However, while this consideration may be important, it does not constitute a useful or complete statement of what must be considered on a s. 192 application.

[140] First, the fact that the business judgment test referred to here and the business judgment rule discussed above (at para. 40) are so similarly named leads to confusion. The business judgment *rule* expresses the need for deference to the business judgment of directors as to the best interests of the corporation. The business judgment *test* under s. 192, by contrast, is aimed at determining whether the proposed arrangement is fair and reasonable, having regard to the corporation and relevant stakeholders. The two inquiries are quite different. Yet the use of the same terminology has given rise to confusion. Thus, courts have on occasion cited the business judgment test while saying that it stands for the principle that arrangements do not have to be perfect, i.e. as a deference principle: see *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] Q.J. No. 16158 (QL), 2007 QCCS 6830. To conflate the business judgment test and the business judgment rule leads to difficulties in understanding what "fair and reasonable" means and how an arrangement may satisfy this threshold.

[141] Second, in instances where affected security holders have voted on a plan of arrangement, it seems redundant to ask what an intelligent and honest business person, as a member of the voting class concerned and acting in his or her own interest, would do. As will be discussed below (at para. 150), votes on arrangements are an important indicator of whether a plan is fair and reasonable.

commerciale, qui consiste à déterminer si un homme ou une femme d'affaires intelligent et honnête, membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt, approuverait raisonnablement l'arrangement : voir *Trizec*, p. 444; *Pacifica Papers Inc. c. Johnstone* (2001), 15 B.L.R. (3d) 249, 2001 BCSC 1069. Toutefois, bien que cette question puisse être importante, elle ne constitue pas un énoncé utile et complet des éléments à considérer pour l'examen d'une demande fondée sur l'art. 192.

[140] Premièrement, la similitude d'appellation du test de l'appréciation commerciale qui nous intéresse ici et de la règle de l'appréciation commerciale examinée précédemment (au par. 40) sème la confusion. La *règle* de l'appréciation commerciale exprime la nécessité de faire preuve de retenue à l'égard de l'appréciation par les administrateurs de ce qui sert le mieux les intérêts de la société. Le *test* de l'appréciation commerciale pour l'application de l'art. 192, quant à lui, vise à déterminer si l'arrangement proposé est équitable et raisonnable compte tenu des intérêts de la société et des parties intéressées. Ces deux analyses diffèrent passablement. Or, la similitude des termes employés pour les désigner sème la confusion. Ainsi, il est arrivé que des tribunaux citent le test de l'appréciation commerciale à l'appui du principe selon lequel il n'est pas nécessaire que les arrangements soient parfaits, c.-à-d. en tant que principe de retenue judiciaire : voir *Abitibi-Consolidated Inc. (Arrangement relatif à)*, [2007] J.Q. n° 16158 (QL), 2007 QCCS 6830. Lorsqu'on confond le test de l'appréciation commerciale et la règle de l'appréciation commerciale, il devient plus difficile de comprendre le sens de l'expression « équitable et raisonnable » et la façon dont un arrangement peut satisfaire à cette condition.

[141] Deuxièmement, lorsque les détenteurs de valeurs mobilières dont les droits sont touchés ont voté en faveur d'un plan d'arrangement, il paraît redondant de se demander ce que ferait une femme ou un homme d'affaires intelligent et honnête, en tant que membre de la catégorie ayant droit de vote en cause et agissant dans son propre intérêt. Comme on le verra plus loin (au par. 150), les

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However, the business judgment test does not provide any more information than does the outcome of a vote. Section 192 makes it clear that the reviewing judge must delve beyond whether a reasonable business person would approve of a plan to determine whether an arrangement is fair and reasonable. Insofar as the business judgment test suggests that the judge need only consider the perspective of the majority group, it is incomplete.

[142] In summary, we conclude that the business judgment test is not useful in the context of a s. 192 application, and indeed may lead to confusion.

[143] The framework proposed in these reasons reformulates the s. 192 test for what is fair and reasonable in a way that reflects the logic of s. 192 and the authorities. Determining what is fair and reasonable involves two inquiries: first, whether the arrangement has a valid business purpose; and second, whether it resolves the objections of those whose rights are being arranged in a fair and balanced way. In approving plans of arrangement, courts have frequently pointed to factors that answer these two questions as discussed more fully below: *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. v. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (Que. Sup. Ct.); *PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[144] We now turn to a more detailed discussion of the two prongs.

[145] The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. In other words, courts must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation.

votes tenus au sujet d'arrangements constituent un indicateur important de leur caractère équitable et raisonnable. Toutefois, le critère de l'appréciation commerciale n'est pas plus éclairant que le résultat d'un vote. L'article 192 établit clairement que, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement qui lui est soumis, le juge doit aller au-delà de la question de savoir si un homme ou une femme d'affaires raisonnable l'approuverait. Dans la mesure où le critère de l'appréciation commerciale donne à entendre qu'il suffit au juge d'adopter le point de vue du groupe majoritaire, il est incomplet.

[142] En résumé, la Cour conclut que le critère de l'appréciation commerciale n'est pas utile dans le contexte de l'application de l'art. 192, et qu'il peut même semer la confusion.

[143] Le cadre proposé dans les présents motifs reformule le critère d'appréciation du caractère équitable et raisonnable pour l'application de l'art. 192 en accord avec la logique de cette disposition et la jurisprudence. L'appréciation du caractère équitable et raisonnable suppose deux examens. Le premier consiste à déterminer si l'arrangement poursuit un objectif commercial légitime, et le second s'il répond d'une façon juste et équilibrée aux objections de ceux dont les droits sont visés. Les tribunaux appelés à approuver un arrangement ont souvent mentionné des facteurs qui répondaient à ces deux questions, comme cela sera expliqué plus loin : *Canadian Pacific Ltd. (Re)* (1990), 73 O.R. (2d) 212 (H.C.); *Cinar Corp. c. Shareholders of Cinar Corp.* (2004), 4 C.B.R. (5th) 163 (C.S. Qué.); *PetroKazakhstan Inc. c. Lukoil Overseas Kumkol B.V.* (2005), 12 B.L.R. (4th) 128, 2005 ABQB 789.

[144] Passons maintenant à un examen plus détaillé de chacun de ces deux volets.

[145] Le volet de l'analyse du caractère équitable et raisonnable qui se rapporte à l'objectif commercial légitime reconnaît que l'arrangement doit procurer à la société un avantage qui compense l'atteinte aux droits. Autrement dit, le tribunal doit être convaincu que l'intérêt de la société justifie le fardeau imposé par l'arrangement aux détenteurs de

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The proposed plan of arrangement must further the interests of the corporation as an ongoing concern. In this sense, it may be narrower than the "best interests of the corporation" test that defines the fiduciary duty of directors under s. 122 of the *CBCA* (see paras. 38-40).

[146] The valid purpose inquiry is invariably fact-specific. Thus, the nature and extent of evidence needed to satisfy this requirement will depend on the circumstances. An important factor for courts to consider when determining if the plan of arrangement serves a valid business purpose is the necessity of the arrangement to the continued operations of the corporation. Necessity is driven by the market conditions that a corporation faces, including technological, regulatory and competitive conditions. Indicia of necessity include the existence of alternatives and market reaction to the plan. The degree of necessity of the arrangement has a direct impact on the court's level of scrutiny. Austin J. in *Canadian Pacific* concluded that

> while courts are prepared to assume jurisdiction notwithstanding a lack of necessity on the part of the company, the lower the degree of necessity, the higher the degree of scrutiny that should be applied. [Emphasis added; p. 223.]

If the plan of arrangement is necessary for the corporation's continued existence, courts will more willingly approve it despite its prejudicial effect on some security holders. Conversely, if the arrangement is not mandated by the corporation's financial or commercial situation, courts are more cautious and will undertake a careful analysis to ensure that it was not in the sole interest of a particular stakeholder. Thus, the relative necessity of the arrangement may justify negative impact on the interests of affected security holders.

[147] The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.

valeurs mobilières. Le plan proposé doit en outre servir les intérêts de la société dans la perspective de la continuité de l'entreprise, critère qui peut avoir une portée plus réduite que le critère de ce qui est « au mieux des intérêts de la société » utilisé pour définir l'obligation fiduciaire imposée aux administrateurs par l'art. 122 de la *LCSA* (voir les par. 38-40).

[146] L'examen de l'objectif commercial légitime est invariablement lié aux faits. Par conséquent, la nature et l'étendue de la preuve requise pour répondre à ce critère variera suivant les circonstances. Un important facteur à considérer pour établir si un plan d'arrangement poursuit un objectif commercial légitime est celui de la nécessité de l'arrangement pour la poursuite des activités de la société. Cette nécessité est fonction des conditions du marché, notamment sur les plan de la technologie, de la réglementation et de la concurrence. L'existence de solutions de rechange et la réaction du marché au plan constituent des indices de la nécessité du plan. Le degré de nécessité de l'arrangement a une incidence directe sur la rigueur de l'examen. Dans *Canadian Pacific*, la juge Austin a conclu :

> [TRADUCTION] . . . bien que les tribunaux soient disposés à exercer leur compétence malgré l'absence de nécessité suffisante pour la société, moins la nécessité est grande, plus l'examen doit être rigoureux. [Nous soulignons; p. 223.]

Si le plan d'arrangement est nécessaire pour que la société continue d'exister, les tribunaux seront plus enclins à l'approuver en dépit de ses effets préjudiciables sur certains détenteurs de valeurs mobilières. À l'inverse, si la situation financière ou commerciale de la société ne requiert pas l'arrangement, les tribunaux se montreront plus circonspects et procéderont à un examen minutieux pour s'assurer qu'il ne sert pas uniquement les intérêts d'une partie intéressée en particulier. Par conséquent, la nécessité relative de l'arrangement peut en justifier les effets négatifs sur les intérêts des détenteurs de valeurs mobilières touchés.

[147] Le second volet de l'analyse du caractère équitable et raisonnable est axé sur la question de savoir si les objections de ceux dont les droits sont visés ont été résolues de façon juste et équilibrée.

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[148] An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:

> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[149] The question is whether the plan, viewed in this light, is fair and reasonable. In answering this question, courts have considered a variety of factors, depending on the nature of the case at hand. None of these alone is conclusive, and the relevance of particular factors varies from case to case. Nevertheless, they offer guidance.

[150] An important factor is whether a majority of security holders has voted to approve the arrangement. Where the majority is absent or slim, doubts may arise as to whether the arrangement is fair and reasonable; however, a large majority suggests the converse. Although the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court, courts have placed considerable weight on this factor. Voting results offer a key indication of whether those affected by the plan consider it to be fair and reasonable: *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Gen. Div.).

[151] Where there has been no vote, courts may consider whether an intelligent and honest business person, as a member of the class concerned and

[148] Un plan d'arrangement peut susciter des objections lorsqu'il existe des tensions entre les intérêts de la société et ceux de détenteurs de valeurs mobilières ou lorsque différents groupes dont les droits sont touchés ont des intérêts opposés. Le juge doit être convaincu que l'arrangement établit un juste équilibre compte tenu des intérêts continus de la société et des circonstances de l'affaire. Pour cela, il devra souvent procéder à une pondération complexe en déterminant si des mesures d'accommodement ou de protection appropriées ont été offertes aux parties concernées. Toutefois, comme l'a indiqué le juge Forsyth dans *Trizec*, par. 36,

> [TRADUCTION] le tribunal doit prendre garde de ne pas s'attacher aux besoins particuliers d'un groupe donné et s'efforcer de traiter équitablement tous ceux qui sont touchés par la transaction compte tenu des circonstances. Le caractère équitable de l'arrangement doit s'apprécier globalement ainsi qu'à l'égard de chacune des différentes parties intéressées.

[149] Il faut se demander si le plan, considéré dans cette perspective, est équitable et raisonnable. Pour répondre à cette question, les tribunaux ont tenu compte de divers facteurs, selon la nature de l'affaire. Aucun de ces facteurs n'est déterminant à lui seul et la pertinence de chacun varie d'un cas à l'autre, mais ils fournissent des indications utiles.

[150] Le fait que la majorité des détenteurs de valeurs mobilières aient voté en faveur du plan constitue un facteur important. Le caractère équitable et raisonnable d'un plan qui ne recueille qu'une minorité ou une faible majorité des voix peut être mis en doute, tandis qu'une majorité substantielle a l'effet inverse. Bien que le résultat du vote des détenteurs de valeurs mobilières ne soit pas déterminant pour l'approbation judiciaire du plan, les tribunaux attribuent un poids considérable à ce facteur. Il s'agit d'un indice capital permettant de savoir si les parties touchées estiment que l'arrangement est équitable et raisonnable : *St. Lawrence & Hudson Railway Co. (Re)*, [1998] O.J. No. 3934 (QL) (Div. gén.).

[151] En l'absence de vote, les tribunaux peuvent se demander si une femme ou un homme d'affaires intelligent et honnête, en tant que membre de

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acting in his or her own interest, might reasonably approve of the plan: *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] Other indicia of fairness are the proportionality of the compromise between various security holders, the security holders' position before and after the arrangement and the impact on various security holders' rights: see *Canadian Pacific*; *Trizec*. The court may also consider the repute of the directors and advisors who endorse the arrangement and the arrangement's terms. Thus, courts have considered whether the plan has been approved by a special committee of independent directors; the presence of a fairness opinion from a reputable expert; and the access of shareholders to dissent and appraisal remedies: see *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (Ont. S.C.J.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] This review of factors represents considerations that have figured in s. 192 cases to date. It is not meant to be exhaustive, but simply to provide an overview of some factors considered by courts in determining if a plan has reasonably addressed the objections and conflicts between different constituencies. Many of these factors will also indicate whether the plan serves a valid business purpose. The overall determination of whether an arrangement is fair and reasonable is fact-specific and may require the assessment of different factors in different situations.

[154] We arrive then at this conclusion: in determining whether a plan of arrangement is fair and reasonable, the judge must be satisfied that the plan serves a valid business purpose and that it adequately responds to the objections and conflicts between different affected parties. Whether these requirements are met is determined by taking into account a variety of relevant factors, including the necessity of the arrangement to the corporation's

la catégorie en cause et agissant dans son propre intérêt, approuverait raisonnablement le plan : *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Trizec*.

[152] La proportionnalité du compromis entre les divers détenteurs de valeurs mobilières, la situation des détenteurs de valeurs mobilières avant et après l'arrangement et les effets de l'arrangement sur les droits des divers détenteurs de valeurs mobilières sont aussi des indices de son caractère équitable : voir *Canadian Pacific*; *Trizec*. Les tribunaux peuvent également tenir compte de la réputation des administrateurs et conseillers qui défendent l'arrangement et ses modalités. Ainsi, les tribunaux ont déjà tenu compte du fait qu'un plan avait été approuvé par un comité spécial d'administrateurs indépendants, de l'existence d'une opinion formulée par un spécialiste de renom sur le caractère équitable du plan et des moyens auxquels les actionnaires avaient accès pour exprimer leur dissidence et obtenir une évaluation : voir *Stelco Inc., Re* (2006), 18 C.B.R. (5th) 173 (C.S.J. Ont.); *Cinar*; *St. Lawrence & Hudson Railway*; *Trizec*; *Pacifica Papers*; *Canadian Pacific*.

[153] Les facteurs susmentionnés représentent les éléments pris en considération jusqu'à maintenant pour l'examen des demandes prévues à l'art. 192. Cette énumération n'est pas exhaustive, mais vise simplement à donner un aperçu des facteurs retenus par les tribunaux pour établir si un plan avait résolu de façon raisonnable les objections soulevées et les conflits entre parties intéressées. Beaucoup de ces facteurs pourront aussi indiquer si le plan poursuit un objectif commercial légitime. L'appréciation globale du caractère équitable et raisonnable d'un arrangement dépend des faits et peut faire intervenir différents facteurs suivant les circonstances.

[154] Cela mène donc à la conclusion suivante : pour qu'un plan d'arrangement soit déclaré équitable et raisonnable, le juge doit être convaincu qu'il poursuit un objectif commercial légitime et qu'il répond adéquatement aux objections et aux conflits entre différentes parties intéressées. Pour décider si un arrangement répond à ces critères, le juge tient compte de divers facteurs pertinents, dont la nécessité de l'arrangement pour la continuité de la société,

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continued existence, the approval, if any, of a majority of shareholders and other security holders entitled to vote, and the proportionality of the impact on affected groups.

[155] As has frequently been stated, there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision: *Trizec*; *Maple Leaf Foods*. The court on a s. 192 application should refrain from substituting their views of what they consider the "best" arrangement. At the same time, the court should not surrender their duty to scrutinize the arrangement. Because s. 192 facilitates the alteration of legal rights, the Court must conduct a careful review of the proposed transactions. As Lax J. stated in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J.), at para. 153: "Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination."

(2) Application to These Appeals

[156] As discussed above (at paras. 137-38), the corporation on a s. 192 application must satisfy the court that: (1) the statutory procedures are met; (2) the application is put forward in good faith; and (3) the arrangement is fair and reasonable, in the sense that: (a) the arrangement has a valid business purpose; and (b) the objections of those whose rights are being arranged are resolved in a fair and balanced way.

[157] The first and second requirements are clearly satisfied in this case. On the third element, the debentureholders no longer argue that the arrangement lacks a valid business purpose. The debate before this Court focuses on whether the objections of those whose rights are being arranged were resolved in a fair and balanced way.

l'approbation du plan par la majorité des actionnaires et des autres détenteurs de valeurs mobilières ayant droit de vote, le cas échéant, et la proportionnalité des effets du plan sur les groupes touchés.

[155] Comme cela a souvent été dit, il n'existe pas d'arrangement parfait. Ce qui est requis, c'est que la décision soit raisonnable au regard des circonstances particulières de l'espèce, et non qu'elle soit parfaite : *Trizec*; *Maple Leaf Foods*. Les tribunaux appelés à approuver un plan en vertu de l'art. 192 doivent s'abstenir d'y substituer leur propre conception de ce qui constituerait le « meilleur » arrangement. Mais ils ne doivent pas pour autant renoncer à s'acquitter de leur obligation d'examiner l'arrangement. Étant donné que l'art. 192 facilite la modification de droits, le tribunal doit procéder à un examen attentif des transactions proposées. Comme la juge Lax l'a déclaré dans *UPM-Kymmene Corp. c. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (C.S.J. Ont.), par. 153 : [TRADUCTION] « Bien qu'il n'y ait pas lieu de scruter les décisions du conseil d'administration à la loupe dans la perspective idéale que permet le recul, il faut tout de même les examiner. »

(2) Application aux présents pourvois

[156] Comme il a déjà été mentionné (aux par. 137-138), la société qui soumet une demande en vertu de l'art. 192 doit convaincre le tribunal que : (1) la procédure prévue par la loi a été suivie, (2) la demande est soumise de bonne foi et (3) l'arrangement est équitable et raisonnable au sens où a) il poursuit un objectif commercial légitime et b) il répond de façon équitable et équilibrée aux objections de ceux dont les droits sont visés par l'arrangement.

[157] En l'espèce, les deux premières conditions sont indiscutablement remplies et, en ce qui concerne la troisième, les détenteurs de débentures ne contestent plus que l'arrangement poursuive un objectif commercial légitime. Le débat, devant la Cour, porte donc sur la question de savoir si les objections de ceux dont les droits sont visés par l'arrangement ont été résolues de façon équitable et équilibrée.

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[158] The debentureholders argue that the arrangement does not address their rights in a fair and balanced way. Their main contention is that the process adopted by the directors in negotiating and concluding the arrangement failed to consider their interests adequately, in particular the fact that the arrangement, while upholding their contractual rights, would reduce the trading value of their debentures and in some cases downgrade them to below investment grade rating.

[159] The first question that arises is whether the debentureholders' economic interest in preserving the trading value of their bonds was an interest that the directors were required to consider on the s. 192 application. We earlier concluded that authority and principle suggest that s. 192 is generally concerned with legal rights, absent exceptional circumstances. We further suggested that the fact that a group whose legal rights are left intact faces a reduction in the trading value of its securities would generally not constitute such a circumstance.

[160] Relying on Policy Statement 15.1, the trial judge in these proceedings concluded that the debentureholders were not entitled to vote on the plan of arrangement because their legal rights were not being arranged; "[t]o do so would unjustly give [them] a veto over a transaction with an aggregate common equity value of approximately $35 billion that was approved by over 97% of the shareholders" (para. 166). Nevertheless, the trial judge went on to consider the debentureholders' perspective.

[161] We find no error in the trial judge's conclusions on this point. Since only their economic interests were affected by the proposed transaction, not their legal rights, and since they did not fall within an exceptional situation where non-legal interests should be considered under s. 192, the debentureholders did not constitute an affected class under s. 192. The trial judge was thus correct in concluding

[158] Suivant les détenteurs de débentures de Bell Canada, l'arrangement ne tient pas compte de leurs droits d'une façon équitable et équilibrée. Leur principal argument porte que le processus adopté par les administrateurs pour négocier et conclure l'arrangement n'a pas tenu suffisamment compte de leurs intérêts, plus particulièrement parce que l'arrangement, bien qu'il maintienne leurs droits contractuels, réduirait la valeur marchande de leurs débentures et, dans certains cas, leur ferait perdre leur cote de placements admissibles.

[159] La première question qui se pose est de savoir si les administrateurs étaient tenus de prendre en considération les intérêts financiers des détenteurs de débentures quant au maintien de la valeur marchande de leurs titres dans le cadre de l'application de l'art. 192. La Cour a conclu précédemment qu'il ressort des principes et de la jurisprudence que l'art. 192 concerne généralement les droits, en l'absence de circonstances particulières. Elle a aussi indiqué que la diminution possible de la valeur marchande des valeurs mobilières d'un groupe dont les droits sont demeurés intacts ne constitue habituellement pas ce type de circonstances.

[160] En s'appuyant sur l'Énoncé de politique 15.1, le juge de première instance a conclu que les détenteurs de débentures ne devaient pas se voir accorder le droit de voter sur le plan d'arrangement parce qu'il ne visait pas leurs droits : [TRADUCTION] « Leur accorder ce droit [leur] conférerait injustement un droit de veto sur une transaction d'une valeur totale d'environ 35 milliards de dollars d'actions ordinaires, approuvée par plus de 97 p. 100 des actionnaires » (par. 166). Le juge a néanmoins tenu compte du point de vue des détenteurs de débentures.

[161] Selon la Cour, le juge de première instance pouvait à bon droit conclure ainsi. Puisque la transaction proposée touchait uniquement les intérêts financiers des détenteurs de débentures, et non leurs droits, et puisqu'ils ne se trouvaient pas dans des circonstances particulières commandant la prise en compte de simples intérêts sous le régime de l'art. 192, les détenteurs de débentures

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that they should not be permitted to veto almost 98 percent of the shareholders simply because the trading value of their securities would be affected. Although not required, it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable under s. 192, as he did.

[162] The next question is whether the trial judge erred in concluding that the arrangement addressed the debentureholders' interests in a fair and balanced way. The trial judge emphasized that the arrangement preserved the contractual rights of the debentureholders as negotiated. He noted that it was open to the debentureholders to negotiate protections against increased debt load or the risks of changes in corporate structure, had they wished to do so. He went on to state:

> . . . the evidence discloses that [the debentureholders'] rights were in fact considered and evaluated. The Board concluded, justly so, that the terms of the 1976, 1996 and 1997 Trust Indentures do not contain change of control provisions, that there was not a change of control of Bell Canada contemplated and that, accordingly, the Contesting Debentureholders could not reasonably expect BCE to reject a transaction that maximized shareholder value, on the basis of any negative impact [on] them.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, at para. 162, quoting (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, at para. 199)

[163] We find no error in these conclusions. The arrangement does not fundamentally alter the debentureholders' rights. The investment and the return contracted for remain intact. Fluctuation in the trading value of debentures with alteration in debt load is a well-known commercial phenomenon. The debentureholders had not contracted against this contingency. The fact that the trading value of

ne constituaient pas une catégorie touchée pour l'application de cette disposition. Le juge de première instance était donc fondé à conclure qu'ils ne pouvaient être autorisés à opposer un veto à près de 98 p. 100 des actionnaires simplement parce que la transaction pouvait avoir des répercussions négatives sur la valeur de leurs titres. Même s'il n'en avait pas l'obligation, le juge de première instance avait le droit de tenir compte des intérêts financiers des détenteurs de débentures, comme il l'a fait, pour se prononcer sur le caractère équitable et raisonnable de l'arrangement en vertu de l'art. 192.

[162] Il faut ensuite se demander si le juge de première instance a conclu à tort que l'arrangement répondait de façon équitable et équilibrée aux intérêts des détenteurs de débentures. Le juge a souligné que l'arrangement préservait les droits contractuels des détenteurs de débentures tels que ces derniers les avaient négociés. Il a indiqué que les détenteurs de débentures, s'ils l'avaient désiré, auraient pu négocier des mesures de protection contre l'accroissement de la dette ou les risques de changement dans la structure de la société. Il a ajouté :

> [TRADUCTION] . . . la preuve révèle que leurs droits [des détenteurs de débentures] ont effectivement été pris en compte et évalués. Le Conseil d'administration a conclu, à juste titre, que les actes de fiducie de 1976, 1996 et 1997 ne renfermaient aucune stipulation concernant un changement de contrôle et que, par ailleurs, aucun changement de contrôle de Bell Canada n'était envisagé, de sorte que les détenteurs de débentures ne pouvaient raisonnablement s'attendre à ce que BCE rejette une transaction qui maximisait la valeur actionnariale parce qu'elle avait des effets négatifs pour eux.

((2008), 43 B.L.R. (4th) 1, 2008 QCCS 905, par. 162, citant (2008), 43 B.L.R. (4th) 79, 2008 QCCS 907, par. 199)

[163] La Cour ne décèle aucune erreur dans ces conclusions. L'arrangement ne modifie pas fondamentalement les droits des détenteurs de débentures. L'investissement et le rendement prévus par contrat demeurent inchangés. La fluctuation de la valeur marchande des débentures associée à une variation de l'endettement est un phénomène commercial bien connu. Les détenteurs de débentures

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the debentures stood to diminish as a result of the arrangement involving new debt was a foreseeable risk, not an exceptional circumstance. It was clear to the judge that the continuance of the corporation required acceptance of an arrangement that would entail increased debt and debt guarantees by Bell Canada: necessity was established. No superior arrangement had been put forward, and BCE had been assisted throughout by expert legal and financial advisors, suggesting that the proposed arrangement had a valid business purpose.

ne se sont pas prémunis contractuellement contre une telle éventualité. La diminution éventuelle de la valeur marchande de leurs titres par suite de l'arrangement prévoyant l'accroissement de l'endettement constituait un risque prévisible, et non des circonstances particulières. Il était clair pour le juge que, pour la continuité de la société, l'approbation d'un arrangement comportant un accroissement de l'endettement et des garanties à la charge de Bell Canada était nécessaire. La nécessité était établie. Aucun arrangement supérieur n'avait été soumis et BCE avait bénéficié, pendant tout le processus, des conseils de spécialistes du droit et de la finance, ce qui donne à croire que l'arrangement poursuivait un objectif commercial légitime.

[164] Based on these considerations, and recognizing that there is no such thing as a perfect arrangement, the trial judge concluded that the arrangement had been shown to be fair and reasonable. We see no error in this conclusion.

[164] En s'appuyant sur ces considérations, et reconnaissant qu'il n'existe pas d'arrangement parfait, le juge de première instance a conclu que le caractère équitable et raisonnable de l'arrangement avait été démontré. Cette conclusion n'est à notre avis entachée d'aucune erreur.

[165] The Court of Appeal's contrary conclusion rested, as suggested above, on an approach that incorporated the s. 241 oppression remedy with its emphasis on reasonable expectations into the s. 192 arrangement approval process. Having found that the debentureholders' reasonable expectations (that their interests would be considered by the Board) were not met, the court went on to combine that finding with the s. 192 onus on the corporation. The result was to combine the substance of the oppression action with the onus of the s. 192 approval process. From this hybrid flowed the conclusion that the corporation had failed to discharge its burden of showing that it could not have met the alleged reasonable expectations of the debentureholders. This result could not have obtained under s. 241, which places the burden of establishing oppression on the claimant. By combining s. 241's substance with the reversed onus of s. 192, the Court of Appeal arrived at a conclusion that could not have been sustained under either provision, read on its own terms.

[165] Comme cela a déjà été précisé, l'opinion contraire de la Cour d'appel procédait d'un raisonnement qui amalgamait la demande de redressement pour abus de l'art. 241, axé sur les attentes raisonnables, et le processus d'approbation d'un arrangement établi à l'art. 192. Après avoir conclu que les attentes raisonnables des détenteurs de débentures (que le Conseil d'administration tienne compte de leurs intérêts) n'avaient pas été satisfaites, la cour a associé cette conclusion au fardeau de preuve imposé à la société par l'art. 192. Elle a ainsi combiné les éléments substantiels de la demande de redressement pour abus au fardeau de la preuve applicable dans le cadre d'une demande d'approbation sous le régime de l'art. 192. De ce croisement a découlé la conclusion que la société ne s'était pas acquittée de son obligation de démontrer qu'il n'était pas possible de répondre aux attentes raisonnables des détenteurs de débentures. L'application de l'art. 241, qui impose au plaignant l'obligation de prouver l'abus, n'aurait pas pu produire un tel résultat. En combinant les éléments substantiels de l'art. 241 au fardeau de preuve inversé prévu à l'art. 192, la Cour d'appel est parvenue à une conclusion qu'aucune de ces dispositions, isolément, n'aurait pu justifier.

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VI. Conclusion

[166] We conclude that the debentureholders have failed to establish either oppression under s. 241 of the *CBCA* or that the trial judge erred in approving the arrangement under s. 192 of the *CBCA*.

[167] For these reasons, the appeals are allowed, the decision of the Court of Appeal set aside, and the trial judge's approval of the plan of arrangement is affirmed with costs throughout. The cross-appeals are dismissed with costs throughout.

Appeals allowed with costs. Cross-appeals dismissed with costs.

Solicitors for the appellants/respondents on cross-appeals BCE Inc. and Bell Canada: Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Solicitors for the appellant/respondent on cross-appeals 6796508 Canada Inc.: Woods & Partners, Montréal.

Solicitors for the respondents/appellants on cross-appeals Group of 1976 Debentureholders and Group of 1996 Debentureholders: Fishman, Flanz, Meland, Paquin, Montréal.

Solicitors for the respondent/appellant on cross-appeals Group of 1997 Debentureholders: McMillan, Binch, Mendelsohn, Toronto.

Solicitors for the respondent Computershare Trust Company of Canada: Miller, Thomson, Pouliot, Montréal.

Solicitor for the intervener Catalyst Asset Management Inc.: Christian S. Tacit, Kanata.

Solicitors for the intervener Matthew Stewart: Langlois, Kronström, Desjardins, Montréal.

VI. Conclusion

[166] La Cour est d'avis que les détenteurs de débentures n'ont établi ni qu'il y avait eu abus au sens de l'art. 241 de la *LCSA* ni que le juge de première instance a commis une erreur en approuvant l'arrangement sous le régime de l'art. 192 de la *LCSA*.

[167] Pour ces motifs, les pourvois sont accueillis, la décision de la Cour d'appel est annulée et l'approbation du plan d'arrangement par le juge de première instance est rétablie, avec dépens devant toutes les cours. Les pourvois incidents sont rejetés avec dépens devant toutes les cours.

Pourvois principaux accueillis avec dépens. Pourvois incidents rejetés avec dépens.

Procureurs des appelantes/intimées aux pourvois incidents BCE Inc. et Bell Canada : Davies, Ward, Phillips & Vineberg, Montréal; Ogilvy Renault, Montréal.

Procureurs de l'appelante/intimée aux pourvois incidents 6796508 Canada Inc. : Woods & Partners, Montréal.

Procureurs des intimés/appelants aux pourvois incidents un groupe de détenteurs de débentures de 1976 et un groupe de détenteurs de débentures de 1996 : Fishman, Flanz, Meland, Paquin, Montréal.

Procureurs de l'intimé/appelant aux pourvois incidents un groupe de détenteurs de débentures de 1997 : McMillan, Binch, Mendelsohn, Toronto.

Procureurs de l'intimée la Société de fiducie Computershare du Canada : Miller, Thomson, Pouliot, Montréal.

Procureur de l'intervenante Catalyst Asset Management Inc. : Christian S. Tacit, Kanata.

Procureurs de l'intervenant Matthew Stewart : Langlois, Kronström, Desjardins, Montréal.

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TAB 19

1975 CarswellBC 151
British Columbia Court of Appeal

Bank of Nova Scotia v. Sharp,

1975 CarswellBC 151, [1975] 6 W.W.R. 97, [1975] B.C.J. No. 1148, 57 D.L.R. (3d) 260

Bank of Nova Scotia v. Sharp

Farris C.J.B.C., Bull and Robertson JJ.A.

Judgment: May 30, 1975

Counsel: *R. C. Bledsoe*, for appellant.
S. J. Shabbits, for respondent.

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

1 On 10th July 1972 the respondent Sharp opened a savings account at the Nanaimo branch of the appellant bank with a deposit of $10,000. Mr. Sharp was entitled to draw cheques on the account. No arrangement was made that, where cheques were credited to the account prior to the receipt of payment, Mr. Sharp would be entitled to draw on them before payment was received. He made two further substantial deposits in September and November 1972 and from time to time he made withdrawals from the account by cheque. On 15th September 1972 Mr. Tait, the manager of the branch, gave Mr. Sharp overdraft privileges up to an amount of $2,500 and by 20th September he had overdrawn. On 17th October 1972 Mr. Sharp endorsed and deposited in his account a cheque for $6,000, drawn in his favour by Mehan Lake Logging Limited ("Mehan") on the Langley branch of the bank. The bank did not give any valuable consideration for the cheque nor did it then do anything else that would make it the beneficial owner of the cheque. While the bank, in its own record of Mr. Sharp's account, showed the amount of the cheque as a credit, it is clear that Mr. Sharp deposited the cheque only for collection. In his evidence in chief Mr. Tait said:

> Q. What would you in the majority of occasions do when a cheque was returned back N.S.F.? A. We would charge it back to the customer's account.
>
> And Mr. Sharp, in his cross-examination, said:
>
> Q. And what conclusion did you draw in your own mind as to what the situation would be if he couldn't collect the cheque? A. I thought that I would have to collect by process of law from Mr. Sims (Mehan's president) and pay the bank if the bank couldn't collect it themselves.
>
> Q. You never at any time thought that it was the responsibility of the bank to collect that cheque and if they did not — I'm sorry — collect the proceeds — and if they did not collect the proceeds, that was no concern of yours? A. Yes, I thought it was the responsibility of the bank.
>
> Q. Well, let me put the question differently. Did you at any time think that if the bank failed to do so, that you were free and clear of any responsibility for repaying the bank — that you had no obligation to repay the bank? A. No, I never — that never passed through my mind.

2 The Nanaimo branch of the bank sent the cheque to the Langley branch of the bank but, there being insufficient funds in Mehan's account, the Langley branch returned the cheque to the Nanaimo branch N.S.F. on or about 19th October 1972. Upon receipt of the dishonoured cheque Mr. Tait telephoned the manager of the Langley branch asking information as to the likelihood of the cheque being honoured and, on being given a favourable reply, he sent the cheque to the Langley branch again, this time "on a collection basis", which meant that the Langley branch would hold the cheque against the event that sufficient

funds were deposited in the account of the drawer, whereupon the cheque would be paid. Before doing this, Mr. Tait did not inform Mr. Sharp that the cheque had been dishonoured and so, of course, had no authorization from Mr. Sharp to sent the cheque to the Langley branch a second time. Ultimately Mr. Tait informed Mr. Sharp that the cheque had been dishonoured and the learned trial Judge found that this was on or after — perhaps substantially later than — 26th October 1972. The cheque was never honoured and on 23rd November 1972 the Nanaimo branch debited Mr. Sharp's account in the sum of $6,000. The effect of this was to put Mr. Sharp's account into an overdraft position of $2,331.66. As a result of further withdrawals, by 11th January 1973 the overdraft stood at $3,602.40. At some unspecified time before the trial of this action, Mr. Sharp brought against Mehan an action upon the cheque for $6,000.

3 The bank brought this action against Mr. Sharp to recover the sum of $3,602.40 owing on the overdrawn account and interest. Mr. Sharp counterclaimed for $6,000, alleging that the bank had failed to notify him promptly of the dishonour of the cheque, alleging that he thereby suffered damage and alleging that, as a result of the bank's failure to give him notice of dishonour, he was discharged of any liability under the cheque. (Nothing was said about notice of dishonour to Mehan.)

4 In the result the trial Judge both dismissed the bank's claim for $3,602.40 and gave Mr. Sharp judgment against the bank for $6,000; and a formal judgment was entered accordingly. Upon the hearing of the appeal it was conceded by counsel for Mr. Sharp that the dismissal of the bank's claim was a mistake, as it clearly was.

5 The applicable law is in my opinion correctly set out in 2 Hals (3d) in the following passages [pp. 176-78]:

> 334. As agent of customer. Collection, strictly speaking, is the conduct of a banker who acts as a mere agent or conduit pipe to receive payment of the cheque from the banker on whom it is drawn and holds the proceeds at the disposal of his customer.
>
> The character in which a banker receives a cheque is a matter of fact in each case.
>
> As agent for collection he is bound to exercise diligence in the presentation of the cheque for payment. He fulfils his duty if, when the cheque is drawn on a bank in the same place, he presents it the day after receipt, or, when on a bank in another place, he either presents it or forwards it on the day following receipt. The forwarding may be to another branch or to an agent of the bank, who has the same time after receipt in which to present ...
>
> If the banker fails to present the cheque within the allotted time after it reaches him, he is liable to his customer for loss arising from the delay. The endorsers, if any, are discharged, ...
>
> 335. Effect of notice of dishonour. If a cheque is dishonoured on presentment, the collecting banker can debit the customer's account with the amount. He must give due notice of dishonour either to the parties liable on the cheque, or to his customer. The latter is the usual course. Return of the cheque to the customer is deemed sufficient notice of dishonour, if the customer has endorsed it. Branches of the same bank are held to be separate persons for the transmission of notice of dishonour ...
>
> 336. When proceeds available. Where cheques are collected, the banker has a reasonable time, consistent with ordinary bookkeeping, in which to pass the proceeds to current account before they are available for drawing against. Where cheques are credited as cash prior to receipt of payment, the customer is only entitled to draw on them at once if there is an agreement, express or implied, to that effect. If the cheque is dishonoured, the banker is entitled to debit the customer's account.

6 In Falconbridge on Banking and Bills of Exchange, 7th ed. (1969), this appears at p. 269:

> If a cheque is deposited and presented with due diligence to the drawee bank and dishonoured, the mere fact that the collecting bank has credited the payee with the amount of the cheque is not sufficient proof that the cheque was intended to be discounted, and the entry in the books of the collecting bank may be reversed and the payee of the cheque charged with the amount: *Regina v. Bank of Montreal* (1886), 1 Exch. C.R. 154.

7 As to proof, at p. 163 in the case cited, Strong J. said

The question of the real relation between the bank and the Crown arising out of this particular transaction, is not a question of law, but one purely of fact ... and as a question of fact, it is not concluded by an entry in the books, — such entry being susceptible of explanation, and being, as I hold, in the present case sufficiently explained by the evidence of ... and by the attendant circumstances, and therefore to be construed in the way already indicated.

8 Merely for the purpose of illustrating how old in Canada is the practice of a customer being credited with the amount of a cheque that he has deposited in his bank account and then later being debited with the same amount after the cheque, presented by the bank for payment, has been dishonoured, I cite *Owens v. Quebec Bank* (1870), 30 U.C.Q.B. 382 (C.A.), to which the learned Judge referred.

9 Applying the law as I have outlined it, I am of the opinion that the bank, having credited Mr. Sharp's account with $6,000 when he deposited the cheque, was entitled to debit his account with the same amount after the cheque was dishonoured. On the other hand, the bank owed a duty to Mr. Sharp to give him prompt notice of the dishonour of the cheque at its Langley branch on 19th October 1972. Its failure to do so was a breach of its duty and Mr. Sharp is entitled to recover any damages that he can prove resulted from the breach of that duty. At the same time, the breach of duty did not change the relationship between the parties so as to convert the bank from an agent for collection into beneficial owner of the cheque. The only section of the Bills of Exchange Act, R.S.C. 1970, c. B-5, that may have direct application here is this one:

100. (1) Where a bill when dishonoured is in the hands of an agent he may himself give notice to the parties liable on the bill, or he may give notice to his principal, in which case the principal upon receipt of the notice has the same time for giving notice as if the agent had been an independent holder.

(2) Where the agent gives notice to his principal he must do so within the same time as if he were an independent holder.

10 The learned trial Judge took a different approach. After citing some authorities and referring to ss. 85, 86, 96, 97 and 165 of the Bills of Exchange Act, among which there are included these provisions:

85. (1) Subject to this Act, a bill must be duly presented for payment.

(2) If it is not so presented, the drawer and endorsers are discharged ...

96. (1) Subject to this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer, and each endorser, and any drawer or endorser to whom such notice is not given is discharged.

11 The Judge said [[1974] 6 W.W.R. 481 at 487-89, 48 D.L.R. (3d) 382]:

The 'notice of the dishonour' provisions applicable are to be found in ss. 96 to 108 inclusive. I find, as a fact, that no such notice of dishonour as anticipated in those sections was given to the defendant Sharp within the time limited in s. 97(*a*), hereinbefore reproduced, and accordingly the defendant Sharp is discharged from liability as an endorser of the $6,000 cheque.

By virtue of s. 165(2), ss. 133 to 135 inclusive also have application to the issue I must decide which are reproduced herein in part:

133. The endorser of a bill by endorsing it, subject to the effect of any express stipulation hereinbefore authorized,

(*a*) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the *holder* or a subsequent endorser who is compelled to pay it, if the requisite proceedings *on dishonour* are duly taken;

(*b*) is precluded from denying to *a holder in due course* the genuineness and regularity in all respects of the drawer's signature and all previous endorsements; ...

134. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, are

(*a*) the amount of the bill; ...

135. In case of the dishonour of a bill the holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser, the damages aforesaid. (The italics are mine.)

I find as a fact that the defendant Sharp endorsed the cheque on the reverse side in the appropriate place (see Ex. 4). In my opinion, it does not matter whether on or shortly after 19th October 1972 the plaintiff changed its status from a mere holder (i.e., an agent for collection) to a holder in due course because the reference in s. 133(*a*) is to a holder as distinguished from a holder in due course as referred to in s. 133(*b*).

Neither counsel relied or alluded to ss. 133 to 135 inclusive in their arguments, however, it is my view that pursuant to s. 133(*a*) the defendant Sharp would only become liable to compensate the holder, i.e., the plaintiff bank if '*requisite proceedings on dishonour'* had been properly taken. If I am wrong in that conclusion, the law merchant should govern. Section 10 of the Act reads as follows:

10. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques.

12 (I interject here that the learned Judge did not refer to the aspects of the common law to which I have referred earlier.)

It is my considered opinion that the plaintiff bank was negligent on or about 19th October 1972 in failing to promptly notify the defendant Sharp of the dishonour of the $6,000 cheque. Accordingly, I find that the plaintiff was not entitled to reverse the $6,000 credited to the defendant Sharp's account as they purported to do on 23rd November 1972. The damages suffered by the defendant are in the amount of $6,000 and the plaintiff is, of course, entitled to continued possession of the original $6,000 cheque to take such steps, as it may be advised, against the drawer Mehan Lake Log Ltd.

13 In my respectful opinion the learned Judge went wrong in treating the bank's assertion of a right to reverse the credit in its accounts upon the basis that it was asserting the rights under ss. 133 and 134 above of the holder of the bill against an endorser thereof. This was not the basis of the bank's claim to reverse the credit. Its claim arose from the common law and its position as collection agent. When s. 85(2) says that, if a bill is not duly presented, the endorsers are discharged, it speaks of them being discharged in their capacity as endorsers, and not otherwise. When s. 96(1) says that "any ... endorser to whom such notice is not given is discharged" it means that he is discharged qua endorser. Paragraph (*a*) of s. 133 says what the endorser of a bill "engages" "by endorsing it", if the requisite proceedings on dishonour are duly taken, and it does not extend to engagements that flow from some source other than the endorsement of the bill. Section 134 has to do with the measure of damages against a person who is liable in damages because of the dishonour of a bill on which he is liable, and it does not apply to the damages payable by an agent for collection to his principal because the agent has failed to give due notice of dishonour to the principal.

14 As I have said, Mr. Sharp is entitled to recover such damages as he can prove resulted from the bank's breach of duty; but that is all he can recover. On the trial, as part of its case, counsel for the bank put in these portions of the examination of Mr. Sharp for discovery:

Q. 247. Now, in the next paragraph, paragraph 3, of your counter-claim, you allege and I am talking about half way down — that by reason of the failure of the bank to notify you that the cheque was not honoured by Mehan Lake Log that you have suffered damage. Now, can you tell me what is the damage that you consider you have suffered as a consequence of this failure on the part of the bank? In what way have you suffered? A. Yes. I had my bank account closed off. I had the embarrassment of going around redeeming cheques. I felt hurt by the bank's action — their negligence in informing me.

Q. 248. Are you out of pocket in any way due to this failure and if so, how? A. Well, I am out of pocket because they mishandled the cheque. They mishandled the whole affair.

Q. 249. You say that by his late notifying you of the fact that this cheque was N.S.F. that you are out of pocket and can you explain to me in what way you are out of pocket and how much? What have you lost as a result? A. Well, I think that my greatest or — I should say I think my loss is in being hurt by the bank.

Q. 250. Would you agree with me that you are not out of pocket? You have not lost any money which you might otherwise have had? A. It's hard to say.

Q. 251. Well, you are the one who is saying it in your counter-claim and I am entitled to understand your counter-claim. Would you explain to me if you can how you have lost $6,000? A. Well —

Q. 252. Which is what you are claiming? A. Yes. I've lost $6,000 because they were negligent in honouring that cheque.

15 At the trial only Mr. Sharp gave evidence on his behalf and he said nothing about any damage that he had suffered. The damages must then be assessed solely on the evidence afforded by his examination for discovery put in by the bank. Upon this evidence I think that no more than nominal damages can be awarded, and I would assess them at $100.

16 In the result I would allow the appeal, give the bank judgment for $3,602.40 with interest at 12 per cent per annum, and reduce the damages awarded Mr. Sharp on his counterclaim from $6,000 to $100. The $100 should be set off against the amount for which the bank is given judgment. The bank is entitled to the costs of the action and Mr. Sharp to the costs of the counter-claim, and the bank is entitled to the costs of the appeal.

TAB 20

2005 SCC 58 (CanLII)

Frederick Leroy Barney *Appellant*

v.

Her Majesty The Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development, and United Church of Canada *Respondents*

and

Her Majesty The Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development *Appellant*

v.

United Church of Canada, R.A.F., R.J.J., M.L.J., M.W. (2), Frederick Leroy Barney and Patrick Dennis Stewart *Respondents*

and

Assembly of First Nations, Women's Legal Education and Action Fund, Native Women's Association of Canada and Disabled Women's Network of Canada *Interveners*

Frederick Leroy Barney *Appelant*

c.

Sa Majesté la Reine du chef du Canada, représentée par le ministre des Affaires indiennes et du Nord Canada, et Église unie du Canada *Intimées*

et

Sa Majesté la Reine du chef du Canada, représentée par le ministre des Affaires indiennes et du Nord Canada *Appelante*

c.

Église unie du Canada, R.A.F., R.J.J., M.L.J., M.W. (2), Frederick Leroy Barney et Patrick Dennis Stewart *Intimés*

et

Assemblée des Premières Nations, Fonds d'action et d'éducation juridiques pour les femmes, Association des femmes autochtones du Canada et Réseau d'action des femmes handicapées du Canada *Intervenants*

INDEXED AS: BLACKWATER *v.* PLINT

Neutral citation: 2005 SCC 58.

File No.: 30176.

2005: May 16; 2005: October 21.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

RÉPERTORIÉ : BLACKWATER *c.* PLINT

Référence neutre : 2005 CSC 58.

N^{o} du greffe : 30176.

2005 : 16 mai; 2005 : 21 octobre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Vicarious liability — Charitable immunity — Negligence — Fiduciary duty — Former students of Indian residential school operated by Government of Canada and United Church claiming damages for

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

Délits civils — Responsabilité du fait d'autrui — Exonération des organismes de bienfaisance — Négligence — Obligation fiduciaire — Anciens élèves d'un pensionnat pour enfants indiens géré par le

sexual abuse and other harm suffered while residing at school — Whether Canada and Church jointly vicariously liable to former students for sexual assaults by dormitory supervisor — Whether doctrine of charitable immunity applies to exempt Church from liability — Whether negligence or fiduciary duty by Canada and Church established.

Torts — Non-delegable statutory duty — Former students of Indian residential school operated by Government of Canada and United Church claiming damages for sexual abuse and other harm suffered while residing at school — Whether language of Indian Act provisions establishes non-delegable duty of care on Canada to protect safety and welfare of Aboriginal children while attending residential schools — Indian Act, S.C. 1951, c. 29, ss. 113, 114.

Damages — Apportionment — Vicarious liability — Former students of Indian residential school operated by Government of Canada and United Church claiming damages for sexual abuse and other harm suffered while residing at school — Whether unequal apportionment of responsibility appropriate in cases of vicarious liability — If so, whether trial judge's unequal apportionment of damages between Canada and Church correct.

Damages — Assessment — Effect of prior abuse — Former student of Indian residential school operated by Government of Canada and United Church claiming damages for sexual abuse and other harm suffered while residing at school — Whether unrelated traumas suffered by student before coming to residential school and statute-barred wrongs at school should have been considered by trial judge in assessing damages for sexual abuse.

Damages — General damages — Aggravated damages — Punitive damages — Quantum — Loss of future earning opportunity — Whether trial judge considered correct factors in assessing and awarding damages.

gouvernement du Canada et l'Église unie réclamant des dommages-intérêts pour le préjudice causé par des agressions sexuelles et d'autres actes fautifs commis pendant leur placement au pensionnat — Le gouvernement du Canada et l'Église sont-ils solidairement responsables du fait d'autrui envers les anciens élèves pour les agressions sexuelles commises par le surveillant de dortoir? — La doctrine de l'exonération des organismes de bienfaisance écarte-t-elle la responsabilité de l'Église?— La négligence ou l'obligation fiduciaire du gouvernement du Canada ou de l'Église est-elle établie?

Délits civils — Obligation légale intransmissible — Anciens élèves d'un pensionnat pour enfants indiens géré par le gouvernement du Canada et l'Église unie réclamant des dommages-intérêts pour le préjudice causé par des agressions sexuelles et d'autres actes fautifs commis pendant leur placement au pensionnat — Le libellé de la Loi sur les Indiens impose-t-il au gouvernement du Canada une obligation de diligence intransmissible dont l'objet est d'assurer la sécurité et le bien-être des enfants autochtones placés dans les pensionnats? — Loi sur les Indiens, S.C. 1951, ch. 29, art. 113, 114.

Dommages-intérêts — Répartition — Responsabilité du fait d'autrui — Anciens élèves d'un pensionnat pour enfants indiens géré par le gouvernement du Canada et l'Église unie réclamant des dommages-intérêts pour le préjudice causé par des agressions sexuelles et d'autres actes fautifs commis pendant leur placement au pensionnat — Est-il opportun de répartir inégalement la responsabilité du fait d'autrui? — Dans l'affirmative, le juge de première instance a-t-il eu raison de répartir les dommages-intérêts inégalement entre le gouvernement du Canada et l'Église?

Dommages-intérêts — Évaluation — Incidence de traumatismes antérieurs — Ancien élève d'un pensionnat pour enfants indiens géré par le gouvernement du Canada et l'Église unie réclamant des dommages-intérêts pour le préjudice causé par des agressions sexuelles et d'autres actes fautifs commis pendant son placement au pensionnat — Le juge de première instance aurait-il dû, pour la fixation des dommages-intérêts afférents aux agressions sexuelles, tenir compte des traumatismes subis par l'élève avant son arrivée au pensionnat et de ceux liés à des délits prescrits commis au pensionnat?

Dommages-intérêts — Dommages-intérêts généraux — Dommages-intérêts majorés — Dommages-intérêts exemplaires — Montants — Perte de capacité de gain ultérieure — Le juge de première instance a-t-il tenu compte des bons facteurs pour fixer les dommages-intérêts?

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The Government of Canada and the United Church of Canada operated an Indian residential school in British Columbia in the 1940s, 1950s and 1960s. Aboriginal children were taken from their families pursuant to the *Indian Act* and sent to the school. They were disciplined by corporal punishment. Some, like the appellant B, were repeatedly and brutally sexually assaulted. Four actions were commenced in 1996 by former residents of the school claiming damages for sexual abuse and other harm. The trial judge found that all claims other than those of a sexual nature were statute-barred. P, a dormitory supervisor, was held liable for sexual assault. Canada was held liable for the assaults on the basis of breach of non-delegable statutory duty, and also because Canada and the Church were jointly and vicariously liable for these wrongs. Fault was apportioned 75 percent to Canada and 25 percent to the Church. The trial judge awarded $125,000 general damages and $20,000 aggravated damages to B against the Church and Canada. A further $40,000 punitive damages, plus a future counselling fee of $5,000, was awarded to B against P. Other plaintiffs were awarded amounts commensurate with their situations. The Court of Appeal applied a doctrine of charitable immunity to exempt the Church from liability and placed all liability on Canada on the basis of vicarious liability, awarding B an additional $20,000 for loss of future earning opportunity. Otherwise, it maintained the differing awards for sexual abuse.

Held: B's appeal is dismissed. Canada's appeal is allowed in part. The judgment of the trial judge on the issues of joint vicarious liability against the Church and Canada, and assessment and apportionment of damages, is restored. The judgment of the Court of Appeal on the issue of charitable immunity is set aside. The Court of Appeal's award for loss of future earning opportunity is upheld.

The Church exerted sufficient control over the operations at the residential school that gave rise to the wrong to be found vicariously liable with Canada for the wrongful acts of P. The trial judge's factual findings clearly support a conclusion that the Church was one of P's employers in every sense of the word. None of the considerations relied on by the Court of Appeal —

Dans les années 40, 50 et 60, en Colombie-Britannique, le gouvernement du Canada et l'Église unie du Canada ont géré un pensionnat pour enfants indiens. Des enfants autochtones ont été retirés à leurs familles suivant la *Loi sur les Indiens* et envoyés au pensionnat. On leur a infligé des châtiments corporels pour les corriger. Certains, dont l'appelant B, ont subi à maintes reprises des agressions sexuelles brutales. En 1996, quatre actions ont été intentées par d'anciens pensionnaires en vue d'obtenir des dommages-intérêts pour le préjudice causé par des agressions sexuelles et d'autres actes de nature délictuelle. Le juge de première instance a statué que tous les recours étaient prescrits, sauf celui pour agression sexuelle. Un surveillant de dortoir, P, a été tenu responsable pour les agressions sexuelles. Le gouvernement du Canada a été tenu responsable de ces agressions à cause de son manquement à une obligation légale intransmissible, mais aussi parce que l'Église et lui étaient solidairement responsables du fait d'autrui à cet égard. La faute a été répartie à raison de 75 p. 100 au gouvernement du Canada et de 25 p. 100 à l'Église. Le juge de première instance les a condamnés à verser à B des dommages-intérêts généraux de 125 000 $ et des dommages-intérêts majorés de 20 000 $. P a en outre été condamné à lui verser des dommages-intérêts exemplaires de 40 000 $, plus 5 000 $ pour les frais de consultation futurs. D'autres demandeurs ont obtenu des montants proportionnés à leurs situations. La Cour d'appel a interprété la doctrine de l'exonération des organismes de bienfaisance de manière à écarter la responsabilité de l'Église et à attribuer l'entière responsabilité du fait d'autrui au gouvernement du Canada, accordant à B 20 000 $ supplémentaires pour la perte de capacité de gain ultérieure. Pour le reste, elle a confirmé les différents montants octroyés pour agression sexuelle.

Arrêt : Le pourvoi de B est rejeté. Le pourvoi du gouvernement du Canada est accueilli en partie. Le jugement de première instance est rétabli en ce qui concerne la responsabilité solidaire du fait d'autrui de l'Église et du gouvernement du Canada, ainsi que la détermination et la répartition des dommages-intérêts. Le jugement de la Cour d'appel est annulé quant à l'exonération à titre d'organisme de bienfaisance. Sa décision d'accorder une indemnité pour la perte de capacité de gain ultérieure est confirmée.

L'Église exerçait sur le fonctionnement du pensionnat ayant mené à la faute un pouvoir suffisant pour être tenue, de pair avec le gouvernement du Canada, responsable du fait d'autrui pour les actes fautifs de P. Les conclusions de fait du juge de première instance étayent clairement la conclusion que l'Église était l'un des employeurs de P dans tous les sens du terme.

Canada's degree of control over the residential school, the Church's specific mandate of promoting Christian education, and the difficulty of holding two defendants vicariously liable for the same wrong — negate the imposition of vicarious liability on the Church. Similarly, the Court of Appeal erred in exempting the Church from liability on the ground of charitable immunity. A class-based exemption from vicarious liability finds support neither in principle nor in the jurisprudence. Exempting non-profit organizations when government is present would not motivate such organizations to take precautions to screen their employees and protect children from sexual abuse. The presence of the government does not guarantee the safety of children, particularly where, as in this case, the non-profit organization has day-to-day management of the institution. [19] [22] [31-32] [41] [44]

The trial judge erred in finding a non-delegable statutory duty to ensure the safety and welfare of the students at the school in the text of ss. 113 and 114 of the 1951 *Indian Act*. First, the language of the provisions uses the permissive term "may", as opposed to the directive term "shall", limiting the possibility of finding an obligation as strong as a duty. Second, the power of the government to enter into agreements with religious organizations for the care and education of Indian children suggests that the duty is eminently delegable and was contracted out of by the government. Arguments based on general obligations outside the strict language of the statute and the residential school setting, such as Parliament's control over definition and registration of Indians and jurisdiction over reserves, are not persuasive. They risk encroaching on other grounds of liability such as breach of fiduciary duty and negligence. Unless a non-delegable statutory duty is based on the language of the statute, the boundaries between the various grounds of liability become meaningless. [50-51] [98]

No basis has been established for finding negligence, breach of fiduciary duty, or for reassessing the damage awards. The trial judge correctly apportioned the damages unequally between Canada and the Church. Parties may be more or less vicariously liable for a wrong depending on their level of supervision and direct contact. Here, the trial judge found that Canada was in a better position than the Church to supervise the situation and prevent the loss. That finding, which was grounded in the evidence, should not be interfered

Aucune des considérations sur lesquelles s'est fondée la Cour d'appel — le degré de pouvoir du gouvernement du Canada sur le pensionnat, la mission de l'Église de promouvoir l'instruction chrétienne et la difficulté de tenir deux défendeurs responsables du fait d'autrui pour une seule et même faute — ne fait obstacle à la responsabilité du fait d'autrui de l'Église. De même, la Cour d'appel a eu tort d'écarter la responsabilité du fait d'autrui de l'Église au motif qu'il s'agissait d'un organisme de bienfaisance. Aucun principe ou arrêt de jurisprudence ne justifie cette exonération fondée sur la nature de l'organisme. Exonérer un organisme sans but lucratif lorsque l'État est partie prenante ne l'inciterait pas à recruter du personnel sûr et à protéger les enfants contre les agressions sexuelles. La participation de l'État ne garantit pas la sécurité des enfants, surtout lorsqu'il incombe à l'organisme sans but lucratif de veiller à l'administration quotidienne de l'établissement, comme c'était le cas en l'espèce. [19] [22] [31-32] [41] [44]

Le juge de première instance a eu tort de dégager des art. 113 et 114 de la *Loi sur les Indiens* de 1951 l'obligation intransmissible d'assurer la sécurité et le bien-être des élèves au pensionnat. Premièrement, le libellé de ces dispositions emploie le verbe « pouvoir », qui confère une faculté, plutôt que le verbe « devoir », qui impose une obligation, limitant ainsi la possibilité d'y voir une véritable obligation. Deuxièmement, le pouvoir de l'État de contracter avec des organisations religieuses pour le soin et l'éducation des enfants indiens donne à penser que l'obligation est tout à fait transmissible et qu'elle a été sous-traitée par l'État. Un argument fondé sur une obligation générale étrangère au strict libellé de la loi et au fonctionnement du pensionnat, comme le pouvoir accordé par le législateur relativement à la définition d'« Indien » et à l'enregistrement à ce titre, et la compétence sur les réserves, n'est pas convaincant. Il risque d'empiéter sur d'autres motifs de responsabilité, tels le manquement à l'obligation fiduciaire et la négligence. La frontière entre les différents chefs de responsabilité n'a de sens que si l'obligation intransmissible découle du libellé de la loi. [50-51] [98]

Aucun élément n'a été avancé pour justifier une conclusion de négligence ou de manquement à une obligation fiduciaire ou la modification du montant des dommages-intérêts. Le juge de première instance a eu raison de répartir les dommages-intérêts inégalement entre le gouvernement du Canada et l'Église. La responsabilité d'une partie pour l'acte fautif d'un tiers dépend de la surveillance plus ou moins grande qu'elle a exercée sur ce tiers et du lien plus ou moins direct qu'elle a entretenu avec lui. En l'espèce, le juge de première

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with. Since the basis for assigning greater responsibility to Canada was its greater control over the school operations, the assessment is not affected by the finding that there was no non-delegable duty under the *Indian Act*. Lastly, the trial judge did not err in not considering the traumas suffered by B in his home before coming to the residential school and the statute-barred wrongs at the school in assessing damages. First, in the absence of evidence that B's family difficulties prior to coming to the school had exacerbated the damage B suffered from the sexual assaults he sustained at the school, the trial judge had no choice but to attempt to isolate those traumas and to confine damages to only those arising from the actionable torts, the sexual assaults. Second, to permit damages to be awarded for wrongful acts that are subject to limitation periods that have expired would subvert the legislation and compensate for torts that have been alleged but not proven. It would be to override legislative intent, and fix liability in the absence of legal proof. [70-72] [75] [82] [85] [87] [98]

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Referred to: *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *R. v. Salituro*, [1991] 3 S.C.R. 654; *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145; *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51; *Chernesky v. Armadale Publishers Ltd.*, [1974] 6 W.W.R. 162; *Funnell v. C.P.R.*, [1964] 2 O.R. 325; *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170; *Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler* (2004), 12 C.C.L.I. (4th) 278; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* (1999), 173 D.L.R. (4th) 318; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Hall v. Hebert*, [1993] 2 S.C.R. 159; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18.

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Indian Residential School Regulations, 1953, Reg. 2, 13, 14, 15(1)(a), (b), (c), (d), (h).
Negligence Act, R.S.B.C. 1996, c. 333, s. 1(2).

instance a estimé que le gouvernement du Canada était plus en mesure que l'Église de surveiller la situation et de prévenir la perte. Cette conclusion fondée sur la preuve ne devrait pas être modifiée. Étant donné que le gouvernement du Canada s'est vu imputer une plus grande responsabilité parce qu'il avait exercé un plus grand pouvoir sur le fonctionnement du pensionnat, l'inexistence d'une obligation intransmissible découlant de la *Loi sur les Indiens* ne change rien. Enfin, le juge de première instance a eu raison de ne pas tenir compte, pour la fixation des dommages-intérêts, des traumatismes que B avait subis chez lui auparavant ni de ceux découlant de délits prescrits commis au pensionnat. Premièrement, vu l'absence de preuve que les problèmes familiaux antérieurs de B avaient exacerbé le préjudice découlant des agressions sexuelles subies au pensionnat, le juge de première instance n'a eu d'autre choix que de tenter d'isoler ces traumatismes et de n'accorder des dommages-intérêts que pour le préjudice causé par les délits conférant un droit d'action, les agressions sexuelles. Deuxièmement, permettre le dédommagement pour d'autres actes fautifs frappés de prescription priverait la loi de sa raison d'être et permettrait l'indemnisation à l'égard de délits allégués mais non prouvés. L'intention du législateur serait bafouée, et la responsabilité serait imputée en l'absence d'éléments de preuve légaux. [70-72] [75] [82] [85] [87] [98]

Jurisprudence

Arrêts mentionnés : *Bazley c. Curry*, [1999] 2 R.C.S. 534; *Jacobi c. Griffiths*, [1999] 2 R.C.S. 570; *R. c. Salituro*, [1991] 3 R.C.S. 654; *E.D.G. c. Hammer*, [2003] 2 R.C.S. 459, 2003 CSC 52; *Lewis (Tutrice à l'instance de) c. Colombie-Britannique*, [1997] 3 R.C.S. 1145; *K.L.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51; *Chernesky c. Armadale Publishers Ltd.*, [1974] 6 W.W.R. 162; *Funnell c. C.P.R.*, [1964] 2 O.R. 325; *Bell Canada c. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170; *Gerling Global General Insurance Co. c. Siskind, Cromarty, Ivey & Dowler* (2004), 12 C.C.L.I. (4th) 278; *Bow Valley Husky (Bermuda) Ltd. c. Saint John Shipbuilding Ltd.*, [1997] 3 R.C.S. 1210; *Bluebird Cabs Ltd. c. Guardian Insurance Co. of Canada* (1999), 173 D.L.R. (4th) 318; *Athey c. Leonati*, [1996] 3 R.C.S. 458; *Hall c. Hebert*, [1993] 2 R.C.S. 159; *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18.

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Diane H. Soroka, *Peter R. Grant* and *Allan Early*, for the appellant/respondent Frederick Leroy Barney and the respondents R.A.F., R.J.J., M.L.J. and M.W. (2).

Mitchell R. Taylor and *James M. Ward*, for the appellant/respondent Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development.

Christopher E. Hinkson, *Q.C.*, and *Bernard S. Buettner*, for the respondent the United Church of Canada.

David Paterson, for the respondent Patrick Dennis Stewart.

Jack R. London, *Q.C.*, and *Bryan P. Schwartz*, for the intervener the Assembly of First Nations.

Marie Elena O'Donnell, for the interveners the Women's Legal Education and Action Fund, the Native Women's Association of Canada and the Disabled Women's Network of Canada.

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Diane H. Soroka, *Peter R. Grant* et *Allan Early*, pour l'appelant/intimé Frederick Leroy Barney et les intimés R.A.F., R.J.J., M.L.J. et M.W. (2).

Mitchell R. Taylor et *James M. Ward*, pour l'appelante/intimée Sa Majesté la Reine du chef du Canada, représentée par le ministre des Affaires indiennes et du Nord Canada.

Christopher E. Hinkson, *c.r.*, et *Bernard S. Buettner*, pour l'intimée l'Église unie du Canada.

David Paterson, pour l'intimé Patrick Dennis Stewart.

Jack R. London, *c.r.*, et *Bryan P. Schwartz*, pour l'intervenante l'Assemblée des Premières Nations.

Marie Elena O'Donnell, pour les intervenants le Fonds d'action et d'éducation juridiques pour les femmes, l'Association des femmes autochtones du Canada et le Réseau d'action des femmes handicapées du Canada.

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The judgment of the Court was delivered by

THE CHIEF JUSTICE —

1. Introduction

Are the Government of Canada and the United Church of Canada ("Church") liable to Aboriginal students who attended residential schools operated by them in British Columbia in the 1940s, 1950s and 1960s? If so, on what legal basis are they liable, and how should liability be apportioned between them? Finally, what damages should be awarded? These are the central questions on this appeal.

The appeal arises from four actions commenced in 1996 by 27 former residents of the Alberni Indian Residential School ("AIRS") claiming damages for sexual abuse and other harm. The children had been taken from their families pursuant to the *Indian Act*, S.C. 1951, c. 29, and sent to the school, which had been established by the Church's predecessor, the Presbyterian Church of Canada, in 1891 to provide elementary and high school education to Aboriginal children whose families resided in remote locations on the west coast of Vancouver Island. The children were cut off from their families and culture and made to speak English. They were disciplined by corporal punishment. Some, like the appellant Mr. Barney, were repeatedly and brutally sexually assaulted.

A number of former students, including Mr. Barney, brought an action for damages for the wrongs they had suffered. The trial proceeded in two stages; an inquiry into vicarious liability ((1998), 52 B.C.L.R. (3d) 18 ("1998 decision")) followed by a further liability and damages assessment three years later ((2001), 93 B.C.L.R. (3d) 228, 2001 BCSC 997 ("2001 decision")).

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

1. Introduction

1 Le gouvernement du Canada et l'Église unie du Canada (« Église ») ont-ils une responsabilité à l'égard des élèves autochtones qui ont fréquenté leurs pensionnats en Colombie-Britannique dans les années 40, 50 et 60? Dans l'affirmative, quel en est le fondement juridique et comment doit-elle être répartie entre eux? Enfin, quel montant y a-t-il lieu d'accorder à titre de dommages-intérêts? Telles sont les principales questions que notre Cour est appelée à trancher en l'espèce.

2 Le présent pourvoi découle de quatre actions en dommages-intérêts intentées en 1996 par 27 anciens pensionnaires de l'Alberni Indian Residential School (« Pensionnat ») relativement à des agressions sexuelles et à d'autres actes de nature délictuelle. Enfants, ils ont été retirés à leurs familles suivant la *Loi sur les Indiens*, S.C. 1951, ch. 29, puis envoyés au pensionnat créé en 1891 par l'Église presbytérienne du Canada, à laquelle a succédé l'Église, afin de dispenser un enseignement primaire et secondaire aux enfants autochtones habitant des endroits reculés sur la côte ouest de l'île de Vancouver. Les enfants ont perdu tout contact avec leurs familles et leur culture et ont été amenés à s'exprimer en anglais. On leur a infligé des châtiments corporels pour les corriger. Certains, dont l'appelant M. Barney, ont subi à maintes reprises des agressions sexuelles brutales.

3 Un certain nombre d'anciens pensionnaires, dont M. Barney, ont intenté une action en dommages-intérêts pour les préjudices subis. Le procès s'est déroulé en deux étapes : tout d'abord, l'examen de la responsabilité du fait d'autrui ((1998), 52 B.C.L.R. (3d) 18 (« décision de 1998)), puis, trois ans plus tard, le règlement d'autres questions relatives à la responsabilité, suivi de la détermination du montant des dommages-intérêts ((2001) 93 B.C.L.R. (3d) 228, 2001 BCSC 997 (« décision de 2001)).

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4 The trial judge found that all claims other than those of a sexual nature were statute-barred. He held a dormitory supervisor, Plint, liable to six plaintiffs for sexual assault. He held Canada liable for the assaults on the basis of breach of non-delegable statutory duty, and also found that Canada and the Church were jointly and vicariously liable for these wrongs. He apportioned fault 75 percent to Canada and 25 percent to the Church. The trial judge awarded Mr. Barney $125,000 general damages and $20,000 aggravated damages, against the Church and Canada. In addition, the trial judge awarded Mr. Barney punitive damages against Plint in the sum of $40,000 plus a future counselling fee of $5,000. Other plaintiffs were awarded amounts commensurate with their situations.

Le juge de première instance a statué que tous les recours étaient prescrits, sauf celui pour agression sexuelle. Il a tenu le surveillant de dortoir, M. Plint, responsable pour l'agression sexuelle de six demandeurs. Il en a également tenu responsable le gouvernement du Canada à cause du manquement à une obligation légale intransmissible. Il a conclu que le gouvernement du Canada et l'Église étaient solidairement responsables du fait d'autrui à cet égard. Il a fixé à 75 p. 100 la part de responsabilité du gouvernement du Canada et à 25 p. 100 celle de l'Église. Il les a condamnés à verser à M. Barney des dommages-intérêts généraux de 125 000 $ et des dommages-intérêts majorés de 20 000 $. M. Plint devait en outre verser à M. Barney des dommages-intérêts exemplaires se montant à 40 000 $, plus 5 000 $ pour les frais de consultation futurs. D'autres demandeurs ont obtenu des montants proportionnés à leurs situations.

5 All the parties appealed to the B.C. Court of Appeal. The Court of Appeal applied a doctrine of charitable immunity to exempt the Church from liability and to place all liability on Canada on the basis of vicarious liability ((2003), 21 B.C.L.R. (4th) 1, 2003 BCCA 671). It expressed the view that Canada was more responsible than the Church and in a better position to compensate for the damage, and concluded that vicarious liability should not be imposed on the Church. It also granted one of the plaintiffs, M.J., a new trial, and increased the damages of two others. The Court of Appeal awarded Mr. Barney an additional $20,000 for loss of future earning opportunity. Otherwise, it maintained the differing awards for sexual abuse.

Toutes les parties ont interjeté appel du jugement. La Cour d'appel de la Colombie-Britannique a interprété la règle de l'exonération des organismes de bienfaisance de manière à écarter la responsabilité de l'Église et à attribuer l'entière responsabilité du fait d'autrui au gouvernement du Canada ((2003), 21 B.C.L.R. (4th) 1, 2003 BCCA 671). Elle a estimé que le gouvernement du Canada avait une plus grande part de responsabilité que l'Église et qu'il était plus à même d'indemniser les victimes. Elle a aussi conclu que l'Église ne devait pas être tenue solidairement responsable du fait d'autrui. Elle a également ordonné un nouveau procès dans le cas d'un demandeur, M.J., et augmenté le montant des dommages-intérêts octroyés à deux autres. Elle a accordé à M. Barney 20 000 $ supplémentaires pour la perte de capacité de gain ultérieure. Pour le reste, elle a confirmé les différents montants octroyés pour l'agression sexuelle.

6 The plaintiff Mr. Barney and the defendant Canada now appeal to this Court. Mr. Barney alleges errors in the application of the principles of liability and the assessment of damages. More particularly, he raises the following issues:

Le demandeur Barney et le défendeur le gouvernement du Canada interjettent aujourd'hui appel devant notre Cour. M. Barney allègue que des erreurs entachent l'application des principes de responsabilité et la détermination des dommages-intérêts. Il soulève plus particulièrement les questions suivantes :

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1. Did the courts below err in the application of the principles regarding liability for, and assessment of, damages in the circumstances of sexual abuse of Mr. Barney where the defendants who are liable for the sexual abuse are also responsible for other tortious, but time-barred, acts?

2. Did the courts below err in finding no breach of fiduciary duty by the defendants?

3. Did the courts below err in their application of the test for negligence and in finding that the defendants were not negligent?

4. Did the courts below err in the calculation of general and aggravated damages?

5. Did the courts below err in not awarding punitive damages against Canada?

6. Did the Court of Appeal err in awarding the appellant only a nominal award for loss of future earning opportunity?

Canada raises the following issues relating to liability and fault:

1. Whether in the circumstances of this case the Court of Appeal erred in granting the Church charitable immunity from vicarious liability;

2. Whether the trial judge erred in finding Canada owed and breached a non-delegable duty arising from the *Indian Act* such that Canada is liable for the abuse the plaintiffs suffered at the AIRS; and

3. Whether the trial judge erred in apportioning fault between Canada and the Church on

1. Les tribunaux inférieurs ont-ils commis une erreur dans l'application des principes de responsabilité aux agressions sexuelles dont il a été victime et dans l'évaluation du préjudice, dans la mesure où les défendeurs étaient responsables non seulement des agressions sexuelles, mais également d'autres actes délictuels pour lesquels tout recours était prescrit?

2. Ont-ils eu tort de ne pas conclure au manquement des défendeurs à une obligation fiduciaire?

3. Ont-ils mal appliqué le critère de la négligence et ont-ils eu tort de conclure que les défendeurs n'avaient pas été négligents?

4. Ont-ils commis une erreur dans le calcul des dommages-intérêts généraux et majorés?

5. Ont-ils eu tort de ne pas condamner le gouvernement du Canada à des dommages-intérêts exemplaires?

6. La Cour d'appel a-t-elle eu tort de n'accorder à l'appelant que des dommages-intérêts modestes pour la perte de capacité de gain ultérieure?

7

Le gouvernement du Canada soulève les questions suivantes sur le plan de la responsabilité et de la faute :

1. Vu les circonstances de l'espèce, la Cour d'appel a-t-elle eu tort d'exonérer l'Église de la responsabilité du fait d'autrui au motif qu'elle était un organisme de bienfaisance?

2. Le juge de première instance a-t-il eu tort de conclure à l'existence d'une obligation intransmissible incombant au gouvernement du Canada et découlant de la *Loi sur les Indiens* et au manquement à cette obligation, et de tenir le gouvernement responsable des sévices dont les demandeurs avaient été victimes au Pensionnat?

3. Le juge de première instance a-t-il eu tort de ne pas imputer la faute à parts égales au

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anything but an equal basis in circumstances where both defendants were liable solely on no-fault legal principles.

8 The two appeals, considered together, raise the following legal issues, which I propose to deal with in order:

1. Negligence
2. Vicarious liability
3. The doctrine of charitable immunity
4. Non-delegable statutory duty
5. Fiduciary duty
6. Apportionment of damages
7. Damages: the effect of prior harm
8. General and aggravated damages: quantum
9. Punitive damages
10. Loss of future opportunity

9 A more general issue lurks beneath the surface of a number of the specific legal issues. It concerns how claims such as this, which reach back many years, should be proved, and the role of historic and social science evidence in proving issues of liability and damages. For example, to what extent is evidence of generalized policies toward Aboriginal children relevant? Can such evidence lighten the burden of proving specific fault and damage in individual cases? I conclude that general policies and practices may provide relevant context for assessing claims for damages in cases such as this. However, government policy by itself does not create a legally actionable wrong. For that, the law requires specific wrongful acts causally connected to damage suffered. This appeal must be decided on the evidence

gouvernement du Canada et à l'Église dans la mesure où les deux défendeurs ont été tenus responsables sur le seul fondement de principes de responsabilité sans égard à la faute?

J'aborderai dans l'ordre suivant les questions de droit que les appels soulèvent tous deux :

1. Négligence
2. Responsabilité du fait d'autrui
3. Doctrine de l'exonération des organismes de bienfaisance
4. Obligation légale intransmissible
5. Obligation fiduciaire
6. Répartition des dommages-intérêts
7. Dommages-intérêts : incidence de traumatismes antérieurs
8. Dommages-intérêts généraux et majorés : montants
9. Dommages-intérêts exemplaires
10. Perte de capacité de gain ultérieure

Une question plus générale se profile derrière certaines de ces questions : dans une affaire comme celle considérée en l'espèce, où les faits remontent à de nombreuses années, quelle preuve doit être présentée relativement à la responsabilité et au préjudice et quel est à cet égard le rôle des éléments de preuve relevant de l'histoire et des sciences sociales. Par exemple, dans quelle mesure la preuve de pratiques généralisées à l'endroit des enfants autochtones est-elle pertinente? Peut-elle atténuer l'obligation de prouver la faute et le préjudice dans un cas donné? Je conclus que les politiques et les pratiques générales peuvent constituer des éléments de contexte pertinents pour statuer sur une action en dommages-intérêts comme celle à l'origine du présent pourvoi. Cependant, l'existence d'une politique gouvernementale ne crée pas en soi une faute conférant un droit d'action. Un

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adduced at trial and considered by the Court of Appeal.

In the result, I conclude that the Court of Appeal erred in finding that the Church was protected by the doctrine of charitable immunity, and that the trial judge erred in finding a non-delegable statutory duty on Canada on the terms of the *Indian Act*. I would not interfere with the trial judge's conclusions on negligence, vicarious liability, breach of fiduciary duty or the assessment of damages.

2. Analysis

2.1 *Negligence*

Mr. Barney argues that the trial judge erred in dismissing the claims that the Church and Canada were negligent in employing and continuing to employ various employees when they knew or ought to have known that the employees were pedophiles, in failing to take reasonable steps to prevent or stop physical and sexual assaults, in failing to investigate abuse after it was reported by the students, and in failing to exercise reasonable supervision and direction over their employees.

The trial judge carefully considered the law and the evidence on the issue of negligence. He found that both Canada and the Church were sufficiently proximate to the claimants to give rise to a duty of care to them. He rejected the argument that Canada was exempt from negligence on the basis that its decisions arose from policy decisions: "Here Canada is being taken to task for not only its policy of having Indian residential schools such as AIRS, but also the steps that it took or failed to take to execute that policy" (2001 decision, at para. 79).

lien de causalité doit être établi entre l'acte fautif et le préjudice. Le présent pourvoi doit être réglé au vu de la preuve offerte au procès et soupesée par la Cour d'appel.

10 À mon sens, la Cour d'appel a eu tort de conclure que l'Église était exonérée en tant qu'organisme de bienfaisance et le juge de première instance a conclu à tort que la *Loi sur les Indiens* imposait une obligation intransmissible au gouvernement du Canada. J'estime qu'il n'y a pas lieu de modifier les conclusions du juge de première instance en ce qui concerne la négligence, la responsabilité du fait d'autrui, le manquement à l'obligation fiduciaire ou la détermination des dommages-intérêts.

2. Analyse

2.1 *Négligence*

11 M. Barney soutient que le juge de première instance a eu tort de rejeter les allégations selon lesquelles l'Église et le gouvernement du Canada avaient fait preuve de négligence en employant puis en gardant à leur service des personnes dont ils savaient ou auraient dû savoir qu'elles étaient pédophiles, en omettant de prendre des mesures raisonnables pour empêcher ou faire cesser les agressions physiques et sexuelles, en omettant de faire enquête sur les agressions une fois que les élèves les eurent dénoncées et en omettant de surveiller et d'encadrer convenablement leurs employés.

12 Le juge de première instance a examiné attentivement le droit et les éléments de preuve relatifs à la négligence. Il a estimé que le gouvernement du Canada et l'Église entretenaient tous deux des liens suffisamment étroits avec les demandeurs pour avoir envers eux une obligation de diligence. Il a rejeté la prétention selon laquelle le gouvernement du Canada n'avait pas fait preuve de négligence puisqu'il avait pris ses décisions sur le fondement de politiques générales : [TRADUCTION] « En l'occurrence, le gouvernement du Canada se voit reprocher non seulement sa politique de mise sur pied de pensionnats indiens, comme celui d'Alberni, mais également les mesures qu'il a prises ou qu'il a omis de prendre pour mettre cette politique en œuvre » (décision de 2001, par. 79).

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13 Having concluded that both the Church and Canada owed a duty of care to the claimants, the trial judge examined the applicable standard of care to define the extent of that duty. The question was what Canada and the Church knew or ought to have known, judged by the standards applicable at the time of the acts — the 1940s to the 1960s. In other words, was the risk of sexual assault of the children reasonably foreseeable at the time?

Après avoir conclu que l'Église et le gouvernement du Canada avaient tous deux une obligation de diligence envers les demandeurs, le juge de première instance a déterminé l'étendue de cette obligation au regard de la norme de diligence applicable. La question était la suivante : qu'est-ce que le gouvernement du Canada et l'Église savaient ou auraient dû savoir, compte tenu de l'époque où se sont produits les actes — les années 40 à 60? Autrement dit, le risque que les enfants soient agressés sexuellement était-il alors raisonnablement prévisible?

14 The trial judge concluded that the harm was not foreseeable on the evidence before him. There was no evidence that the possibility of sexual assault was actually brought to the attention of the people in charge of AIRS. The trial judge found that the children had not been very clear in reporting the abuse and the adults to whom they reported did not realize the children were talking about sexual abuse, an almost unthinkable idea at the time. Former employees at AIRS testified that they were ignorant of any systemic or widespread abuse at the school and the doctor who cared for the children there never suspected abuse. On the two occasions that a sexual abuse was brought to the supervisor's attention, the perpetrator was immediately fired.

Au vu de la preuve, le juge de première instance s'est dit d'avis que le préjudice n'était pas prévisible. Aucun élément n'établissait que les responsables du Pensionnat avaient effectivement été mis au courant de la possibilité d'agressions sexuelles. Selon lui, les enfants n'avaient pas signalé les agressions très clairement, et les adultes auxquels ils s'étaient adressés n'avaient pas saisi qu'il s'agissait d'agressions sexuelles, une éventualité alors presque impensable. D'anciens employés du Pensionnat ont témoigné avoir ignoré l'existence d'agressions systématiques ou généralisées dans l'établissement, et le médecin qui s'occupait des enfants n'a jamais soupçonné qu'ils étaient maltraités. Les deux fois où il avait été informé d'une agression sexuelle, le surveillant avait congédié l'agresseur sur-le-champ.

15 Nor, given the standards and awareness of the time, could it be contended that they ought to have known of the risks; as the trial judge stated, ". . . when the evidence is examined closely, one is drawn to the conclusion that the unspeakable acts which were perpetrated on these young children were just that: at that time they were for the most part not spoken of" (2001 decision, at para. 135). By contemporary standards, the measures taken were clearly inadequate and the environment unsafe. But by the standards of the time, constructive knowledge of a foreseeable risk of sexual assault to the children was not established. As a result, the trial judge dismissed the claims of negligence against the Church and Canada.

Selon les normes de l'époque et la sensibilisation qui existait alors, l'on ne peut non plus affirmer qu'ils auraient dû connaître le risque. Le juge de première instance a dit : [TRADUCTION] « examinée de plus près, la preuve porte à conclure que les actes innommables dont ces jeunes enfants ont été victimes ne pouvaient tout simplement pas être nommés : à l'époque, le plus souvent, on n'en parlait pas » (décision de 2001, par. 135). Pour mes contemporains, les mesures prises étaient nettement insuffisantes et le milieu de vie, peu sûr. Toutefois, suivant les normes de l'époque, la connaissance présumée d'un risque prévisible que les enfants soient sexuellement agressés n'a pas été établie. Le juge de première instance a donc rejeté les allégations de négligence formulées contre l'Église et le gouvernement du Canada.

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Mr. Barney does not point to specific errors in the trial judge's application of the test and conclusion on standard of care. Instead he focuses on the trial judge's factual findings. In particular, he argues that the Church and Canada should have investigated why so many children were running away from AIRS and clarified the complaints of the children. This goes to the actual and constructive knowledge of the defendants, and more particularly, what steps they should have taken if they had had knowledge of sexual abuse. The trial judge addressed these matters thoroughly and sensitively in his reasons, and the Court of Appeal correctly concluded that no error in his conclusions on negligence had been demonstrated.

Mr. Barney's appeal on this point must be dismissed.

2.2 *Vicarious Liability*

The trial judge accepted that the Church and Canada were vicariously liable for the wrongful acts of the dormitory supervisor, Plint. The Court of Appeal disagreed. While it upheld the trial judge's finding that Canada was vicariously liable because of its control over the principal and activities at AIRS, the court held that the Church's non-profit status exempted it from any liability.

I conclude that the trial judge was correct in concluding that both the Church and Canada are vicariously liable for the wrongful acts of Plint.

Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires: *Bazley v. Curry*, [1999] 2 S.C.R. 534. The fact that wrongful acts may occur is a cost of business. The imposition of vicarious liability in such circumstances serves the policy

16 M. Barney ne relève aucune erreur particulière dans l'application du critère et la conclusion sur la norme de diligence. Il s'en prend plutôt aux conclusions de fait du juge de première instance. Plus précisément, il fait valoir que l'Église et le gouvernement du Canada auraient dû chercher à savoir pourquoi tant d'enfants s'enfuyaient du Pensionnat et faire la lumière sur les plaintes des enfants. Cette prétention touche à la connaissance réelle et présumée des défendeurs et, surtout, aux mesures qu'ils auraient dû prendre s'ils avaient eu connaissance des agressions sexuelles. Dans ses motifs, le juge de première instance a abordé ces questions avec minutie et doigté, et la Cour d'appel a conclu à juste titre qu'aucune erreur n'entachait ses conclusions sur la négligence.

17 Je suis d'avis de rejeter l'appel de M. Barney sur ce point.

2.2 *Responsabilité du fait d'autrui*

18 Le juge de première instance a reconnu la responsabilité de l'Église et du gouvernement du Canada pour les actes fautifs du surveillant de dortoir, M. Plint. La Cour d'appel n'a pas partagé son avis. Elle a confirmé que le gouvernement du Canada était responsable du fait d'autrui à cause de son pouvoir sur le directeur et les activités du Pensionnat, mais elle a conclu que la qualité d'organisme de bienfaisance exonérait l'Église de toute responsabilité.

19 J'estime que le juge de première instance a eu raison de conclure à la responsabilité du fait d'autrui de l'Église et du gouvernement du Canada pour les actes fautifs de M. Plint.

20 La responsabilité du fait d'autrui peut être imputée dès lors qu'il existe un lien important entre la conduite autorisée par l'employeur, ou le surveillant, et la faute. L'employeur ou le dirigeant de l'entreprise qui a créé ou accru le risque de comportement fautif doit être tenu responsable même lorsque l'acte fautif peut aller à l'encontre de sa volonté : *Bazley c. Curry*, [1999] 2 R.C.S. 534. Le coût associé à la réalisation de ce risque incombe à l'entreprise. Lui imputer la responsabilité pour le fait d'autrui permet d'atteindre les objectifs de

ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence. When determining whether vicarious liability should be imposed, the court bases its decision on several factors, which include: (a) the opportunity afforded by the employer's enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer's interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims.

21 I turn first to the vicarious liability of the Church. On the documents, the Church was Plint's immediate employer. Plint was in charge of the dormitory in which Mr. Barney slept and was answerable to the Church. The trial judge considered the legal test for vicarious liability and concluded that the Church was one of Plint's employers. It employed him in furtherance of its interest in providing residential education to Aboriginal children, and gave him the control and opportunity that made it possible for him to prey on vulnerable victims. In these circumstances, the trial judge found the Church, together with Canada, to be vicariously liable for Plint's sexual assault of the children. However, the Court of Appeal concluded that because of management arrangements between the Church and Canada, the Church could not be considered Plint's employer for purposes of vicarious liability.

22 The trial judge made at least eight factual findings that support his conclusion that the Church was one of Plint's employers in every sense of the word and should be vicariously liable for the assaults.

23 First, the principal, who was responsible for hiring and supervising dormitory supervisors, was hired by the Church subject to Canada's approval as a matter of convention (Caldwell in 1944 and

politique générale que sont l'indemnisation appropriée de la victime et la dissuasion. Pour déterminer si la responsabilité du fait d'autrui est fondée, le tribunal tient compte de plusieurs facteurs dont a) l'occasion que l'entreprise a donnée à l'employé d'abuser de son pouvoir, b) la mesure dans laquelle l'acte fautif a contribué à la réalisation des objectifs de l'employeur, c) la mesure dans laquelle le contexte de travail a créé un climat d'intimité ou d'autres conditions propices à la commission de l'acte fautif, d) l'étendue du pouvoir conféré à l'employé relativement à la victime et e) la vulnérabilité des victimes potentielles.

J'aborde tout d'abord la question de la responsabilité de l'Église pour le fait d'autrui. Suivant la preuve documentaire, l'Église était l'employeur immédiat de M. Plint, qui était chargé de la surveillance du dortoir où dormait M. Barney et relevait de l'Église. Le juge de première instance s'est penché sur le critère juridique applicable à la responsabilité du fait d'autrui et a conclu que l'Église était l'un des employeurs de M. Plint. L'Église avait retenu les services de M. Plint afin de réaliser son objectif — la scolarisation des enfants autochtones en pensionnat —, et elle lui avait donné le pouvoir de s'en prendre à des victimes vulnérables et fourni l'occasion de le faire. Le juge de première instance a donc tenu l'Église et le gouvernement du Canada responsables du fait d'autrui — l'agression sexuelle des enfants par M. Plint. Toutefois, étant donné les accords intervenus entre l'Église et le gouvernement du Canada relativement à l'administration du Pensionnat, la Cour d'appel a conclu que l'Église ne pouvait être considérée comme l'employeur de M. Plint ni, par conséquent, tenue responsable des actes de ce dernier.

Le juge de première instance a tiré au moins huit conclusions de fait à l'appui de sa thèse selon laquelle l'Église était l'un des employeurs de M. Plint, dans tous les sens du terme, et devait être tenue responsable des agressions.

Premièrement, chargé du recrutement et de l'encadrement des surveillants de dortoir, le directeur était engagé par l'Église sur l'approbation du gouvernement du Canada, suivant la convention établie

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Dennys in 1958) and as a matter of agreement (Andrews in 1962): 1998 decision, at paras. 54-55.

Second, it was Principal Andrews' understanding that the Church hired and fired him. In the course of his employment, the principal communicated with both Canada and the Church on a regular basis. The Church was his direct supervisor and controlled the principal's salary: 1998 decision, at para. 60. Andrews' vice-principal confirmed that he was hired by a representative of the Church: 1998 decision, at para. 61.

Third, the Church was involved in all aspects of the operation and management of AIRS, including the ongoing supervision of the principal, the periodic inspection of the school, the hiring of Church workers directly (although it was not responsible for hiring teaching staff after 1949) and the religious education of the students: 1998 decision, at para. 65. In its 1993 Brief to the Royal Commission on Aboriginal Peoples, the Church described that it was responsible for the "day-to-day atmosphere and activity" of the schools as "implementing agents": 1998 decision, at para. 66. The principal controlled Plint in the conduct of his duties as dormitory supervisor.

Fourth, the Church managed a pension plan for lay employees, though the employer's contributions were paid by Canada: 1998 decision, at para. 69.

Fifth, the principal's authority to dismiss employees was subject to review by the Church, and dismissed employees could appeal to the Church Advisory Committee: 1998 decision, at para. 69.

Sixth, the Church made periodic grants to the school's operation (although the budget was funded by Canada), guaranteed the AIRS overdraft and set a limit to the school's line of credit: 1998 decision, at paras. 70-71.

(M. Caldwell en 1944 et M. Dennys en 1958), puis suivant l'accord intervenu (M. Andrews en 1962) : décision de 1998, par. 54-55.

24 Deuxièmement, le directeur Andrews croyait que son engagement et son congédiement relevaient de l'Église. Dans l'exercice de ses fonctions, il communiquait régulièrement tant avec elle qu'avec le gouvernement du Canada. L'Église était son supérieur immédiat et décidait de son salaire : décision de 1998, par. 60. L'adjoint de M. Andrews a confirmé avoir été engagé par un représentant de l'Église : décision de 1998, par. 61.

25 Troisièmement, l'Église participait à tous les aspects de la direction et de l'administration du Pensionnat, y compris la surveillance constante du directeur, l'inspection périodique de l'établissement, l'engagement direct de ses employés (sauf le personnel enseignant après 1949) et l'éducation religieuse des élèves : décision de 1998, par. 65. Suivant le mémoire qu'elle a remis à la Commission royale sur les peuples autochtones en 1993, l'Église s'occupait, en tant qu'[TRADUCTION] « organe d'exécution », « du fonctionnement et du cadre quotidiens » des écoles : décision de 1998, par. 66. Le directeur encadrait M. Plint dans l'exécution de ses fonctions de surveillant de dortoir.

26 Quatrièmement, l'Église gérait le régime de retraite des employés laïques, même si les cotisations de l'employeur étaient acquittées par le gouvernement du Canada : décision de 1998, par. 69.

27 Cinquièmement, le directeur pouvait congédier un employé, mais sa décision était soumise au contrôle de l'Église; l'employé pouvait contester son congédiement devant le comité consultatif de l'Église : décision de 1998, par. 69.

28 Sixièmement, l'Église faisait périodiquement don d'une somme au Pensionnat (même si le budget de fonctionnement de ce dernier était financé par le gouvernement du Canada), garantissait son découvert et fixait la limite de sa marge de crédit : décision de 1998, par. 70-71.

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29 Seventh, the Church inspected the school annually and provided the Christian education at the school: 1998 decision, at paras. 70-71.

30 Finally, the Church appointed an advisory committee to ensure that Church policies were being carried out at the school: 1998 decision, at para. 64.

31 In summary, the trial judge adduced compelling reasons for his conclusion that the Church did in fact exert sufficient control to be found vicariously liable with Canada.

32 The Court of Appeal, in rejecting the Church's vicarious liability, relied on Canada's degree of control over AIRS, the Church's specific mandate to promote Christian education, and the difficulty of holding two defendants — Canada and the Church — vicariously liable for the same wrong. I conclude that none of these considerations negate the imposition of vicarious liability on the Church.

33 The Court of Appeal's first reason for not imposing vicarious liability on the Church is that this would be inappropriate, given the degree of control over the operations exercised by the government. In making this finding, the Court of Appeal engaged in extensive re-evaluation of the evidence to negate the trial judge's conclusion that the Church had sufficient control to attract vicarious liability. Esson J.A. emphasized that the agreement between the government and the Church did not transfer all management responsibility to the Church, and that under the agreement the Minister retained detailed control over the operation. He pointed out that Canada had taken the position before the Canada Labour Relations Board that the employees of residential schools were employees of the Crown. As for the overwhelming evidence that the Church in fact had the daily management and control of the school, including the hiring, firing and supervision of staff, Esson J.A. concluded that this did not matter, since the Church official in charge, Reverend Joblin, was the agent of Canada in

Septièmement, l'Église inspectait l'établissement chaque année et y dispensait l'enseignement chrétien : décision de 1998, par. 70-71.

Enfin, l'Église avait mis sur pied un comité consultatif chargé du respect de ses politiques à l'école : décision de 1998, par. 64.

En résumé, le juge de première instance a étayé de manière convaincante sa conclusion que l'Église exerçait un pouvoir suffisant pour être tenue, de pair avec le gouvernement du Canada, responsable du fait d'autrui.

Pour écarter la responsabilité du fait d'autrui de l'Église, la Cour d'appel a tenu compte du degré de pouvoir du gouvernement du Canada sur le Pensionnat, de la mission de l'Église de promouvoir l'instruction chrétienne, ainsi que de la difficulté de tenir deux défendeurs — le gouvernement du Canada et l'Église — responsables du fait d'autrui pour une seule et même faute. Je conclus qu'aucune de ces considérations ne fait obstacle à la responsabilité du fait d'autrui de l'Église.

La Cour d'appel a tout d'abord invoqué à l'encontre de celle-ci le pouvoir exercé par le gouvernement du Canada sur le fonctionnement du Pensionnat. Elle a donc réexaminé tous les éléments de preuve afin d'écarter la conclusion du juge de première instance selon laquelle l'Église exerçait un pouvoir suffisant pour être tenue responsable du fait d'autrui. Le juge Esson a rappelé que suivant l'accord liant le gouvernement du Canada et l'Église, l'entière responsabilité de l'administration n'était pas transmise à l'Église, le ministre conservant un droit de regard sur le fonctionnement de l'établissement. Il a relevé que, devant le Conseil canadien des relations du travail, le gouvernement du Canada avait soutenu que les employés des pensionnats étaient des employés de l'État. En ce qui concerne la preuve abondante selon laquelle l'Église s'occupait dans les faits de l'administration et de la direction quotidiennes du pensionnat, y compris l'engagement, le congédiement et la surveillance du personnel, le juge Esson a conclu qu'elle n'importait guère puisque le représentant de l'Église, le révérend Joblin,

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providing supervision and management of what were in fact the government's schools.

Despite these assertions, the incontrovertible reality is that the Church played a significant role in the running of the school. It hired, fired and supervised the employees. It did so for the government of Canada, but also for its own end of promoting Christian education to Aboriginal children. The trial judge's conclusion that the Church shared a degree of control of the situation that gave rise to the wrong is not negated by the argument that as a matter of law Canada retained residual control, nor by formalistic arguments that the Church was only the agent of Canada. Canada had an important role, to be sure, which the trial judge recognized in holding it vicariously liable for 75 percent of the loss. But that does not negate the Church's role and the vicarious liability it created.

The Court of Appeal's second reason for not holding the Church vicariously liable is that Plint's employment as dormitory supervisor fell outside the only area in which the Church was mandated to make decisions — the provision of a Christian education. Again, this argument flies in the face of reality. The Church in fact ran the dormitory, as well as other parts of the school. Whether or not that fell within some formal definition of its objects is irrelevant.

The third reason, and the one that seems to drive the decision of the Court of Appeal on the Church's vicarious liability, is discomfort with the idea that two defendants can be vicariously liable for the same conduct.

This concern, however, may be misplaced. There is much to support the view of P. S. Atiyah in *Vicarious Liability in the Law of Torts* (1967), that "[t]here is, of course, no reason why two employers should not jointly employ a servant, and this would normally be the case with the employees of a

était mandataire du gouvernement du Canada pour la surveillance et l'administration de ce qui était en fait des écoles de l'État.

34 En dépit de ces affirmations, l'Église a joué un rôle important dans la direction du Pensionnat. C'est elle qui engageait, congédiait et surveillait les employés. Elle le faisait pour le compte du gouvernement du Canada, mais également pour réaliser un objectif à elle — la promotion de l'instruction chrétienne des enfants autochtones. La conclusion du juge de première instance selon laquelle l'Église était en partie responsable de la situation ayant mené à la faute n'est pas réfutée par l'argument que le gouvernement du Canada conservait en droit un pouvoir résiduel, ni par les arguments formalistes voulant que l'Église n'ait été que son mandataire. Le gouvernement du Canada avait certes un rôle important, que le juge de première instance a reconnu en le tenant à 75 p. 100 responsable du fait d'autrui, mais ni le rôle de l'Église ni sa responsabilité du fait d'autrui ne sont pour autant exclus.

35 Suivant le deuxième motif invoqué par la Cour d'appel à l'encontre de la responsabilité du fait d'autrui de l'Église, les fonctions de M. Plint à titre de surveillant de dortoir échappaient au seul domaine dans lequel l'Église était appelée à prendre des décisions — l'instruction chrétienne des élèves. Là encore, cet argument est incompatible avec la réalité. Dans les faits, l'Église dirigeait le dortoir, ainsi que les autres parties du Pensionnat. Il importe peu de savoir si cela relevait ou non de sa mission officielle.

36 Le troisième motif — celui qui semble sous-tendre la décision de la Cour d'appel concernant la responsabilité du fait d'autrui de l'Église — repose sur la réticence à imposer la responsabilité du fait d'autrui à deux défendeurs pour une même conduite.

37 Or, cette réticence peut être injustifiée. Il y a de nombreuses raisons d'abonder dans le sens de P. S. Atiyah qui, dans son ouvrage intitulé *Vicarious Liability in the Law of Torts* (1967), dit que [TRADUCTION] « rien n'empêche évidemment deux employeurs de retenir de concert les services d'un

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partnership. Here the servant is the servant of each partner and of all jointly, and they are all jointly and severally liable for the servant's torts": p. 149. Thus, joint vicarious liability is acceptable where there is a partnership.

38 In this case, the trial judge specifically found a partnership between Canada and the Church, as opposed to finding that each acted independently of the other. No compelling jurisprudential reason has been adduced to justify limiting vicarious liability to only one employer, where an employee is employed by a partnership. Indeed, if an employer with *de facto* control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence. I conclude that the Church should be found jointly vicariously liable with Canada for the assaults, contrary to the conclusions of the Court of Appeal.

2.3 *The Doctrine of Charitable Immunity*

39 The Court of Appeal went on to find that in any event the Church would be exempted from any liability on the basis of the doctrine of charitable immunity. In effect, the Court of Appeal created a limited status-based exemption from liability for non-profit organizations. It stated that in a situation where "the government is liable and in which the non-profit charitable organization is not at fault and, if it can be said to have introduced the risk at all, did so to a lesser degree than government, no liability should be imposed upon the organization" (para. 48).

40 This conclusion rests on a misapprehension of the principles governing vicarious liability and more particularly, the decisions of this Court in *Bazley* and *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570. It seeks to ground itself in the discussion in *Bazley* of risk allocation, namely the argument that

employé, et que c'est ce que feraient normalement les membres d'un partenariat. En l'espèce, l'employé travaille pour deux employeurs, individuellement et collectivement, et ceux-ci sont solidairement responsables de ses délits » : p. 149. Il peut donc y avoir responsabilité solidaire du fait d'autrui dans le cas d'un partenariat.

Dans la présente affaire, le juge de première instance a précisément conclu à l'existence d'un partenariat entre le gouvernement du Canada et l'Église, plutôt qu'à un fonctionnement individuel indépendant. Aucun motif sérieux issu de la jurisprudence n'a été avancé pour justifier l'imposition de la responsabilité du fait d'autrui à un seul employeur dans le cas d'un partenariat. En effet, les principes de la juste indemnisation et de la dissuasion seraient compromis si la responsabilité d'un employeur exerçant *de facto* un pouvoir sur un employé n'était pas retenue en raison d'une règle arbitraire n'admettant la responsabilité que d'un seul employeur pour le fait d'autrui. Contrairement à la Cour d'appel, je conclus que l'Église doit être tenue responsable du fait d'autrui au même titre que le gouvernement du Canada pour les agressions commises.

2.3 *Doctrine de l'exonération des organismes de bienfaisance*

La Cour d'appel a statué que, de toute manière, l'Église échappait à la responsabilité en raison de l'exonération des organismes de bienfaisance. En effet, elle a créé une exonération de responsabilité restreinte au bénéfice des organismes sans but lucratif. Selon elle, lorsque [TRADUCTION] « le gouvernement est responsable et que l'organisme de bienfaisance sans but lucratif n'a commis aucune faute, ou que, s'il est à l'origine du risque, il l'est dans une moindre mesure que le gouvernement, l'organisme sans but lucratif ne doit se voir imposer aucune responsabilité » (par. 48).

Il s'agit d'une méprise quant aux principes de la responsabilité du fait d'autrui et, en particulier, aux arrêts *Bazley* et *Jacobi c. Griffiths*, [1999] 2 R.C.S. 570. La Cour d'appel fonde l'exonération sur les propos concernant la répartition du risque tenus par notre Cour dans *Bazley*, savoir qu'il peut être

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as between the enterprise that introduces the risk which produces the harm and the victim, it may be fair to require the enterprise to bear the loss, provided there is a sufficient connection between the enterprise and the harm. The Court of Appeal then extends this observation to reason that it is the party best able to bear the loss that should be liable, provided it bears more responsibility than a party less able to pay. Reasoning that the government of Canada is more at fault and better able to bear the loss than the Church, a non-profit organization, it concludes that the Church should not be liable and that Canada alone should bear the loss. The result is to convert a policy observation in *Bazley* into a free-standing legal test that dictates that non-profit organizations should be free from liability for wrongs committed by their employees, provided they are less at fault than a party better able to bear the loss.

juste que l'entreprise qui a créé le risque à l'origine du préjudice, plutôt que la victime, soit contrainte à supporter la perte s'il existe un lien suffisant entre l'entreprise et le préjudice. Elle fait ensuite fond sur cette observation pour soutenir que c'est à la partie la plus à même de supporter la perte d'être tenue responsable, à condition que sa responsabilité soit plus grande que celle d'une partie moins bien nantie. Estimant que le gouvernement du Canada est davantage fautif et plus à même de supporter la perte que l'Église, un organisme sans but lucratif, elle conclut que cette dernière ne doit pas être tenue responsable et que la perte ne doit être supportée que par le gouvernement du Canada. La Cour d'appel fait ainsi de l'observation générale formulée dans l'arrêt *Bazley* un critère juridique indépendant dictant qu'un organisme sans but lucratif échappe à toute responsabilité pour la faute d'un employé lorsque sa part de responsabilité est moindre que celle d'une partie plus à même de supporter la perte.

This class-based exemption finds support neither in principle nor in the jurisprudence. It ignores the other concerns raised in *Bazley* that led the Court to reject a class-based exemption from vicarious liability. First, exempting non-profit organizations when government is present would not motivate such organizations to take precautions to screen their employees and protect children from sexual abuse. The presence of government does not guarantee the safety of children, particularly where, as in this case, the non-profit organization has day-to-day management of the institution.

41 Aucun principe ou arrêt de jurisprudence ne justifie cette exonération fondée sur la nature de l'organisme. La Cour d'appel a fait abstraction des autres considérations qui, dans l'arrêt *Bazley*, avaient amené notre Cour à refuser d'exonérer de la responsabilité du fait d'autrui une catégorie de défendeurs. Premièrement, exonérer un organisme sans but lucratif lorsque l'État est partie prenante ne l'inciterait pas à recruter du personnel sûr et à protéger les enfants contre les agressions sexuelles. La participation de l'État ne garantit pas la sécurité des enfants, surtout lorsqu'il incombe à l'organisme sans but lucratif de veiller à l'administration quotidienne de l'établissement, comme c'était le cas en l'espèce.

Second, the Church in this case was not working with volunteers and in fact was running a residential school with employees. Thus, arguments that it was less able to supervise its employees' actions are inapplicable; the Church clearly supervised its employees' work and actions and arguably was best placed to do so. The Church enhanced the risk it had introduced by placing Mr. Barney in the care of Plint, whose activities the Church managed.

42 Deuxièmement, l'Église ne faisait pas appel à des bénévoles pour diriger le Pensionnat, mais à des employés. L'on ne saurait donc prétendre qu'elle était moins en mesure de surveiller la conduite de ses employés. L'Église encadrait manifestement ses employés dans l'exécution de leurs fonctions et on peut affirmer qu'elle était la mieux placée pour le faire. Elle a accru le risque qu'elle avait créé en confiant M. Barney aux soins de M. Plint, dont elle dirigeait les activités.

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43 The proposed charitable exemption is problematic on yet other grounds. It raises the difficulty that a host of organizations may claim to be non-profit, some of which the law might not wish to favour with an exemption. Indeed, the government itself may be considered a non-profit institution. And it suggests, contrary to legal principle, that lesser responsibility should be converted to no liability, violating the precept that the judge-made common law must proceed incrementally: *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 666.

44 One may sympathize with the situation of the Church, which generally acts with laudable motives and now finds itself facing large claims for wrongs committed in its institutions many years ago. However, sympathy does not permit courts to grant exemptions from liability imposed by settled legal principle. I conclude that the Court of Appeal erred in exempting the Church from liability on the ground of charitable immunity.

2.4 *Non-Delegable Statutory Duty*

45 The trial judge held that Canada was under a non-delegable statutory duty to ensure the safety and welfare of the students at the school, under ss. 113 and 114 of the *Indian Act* (see Appendix).

46 The trial judge found that Canada was bound by a non-delegable duty. The Court of Appeal did not discuss this issue, concluding that the trial judge's conclusions on vicarious liability made it moot. On this appeal, Canada asks us to set aside the finding of the trial judge on this point.

47 Two key questions surround the issue of non-delegable duty: first, is there a non-delegable statutory duty, and second, was it breached? I conclude that no non-delegable statutory duty can be

L'exonération dont on propose de faire bénéficier un organisme de bienfaisance pose d'autres difficultés, dont le risque qu'un grand nombre d'entités prétendent être des organismes sans but lucratif, y compris certaines auxquelles l'on pourrait ne pas vouloir accorder d'exonération. En fait, le gouvernement lui-même peut être considéré comme un organisme sans but lucratif. Par ailleurs, contrairement aux préceptes du droit, une responsabilité moindre deviendrait nulle, ce qui irait à l'encontre du principe selon lequel les tribunaux doivent modifier peu à peu la common law : *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 666.

On peut éprouver de la sympathie pour l'Église, dont les motifs sont généralement louables et qui se voit réclamer aujourd'hui des sommes importantes pour des délits commis dans ses établissements il y a bien des années. Cependant, cette sympathie ne saurait permettre à un tribunal de l'exonérer d'une responsabilité bien établie en droit. J'arrive à la conclusion que la Cour d'appel a eu tort d'écarter la responsabilité de l'Église au motif qu'il s'agissait d'un organisme de bienfaisance.

2.4 *Obligation légale intransmissible*

Le juge de première instance a statué que le gouvernement du Canada avait l'obligation légale intransmissible d'assurer la sécurité et le bien-être des pensionnaires suivant les art. 113 et 114 de la *Loi sur les Indiens* (voir l'annexe).

Le juge de première instance a conclu que le gouvernement du Canada était tenu au respect d'une obligation intransmissible. La Cour d'appel n'a pas examiné la question, estimant que les conclusions du juge de première instance sur la responsabilité du fait d'autrui l'avaient rendue théorique. Dans le présent pourvoi, le gouvernement du Canada nous demande d'écarter la conclusion du juge de première instance concernant l'existence d'une obligation intransmissible.

Cette dernière question comporte deux volets principaux. Premièrement, existe-t-il une obligation légale intransmissible et, deuxièmement, a-t-elle fait l'objet d'un manquement? Je conclus

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inferred from the language of the statute. This makes it unnecessary to consider issues related to how such a duty can be breached and whether it can be imposed where vicarious liability has been found.

The inquiry into whether a non-delegable statutory duty exists in a particular case begins with the words of the statute. The analysis must determine whether the statute clearly places Canada under a non-delegable duty to ensure that students are kept safe while at school: see *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52.

Section 113 of the *Indian Act* states that the "Governor in Council may authorize the Minister . . . (*a*) to establish, operate and maintain schools for Indian children". Section 114 goes on to provide that "[t]he Minister may (*a*) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools . . . (*c*) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations".

The text of ss. 113 and 114 does not support the inference of a mandatory non-delegable duty. First, it uses the permissive term "may", as opposed to the directive term "shall", limiting the possibility of finding an obligation as strong as a duty. Second, the power of the government to enter into agreements with religious organizations for the care and education of Indian children suggests that the duty is eminently delegable and was contracted out of by the government. There is no language in the statute that replicates the clear language found in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, where a non-delegable duty was found. Here one may state, as the Court did in *E.D.G.*, that none of "the general duties gives school boards full responsibility for students' welfare while on school premises, in the way that the statutes in *Lewis* gave the Ministry full responsibility for overseeing maintenance projects and for

qu'on ne peut déduire du libellé de la loi l'existence d'une obligation intransmissible. Il n'est donc pas nécessaire de se pencher sur les questions relatives aux manières de manquer à celle-ci ni sur la possibilité de l'imposer lorsque la responsabilité du fait d'autrui est établie.

48 Pour savoir s'il existe une obligation légale intransmissible dans un cas donné, il faut d'abord examiner le libellé de la loi. L'analyse doit déterminer si la loi impose clairement au gouvernement du Canada l'obligation intransmissible d'assurer la sécurité des élèves à l'école : voir *E.D.G. c. Hammer*, [2003] 2 R.C.S. 459, 2003 CSC 52.

49 L'article 113 de la *Loi sur les Indiens* prévoit que « [l]e gouverneur en conseil peut [. . .] autoriser le Ministre *a*) à établir, diriger et entretenir des écoles pour les enfants indiens ». L'article 114 dispose que « [l]e Ministre peut *a*) [p]ourvoir à des normes de construction, d'installation, d'enseignement, d'éducation, d'inspection et de discipline relativement aux écoles, et établir des règlements à cet égard [et] *c*) [c]onclure des accords avec des institutions religieuses pour le soutien et l'entretien des enfants qui reçoivent leur instruction dans les écoles dirigées par ces institutions ».

50 Le libellé de ces articles n'étaye pas l'inférence d'une obligation intransmissible. Premièrement, on y emploie le verbe « pouvoir », qui confère une faculté, plutôt que le verbe « devoir », qui impose une obligation, limitant ainsi la possibilité d'y voir une véritable obligation. Deuxièmement, le pouvoir de l'État de contracter avec des organisations religieuses pour le soin et l'éducation des enfants indiens donne à penser que l'obligation est tout à fait transmissible et qu'elle a été sous-traitée par l'État. On ne retrouve pas dans la loi le libellé clair qui était en cause dans l'arrêt *Lewis (Tutrice à l'instance) c. Colombie-Britannique*, [1997] 3 R.C.S. 1145, où l'on a conclu à l'existence d'une obligation intransmissible. On peut dire en l'espèce, comme l'a affirmé notre Cour dans l'arrêt *E.D.G.*, qu'« [a]ucune de ces fonctions générales ne fait peser sur les conseils scolaires l'entière responsabilité du bien-être des élèves à l'école, à

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ensuring that workers exercised reasonable care" (para. 20). Other provisions of the Act do not assist. The *Indian Act* falls far short of creating a mandatory duty to ensure the health and safety of children in residential schools.

la façon dont les lois dans l'affaire *Lewis* imposaient au ministère l'entière responsabilité de superviser les projets d'entretien et de s'assurer de la diligence raisonnable des entrepreneurs » (par. 20). Les autres dispositions de la loi ne sont guère éclairantes. La *Loi sur les Indiens* ne crée aucune obligation d'assurer la santé et la sécurité des enfants dans les pensionnats.

51 The Church raises a number of arguments in response. First, it argues that the pervasive control granted by Parliament over every aspect of Indians' lives, including their definition and registration, jurisdiction over reserves and jurisdiction over mentally incompetent Indians, justifies finding a non-delegable statutory duty. However, arguments based on general obligations outside the strict language of the statute and the residential school setting are not persuasive. They risk encroaching on other grounds of liability such as breach of fiduciary duty and negligence. Unless a non-delegable statutory duty is based on the language of the statute, the boundaries between the various grounds of liability become meaningless.

L'Église soulève un certain nombre d'arguments à l'appui de la thèse contraire. Premièrement, elle soutient que le vaste pouvoir accordé par le législateur sur tous les aspects de la vie des Indiens — notamment la définition d'« Indien » et l'enregistrement à ce titre, la compétence sur les réserves et sur les Indiens mentalement incapables — permet de conclure à l'existence d'une obligation légale intransmissible. Cependant, un argument fondé sur une obligation générale étrangère au strict libellé de la loi et au fonctionnement du Pensionnat n'est pas convaincant. Il risque d'empiéter sur d'autres motifs de responsabilité, comme le manquement à l'obligation fiduciaire et la négligence. La frontière entre les différents chefs de responsabilité n'a de sens que si l'obligation intransmissible découle du libellé de la loi.

52 Second, the Church argues that the regulations enacted by the government pursuant to s. 114(*a*) required the principal of AIRS to maintain standards acceptable to the Superintendent of Indian Affairs for Canada with respect to all aspects of the students' life at AIRS, including safety, counselling, guidance, and home and school relationships. In addition, the regulations mandated that "[e]very school shall be subject to inspection by such officials of the Government of Canada and by such other persons as the Superintendent may authorize": *Indian Residential School Regulations*, 1953, Reg. 14. These and other regulations granted Canada the power to set standards for the operation of the school and inspect to see that these standards were met. But they fall short of establishing a mandatory non-delegable duty to ensure the students' safety and welfare. Indeed, they seem to presuppose *delegation* of Canada's duties.

Deuxièmement, l'Église fait valoir que le règlement pris par le gouvernement en application de l'al. 114*a*) obligeait le directeur du Pensionnat à établir des normes convenant au surintendant des affaires indiennes du Canada pour tout ce qui avait trait à la vie des élèves au Pensionnat, y compris la sécurité, la conseillance, l'orientation et les relations à la maison et à l'école. En outre, le règlement prévoyait que [TRADUCTION] « [c]hacun des pensionnats est inspecté par le représentant du gouvernement du Canada et toute autre personne que désigne le surintendant » : *Indian Residential School Regulations*, 1953, art. 14. Ce règlement et d'autres accordaient au gouvernement du Canada le pouvoir d'établir les normes de fonctionnement et d'inspecter les lieux pour s'assurer de leur respect. Ils ne créent toutefois pas une obligation intransmissible d'assurer la sécurité et le bien-être des élèves. Ils semblent plutôt présupposer la *transmission* des obligations du gouvernement du Canada.

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Third, the Church argues that by forcing Aboriginal children to attend designated residential schools that maintained total control over those children (ss. 115 and 117 of the *Indian Act*), Canada acquired a duty to protect the interests of those children. While emotionally compelling, this argument too falls short of establishing a non-delegable statutory duty at law.

Taken together, the statutory language of these provisions falls short of imposing the broad statutory duty of care to protect the safety and welfare of the children.

I conclude that the trial judge erred in finding a non-delegable statutory duty on Canada in this case.

2.5 *Fiduciary Duty*

Neither the trial judge nor the Court of Appeal found breach of fiduciary duty. The appellant, Mr. Barney, asks that we reverse this decision.

A fiduciary duty is a trust-like duty, involving duties of loyalty and an obligation to act in a disinterested manner that puts the recipient's interest ahead of all other interests: *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 51, at para. 49.

The argument for breach of fiduciary duty is presented on two different bases: one individual, one collective.

The first argument, put on an individual basis, is that the government of Canada and the Church occupied a trust-like relationship with attendant trust-like duties with respect to Mr. Barney and other students at the school. As such, it was required to put their interests first and avoid disloyalty in its conduct toward them.

Assuming such a duty did exist, the trial judge found that it was not breached in this case. He specifically found that neither the Church nor Canada were dishonest or intentionally disloyal. These

53 Troisièmement, l'Église affirme qu'en forçant les enfants autochtones à fréquenter des pensionnats désignés qui exerçaient un pouvoir absolu sur eux (art. 115 et 117 de la *Loi sur les Indiens*), le gouvernement du Canada a contracté l'obligation de protéger les intérêts de ces enfants. Bien que convaincant sur le plan de l'émotion, cet argument ne suffit pas non plus à établir en droit l'existence d'une obligation légale intransmissible.

54 Considéré dans son ensemble, le libellé des dispositions législatives n'impose pas une obligation générale de diligence dont l'objet est d'assurer la sécurité et le bien-être des enfants.

55 Je suis d'avis que le juge de première instance a eu tort de conclure que le gouvernement du Canada avait en l'espèce une obligation légale intransmissible.

2.5 *Obligation fiduciaire*

56 Ni le juge de première instance ni la Cour d'appel n'ont retenu la thèse du manquement à une obligation fiduciaire. L'appelant, M. Barney, nous demande d'infirmer leurs décisions.

57 Fondée sur la confiance, l'obligation fiduciaire exige de son débiteur qu'il soit loyal et qu'il agisse de manière désintéressée, faisant passer l'intérêt du créancier avant tout autre : *K.L.B. c. Colombie-Britannique*, [2003] 2 R.C.S. 403, 2003 CSC 51, par. 49.

58 L'argument relatif au manquement à l'obligation fiduciaire a deux fondements, l'un individuel, l'autre collectif.

59 D'un point de vue individuel, le gouvernement du Canada et l'Église auraient eu à l'égard de M. Barney et des autres pensionnaires une relation de nature fiduciaire, avec les obligations fiduciaires que cela suppose. De ce fait, ils auraient dû faire passer les intérêts des enfants avant les leurs et éviter toute conduite déloyale envers eux.

60 Selon le juge de première instance, à supposer que pareille obligation ait existé, elle n'avait pas été violée. Il a précisé que ni l'Église ni le gouvernement du Canada n'avaient fait preuve de

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findings of fact have not been negated. It follows that breach of fiduciary duty toward Mr. Barney and his schoolmates has not been established.

61 Beneath this specific argument, a second broader argument focussing on Aboriginal children collectively can be discerned. This is the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples.

62 This argument cannot be resolved on this appeal. It was not raised below, other than as contextual background to the circumstances and events at the school Mr. Barney attended, AIRS. It was pursued only at this level, and then mainly by interveners. In support of their argument, they submitted studies and writings, none of which were proved in evidence in the courts below and the historic and scientific validity of which the respondents have had no opportunity to challenge. In these circumstances, it would be unfair to rely on this material and inappropriate to deal with the larger argument.

63 We agree with the courts below that the argument on fiduciary duty presented in this case cannot succeed.

2.6 *Apportionment of Damages*

64 Having found the Church and Canada vicariously liable (and Canada liable for breach of non-delegable duty), the trial judge found Canada to have been 75 percent at fault and the Church 25 percent at fault. Since he found them jointly and severally liable, the parties may recover full damages against either or both of them. However, the issue remains whether either of the parties to the joint enterprise that led to the loss is entitled to be completely or partially indemnified by the other.

malhonnêteté ou de déloyauté intentionnelle. Ces conclusions de fait n'ont pas été contestées. Le manquement à l'obligation fiduciaire envers M. Barney et ses camarades de classe n'a donc pas été démontré.

Un second argument, plus général, vise les enfants autochtones collectivement. Cette thèse veut que le système des pensionnats ait soustrait les enfants autochtones à leurs communautés, à leur culture et à leurs réseaux d'entraide pour les placer dans des milieux abusifs. Il s'agirait d'une mesure malhonnête et déloyale par laquelle le gouvernement aurait manqué à son obligation fiduciaire envers les peuples autochtones du Canada.

Notre Cour ne peut statuer sur cet argument dans le cadre du présent pourvoi. Il n'a pas été formulé devant les tribunaux inférieurs, sauf en toile de fond aux événements qui se sont produits au Pensionnat fréquenté par M. Barney. C'est uniquement devant nous qu'il a été avancé, et principalement par les intervenants. Ces derniers ont déposé à l'appui études et documents qui n'avaient pas été mis en preuve devant les tribunaux inférieurs et dont les intimés n'ont pu contester la valeur historique et scientifique. Il serait donc injuste de s'y fier et inopportun de se pencher sur l'argument plus général.

Nous abondons dans le même sens que les tribunaux inférieurs, qui ont conclu que l'argument de l'obligation fiduciaire ne pouvait être retenu.

2.6 *Répartition des dommages-intérêts*

Après avoir conclu à la responsabilité du fait d'autrui de l'Église et du gouvernement du Canada (et à la responsabilité du gouvernement du Canada pour le manquement à une obligation intransmissible), le juge de première instance a établi la part de responsabilité du gouvernement du Canada à 75 p. 100 et celle de l'Église à 25 p. 100. Ceux-ci ayant été déclarés solidairement responsables, les parties peuvent réclamer la totalité des dommages-intérêts à l'un ou l'autre. Cependant, une question demeure : l'une des parties à la coentreprise à l'origine de la perte a-t-elle droit au dédommagement total ou partiel de la part de l'autre?

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The trial judge examined the relationship between the parties and concluded that Canada had not agreed to generally indemnify the Church for loss incurred in running the school. He then considered the allocation of fault between the two. He apportioned the loss 75 percent to Canada and 25 percent to the Church. In doing so, he noted that Canada had the final decision regarding the employment of a principal and control of finances, thus effectively controlling the school. He concluded that as the "more senior of the two partners" in the joint enterprise, Canada should bear the major portion of the loss (2001 decision, at para. 324).

65 Le juge de première instance s'est penché sur la relation entre les parties pour conclure que le gouvernement du Canada n'avait jamais convenu de dédommager généralement l'Église des pertes subies dans l'exploitation du Pensionnat. Compte tenu de la répartition de la responsabilité, il a réparti la perte à raison de 75 p. 100 au gouvernement du Canada et de 25 p. 100 à l'Église. Ce faisant, il a signalé que le gouvernement du Canada avait le dernier mot concernant l'engagement du directeur et la gestion des finances, ce qui lui conférait de fait la mainmise sur l'école. Il a conclu qu'à titre de coentrepreneur [TRADUCTION] « principal », le gouvernement du Canada devait supporter la majeure partie de la perte (décision de 2001, par. 324).

Canada argues that this conclusion runs counter to the British Columbia *Negligence Act*, R.S.B.C. 1996, c. 333, which provides that "if . . . it is not possible to establish different degrees of fault, the liability must be apportioned equally" (s. 1(2)). Canada argues that vicarious liability is not predicated on fault, and therefore liability and apportionment of damages must be divided equally, not 75-25 as the trial judge held.

66 Le gouvernement du Canada soutient que cette conclusion va à l'encontre de la *Negligence Act* de la Colombie-Britannique, R.S.B.C. 1996, ch. 333, qui prévoit que [TRADUCTION] « s'il n'est pas possible d'établir différentes parts de faute, la responsabilité doit être répartie à parts égales » (par. 1(2)). Il prétend que, la responsabilité du fait d'autrui n'étant pas fondée sur la faute, la responsabilité et les dommages-intérêts doivent être répartis à parts égales, et non selon un ratio 75 : 25 comme l'a fait le juge de première instance.

It remains an open question whether the term "fault" in the *Negligence Act* includes vicarious liability. Fault has been held not to include intentional torts and torts other than negligence: e.g., *Chernesky v. Armadale Publishers Ltd.*, [1974] 6 W.W.R. 162 (Sask. C.A.); *Funnell v. C.P.R.*, [1964] 2 O.R. 325 (H.C.). Other cases hold the contrary: *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (Ont. H.C.); *Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler* (2004), 12 C.C.L.I. (4th) 278 (Ont. S.C.J.). However, it is not necessary to resolve this dispute. If vicarious liability amounts to "fault" under the *Negligence Act*, the trial judge's conclusion that Canada was 75 percent at fault would amount to a finding that fault could be apportioned, with the result that s. 1(2) would not apply to impose an equal allocation. On the other hand, if vicarious liability is not "fault" under the Act, then the Act does not apply. In this case, liability

67 Reste à savoir si la « faute » (*fault)* au sens de la *Negligence Act* s'entend de la responsabilité du fait d'autrui. Des tribunaux ont statué qu'elle n'englobait ni les délits intentionnels ni les délits autres que la négligence : voir p. ex. *Chernesky c. Armadale Publishers Ltd.*, [1974] 6 W.W.R. 162 (C.A. Sask.); *Funnell c. C.P.R.*, [1964] 2 O.R. 325 (H.C.). D'autres ont retenu la thèse contraire : *Bell Canada c. Cope (Sarnia) Ltd.* (1980), 11 C.C.L.T. 170 (H.C. Ont.); *Gerling Global General Insurance Co. c. Siskind, Cromarty, Ivey & Dowler* (2004), 12 C.C.L.I. (4th) 278 (C.S.J. Ont.). Il n'est cependant pas nécessaire de trancher. Si la responsabilité du fait d'autrui est une « faute » au sens de la *Negligence Act*, fixer à 75 p. 100 la part de responsabilité du gouvernement du Canada comme l'a fait le juge de première instance revient à conclure que la faute peut être répartie, si bien que le par. 1(2) ne s'applique pas pour imposer un partage égal. Par contre, si la responsabilité du fait d'autrui n'est pas une « faute » au sens

may be assigned at common law, with the same result.

68 In these circumstances, the Church argues that the common law of contribution should apply. This Court in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, questioned whether the common law rule against contribution was absolute. It held that a common law right of contribution between tortfeasors may exist, except for intentional torts or malicious motivation (para. 101). Vicarious liability is not founded on intent or maliciousness. The Church goes on to argue that this is an appropriate case for extending the doctrine of contribution to joint, faultless tortfeasors to prevent the unjust enrichment of Canada, due to the Church's limited control over the operation at AIRS.

69 This raises the question of whether unequal apportionment of responsibility is appropriate in cases of vicarious liability. The conflicting views on whether vicarious liability attributes any fault or blame on the wrongdoer are summarized in *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* (1999), 173 D.L.R. (4th) 318 (B.C.C.A.), at paras. 13-14. The most compelling view is that while vicarious liability is a no-fault offence in the sense that the employer need not have participated in or even have authorized the employee's particular act of wrongdoing, in another sense it implies fault. As D. N. Husak states, "no defendant who is held vicariously liable is selected randomly; the principles used to identify this defendant are not arbitrary. Vicarious liability is imposed on someone who was in a position to have supervised and thus to have prevented the occurrence of the harm": "Varieties of Strict Liability" (1995), 8 *Can. J.L. & Jur.* 189, at p. 215. It follows that the degree of fault may vary depending on the level of supervision. Parties may

de la loi, celle-ci ne s'applique alors pas. En l'espèce, la common law permet d'attribuer la responsabilité avec le même résultat.

Dans ces circonstances, l'Église fait valoir que les principes de la common law en matière de contribution doivent s'appliquer. Dans l'arrêt *Bow Valley Husky (Bermuda) Ltd. c. Saint John Shipbuilding Ltd.*, [1997] 3 R.C.S. 1210, notre Cour s'est interrogée sur le caractère absolu de la règle de la common law interdisant la contribution. Elle a conclu que, en common law, les coauteurs d'un délit pouvaient se réclamer mutuellement une contribution, sauf délit intentionnel ou motivation malveillante (par. 101). La responsabilité du fait d'autrui ne tient ni à l'intention ni à la motivation malveillante. L'Église ajoute que la présente affaire — où les coauteurs du délit n'ont commis aucune faute — se prête à l'application de la règle de la contribution afin d'empêcher l'enrichissement sans cause du gouvernement du Canada, vu le pouvoir limité qu'elle exerçait sur le fonctionnement du Pensionnat.

La question de l'opportunité de répartir inégalement la responsabilité du fait d'autrui se pose alors. Les divergences de vues quant à savoir si une faute ou un blâme est imputé à l'auteur du délit sont résumées dans l'arrêt *Bluebird Cabs Ltd. c. Guardian Insurance Co. of Canada* (1999), 173 D.L.R. (4th) 318 (C.A.C.-B.), par. 13-14. Suivant la thèse la plus convaincante, même si, d'un côté, la responsabilité du fait d'autrui ne tient pas à la commission d'une faute, c'est-à-dire qu'il n'est pas nécessaire que l'employeur ait participé à l'acte fautif de l'employé ni même qu'il l'ait autorisé, d'un autre côté, elle suppose une faute. Comme le dit D. N. Husak, [TRADUCTION] « le responsable du fait d'autrui n'est pas désigné au hasard, et les principes appliqués ne sont pas arbitraires. Une personne est tenue responsable du fait d'autrui si elle était en situation d'autorité et aurait pu, de ce fait, prévenir le préjudice » : « Varieties of Strict Liability » (1995), 8 *Can. J.L. & Jur.* 189, p. 215. Il s'ensuit que la part de responsabilité peut varier en fonction de

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be more or less vicariously liable for an offence, depending on their level of supervision and direct contact.

The trial judge's reasoning suggests that he applied this analysis to conclude that one of the parties, Canada, was "more senior" and had more control (2001 decision, at para. 324). He reasoned that when an employee has two or more employers, it is more likely than not that one exercises more control or plays a more important role than the other. The damage award, he concluded, should reflect that. It is true that at various places the trial judge referred to the "partnership" (1998 decision, at paras. 99 and 119), the "joint enterprise" (at para. 107), and "join[t] control" (at para. 114). However, I cannot accept Canada's argument that the trial judge found no hierarchical relationship between Church and Crown. He found the relationship between Canada and the Church was not that of principal-agent or employer-employee. This does not exclude one party to the joint enterprise being more senior or exercising more control. In these circumstances an unequal apportionment of responsibility is appropriate.

Here the trial judge found that Canada was in a better position than the Church to supervise the situation and prevent the loss. That finding was grounded in the evidence and I would not interfere with it.

A final question arises. The trial judge made the allocation on the basis that Canada was both vicariously liable and liable under a non-delegable statutory duty. I conclude that the latter basis of liability was not available. Should this change the allocation of loss as between Canada and the Church? Logic suggests it should not. The basis for assigning greater responsibility to Canada was its greater control over the enterprise. The

l'autorité exercée. La responsabilité d'une partie pour l'infraction commise par un tiers dépend de la surveillance plus ou moins grande qu'elle a exercée sur ce tiers et du lien plus ou moins direct qu'elle a entretenu avec lui.

70 Le raisonnement du juge de première instance donne à penser qu'il s'est fondé sur cette analyse pour conclure que l'une des parties, le gouvernement du Canada, était le coentrepreneur « principal » et exerçait un plus grand pouvoir (décision de 2001, par. 324). À son avis, lorsqu'un employé a plus d'un employeur, l'un d'eux exerce vraisemblablement un plus grand pouvoir ou joue un rôle plus important que l'autre. Il a estimé que le montant des dommages-intérêts devait en tenir compte. Il est vrai qu'il a utilisé à plusieurs reprises les termes [TRADUCTION] « partenariat » (décision de 1998, par. 99 et 119), « coentreprise » (par. 107) et « surveillance conjointe » (par. 114). Je ne peux cependant pas retenir l'argument du gouvernement du Canada portant que le juge de première instance n'a vu aucune relation hiérarchique entre l'Église et la Couronne. Le juge a conclu que leur relation n'était pas celle d'un mandant et d'un mandataire ou d'un employeur et d'un employé. Ce qui n'empêche pas l'un des coentrepreneurs d'avoir plus d'ascendant ou d'exercer un plus grand pouvoir. Dans ces circonstances, il est opportun de répartir inégalement la responsabilité.

71 En l'espèce, le juge de première instance a estimé que le gouvernement du Canada était plus en mesure que l'Église de surveiller la situation et de prévenir la perte. Cette conclusion se fondait sur la preuve et je ne la modifierais pas.

72 Reste une dernière question. Le juge de première instance a réparti la responsabilité en considérant que le gouvernement du Canada était responsable à la fois pour le fait d'autrui et pour le manquement à une obligation légale intransmissible. J'estime qu'il ne lui était pas loisible de retenir ce deuxième élément. La répartition de la perte entre le gouvernement du Canada et l'Église devrait-elle en être modifiée? La réponse

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assessment is not affected by finding there was no non-delegable duty under the statute.

73 I would confirm that damages should be apportioned 75 percent to Canada and 25 percent to the Church.

2.7 *Damages: The Effect of Prior Abuse*

74 The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong.* It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32.

75 The trial judge followed this principle and sought to exclude damages relating to trauma suffered by Mr. Barney before coming to AIRS and statute-barred wrongs. In his view, the plaintiff's family background, his institutionalization at AIRS and the non-sexual traumas he suffered, fell to be considered as factors inherent in his position, distinct from the sexual assaults. The trial judge clearly concluded that Mr. Barney's family life prior to AIRS, as well as other experiences at AIRS, made it likely that he would have suffered serious psychological difficulties even if the sexual abuse had never occurred.

dictée par la logique est négative. Le gouvernement du Canada s'est vu imputer une plus grande responsabilité parce qu'il avait exercé un plus grand pouvoir sur l'entreprise. L'inexistence d'une obligation légale intransmissible n'y change rien.

Je suis d'avis de confirmer que le gouvernement du Canada doit payer 75 p. 100 des dommages-intérêts, et l'Église 25 p. 100.

2.7 *Dommages-intérêts : incidence de traumatismes antérieurs*

Deux autres traumatismes compliquent le calcul du montant des dommages-intérêts auxquels M. Barney a droit pour l'agression sexuelle dont il a été victime : (1) celui subi chez lui avant son placement au Pensionnat et (2) l'autre découlant des privations et des sévices non sexuels subis au Pensionnat et pour lequel tout recours était prescrit. En réalité, ces traumatismes se sont confondus avec les expériences subséquentes pour donner naissance aux problèmes avec lesquels M. Barney a été aux prises toute sa vie. Il est pratiquement impossible de démêler les différentes sources de préjudice. Le droit l'exige pourtant puisque le demandeur ne peut être indemnisé que pour le *préjudice causé par le délit lui conférant un droit d'action*. Selon « [l]'objet essentiel, le principe le plus fondamental du droit de la responsabilité délictuelle », le demandeur doit être rétabli dans la situation où il aurait été n'eût été le délit : *Athey c. Leonati*, [1996] 3 R.C.S. 458, par. 32.

Adhérant à ce principe, le juge de première instance a entrepris d'exclure les préjudices issus des traumatismes dont M. Barney avait été victime avant son arrivée au Pensionnat et ceux liés aux délits prescrits. À son avis, les antécédents familiaux du demandeur, son placement au Pensionnat et les traumatismes d'ordre non sexuel qu'il avait subis devaient être considérés comme des facteurs inhérents à sa situation, distincts des agressions sexuelles. La conclusion du juge de première instance est claire : la vie familiale de M. Barney avant son arrivée au Pensionnat et les autres expériences qu'il y a vécues l'avaient prédisposé à des troubles psychologiques graves, indépendamment des agressions sexuelles.

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Mr. Barney submits that his situation prior to entering the school and other traumas suffered while at the school must be considered in assessing damages, and that the trial judge erred in not doing so. He also argues that the principle of *ex turpi causa non oritur actio* (a person cannot profit from his own wrong) prevents the respondents from claiming that some of his problems stem not from the sexual assaults he suffered but from other statute-barred wrongs he suffered while at the school. These submissions indirectly raise some of the same generalized complaints against the residential school policy as a whole as are raised with respect to breach of fiduciary obligation.

76 M. Barney soutient que sa situation avant son placement au Pensionnat et les autres traumatismes qu'il y a subis sont pertinents pour l'évaluation du préjudice et que le juge de première instance a eu tort de ne pas en tenir compte. Il affirme également que suivant la maxime *ex turpi causa non oritur actio* (nul ne peut tirer profit de sa faute), les défendeurs ne peuvent alléguer que certains de ses problèmes ne découlent pas des agressions sexuelles, mais des autres délits, frappés de prescription, dont il a été victime au Pensionnat. Ces prétentions soulèvent indirectement, à certains égards, les mêmes doléances généralisées contre la politique des pensionnats dans son ensemble que le manquement allégué à l'obligation fiduciaire.

For the reasons that follow, I am not persuaded that the trial judge erred in proceeding as he did.

77 Pour les motifs qui suivent, je ne suis pas persuadée que le juge de première instance a commis une erreur.

It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.

78 Il importe d'établir une distinction entre la cause de la perte et l'évaluation du préjudice en matière de responsabilité civile délictuelle. Pour ce qui concerne le lien de causalité, la règle veut généralement que l'on se demande si, selon la prépondérance des probabilités, n'eût été les actes du défendeur, le demandeur aurait subi le préjudice. Les causes, délictuelles ou non délictuelles, du préjudice subi par le demandeur peuvent être multiples, mais le défendeur en est pleinement responsable si l'acte qu'il a commis est l'une d'elles. Au chapitre de l'évaluation du préjudice, il faut déterminer la situation initiale du demandeur. Le principe fondamental est que le défendeur n'est pas tenu de rendre la situation du demandeur meilleure qu'elle ne l'était au départ et qu'il n'a pas à indemniser le demandeur d'un préjudice qu'il aurait subi de toute manière : *Athey*. La prétention de M. Barney selon laquelle le préjudice découlant d'autres traumatismes que l'agression sexuelle ne devrait pas être écarté revient à dire qu'une fois établi que l'acte délictuel est une cause réelle de préjudice, le défendeur devient responsable de tous les préjudices allégués par la suite, qu'il en soit responsable ou non.

At the same time, the defendant takes his victim as he finds him — the thin skull rule. Here the victim suffered trauma before coming to AIRS.

79 Par ailleurs, le défendeur prend sa victime comme elle est — c'est la règle de la vulnérabilité de la victime. En l'espèce, la victime a subi des

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The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.

80 Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.

81 All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

82 The trial judge correctly apprehended the applicable legal principles. He recognized the "daunting task" of untangling multiple interlocking factors and confining damages to only those arising from the actionable torts, the sexual assaults (2001 decision, at para. 365). He tried his best to award fair damages, taking all this into account. He recognized the thin skull principle, but in the absence of evidence that Mr. Barney's family difficulties prior to coming to AIRS had exacerbated the damage he suffered from the sexual assaults he sustained at AIRS, the trial judge had no choice but to attempt to isolate those traumas. Similarly, there was no legal basis upon which he could allow damages suffered as a result of statute-barred wrongs

traumatismes avant son placement au Pensionnat. Il faut donc se demander quel a été l'effet de l'agression sexuelle sur le demandeur, déjà marqué par la vie. Le préjudice est celui causé par les agressions sexuelles, et non par sa situation antérieure, qu'il importe toutefois d'examiner pour circonscrire la perte imputable aux agressions. Ainsi, dans la mesure où la preuve établit que les agressions sexuelles ont eu un effet plus dévastateur à cause du préjudice préexistant, on peut tenir compte de cet état préexistant pour fixer les dommages-intérêts.

Lorsqu'un deuxième acte fautif ou une négligence contributive du demandeur survient après l'acte fautif initial ou simultanément, on peut avoir affaire à ce qu'on appelle une « vulnérabilité déjà active ». Chaque auteur d'un délit peut obtenir que l'on tienne compte des conséquences des actes de l'autre. Le défendeur doit indemniser le demandeur du préjudice qu'il lui a effectivement causé, mais il n'est pas tenu de le dédommager des effets débilitants de l'autre acte fautif qui se seraient produits de toute manière. Ainsi, les dommages-intérêts exigibles de l'auteur du délit peuvent être réduits lorsque d'autres facteurs ont contribué au préjudice : *Athey*, par. 32-36.

Ces scénarios découlent tous du principe fondamental selon lequel les dommages-intérêts doivent rétablir le demandeur dans la situation où il se serait trouvé n'eût été le délit dont le défendeur est responsable.

Le juge de première instance a bien manié les principes juridiques applicables. Il a reconnu la [TRADUCTION] « grande difficulté » de démêler des facteurs imbriqués les uns dans les autres et de circonscrire le préjudice causé uniquement par le délit conférant le droit d'action, soit l'agression sexuelle (décision de 2001, par. 365). Tenant compte de tous ces éléments, il a fait de son mieux pour accorder au demandeur une juste indemnité. Il a reconnu le principe de la vulnérabilité de la victime, mais vu l'absence de preuve que les problèmes familiaux de M. Barney avant son arrivée au Pensionnat avaient exacerbé le préjudice infligé par les agressions sexuelles, il n'a eu d'autre choix que de tenter d'isoler ces traumatismes. De même, aucun

committed at AIRS, like the beatings, to increase the award of damages.

More broadly, Mr. Barney relies on the maxim that none should profit from his own wrong, *ex turpi causa non oritur actio*, to argue that the respondents should not be enriched by their improper care of him. He argues that reducing his damages award because of the harm caused by placing Aboriginal children in residential schools allows the Church and Canada to profit from their own immoral and illegal conduct.

This argument cannot succeed, notwithstanding its instinctive appeal. First, it is not correct to view the respondents' case as an attempt to profit from immoral and illegal conduct by reducing damages. The amount of damages is limited by loss caused by the actionable torts, in this case sexual assault. Not awarding damages for loss caused by other factors does not "reduce" damages. On the contrary, to award damages for such loss would be to "increase" them beyond what the law allows. Thus it cannot be said that the respondents are profiting from their wrong.

Second, the maxim *ex turpi causa non oritur actio* cannot be applied to evade legal limits or undermine the legal system. Applying it to permit damages to be awarded for wrongful acts that are subject to limitation periods that have expired would subvert the legislation and compensate for torts that have been alleged but not proven. It would be to override legislative intent and fix liability in the absence of legal proof.

Third, even if these difficulties could be overcome, *ex turpi causa non oritur actio* should be applied cautiously, where it is clearly mandated: *Hall v. Hebert*, [1993] 2 S.C.R. 159. Compensation for the impact of attending residential schools is fraught with controversy and difficulty. Here, as for

fondement juridique ne lui permettait d'indemniser le préjudice découlant de délits prescrits commis au Pensionnat, les coups par exemple, et d'accorder ainsi des dommages-intérêts plus élevés.

83 De manière plus générale, M. Barney se fonde sur la maxime *ex turpi causa non oritur actio* (nul ne peut tirer profit de sa faute) pour soutenir que le fait d'avoir mal pris soin de lui ne devrait pas permettre aux intimés de s'enrichir. Il prétend que réduire le montant des dommages-intérêts en fonction du préjudice causé par le placement des enfants autochtones dans des pensionnats permet à l'Église et au gouvernement du Canada de tirer profit de leur conduite immorale et illégale.

84 Cet argument ne saurait être retenu malgré l'attrait éprouvé spontanément. Tout d'abord, il est erroné de voir dans la réduction sollicitée par les intimés une tentative de tirer profit d'une conduite immorale ou illégale. Le montant des dommages-intérêts ne correspond qu'à la perte causée par le délit conférant un droit d'action, en l'occurrence l'agression sexuelle. Ne pas indemniser le demandeur pour la perte découlant d'autres facteurs n'équivaut pas à « réduire » les dommages-intérêts. Par contre, l'indemniser d'une telle perte reviendrait à accorder des dommages-intérêts « supérieurs » à ceux exigibles en droit. On ne saurait donc affirmer que les intimés tirent profit de leurs actes fautifs.

85 Deuxièmement, la maxime *ex turpi causa non oritur actio* ne peut être invoquée pour contourner une limite fixée par la loi ou pour saper le système juridique. L'appliquer de manière à permettre le dédommagement pour d'autres actes fautifs frappés de prescription priverait la loi de sa raison d'être et permettrait l'indemnisation à l'égard de délits allégués mais non prouvés. L'intention du législateur serait bafouée, et la responsabilité serait imputée en l'absence d'éléments de preuve légaux.

86 Troisièmement, à supposer que ces obstacles soient surmontables, lorsque les circonstances commandent clairement l'application de la maxime *ex turpi causa non oritur actio*, les tribunaux doivent faire preuve de circonspection en l'appliquant : *Hall c. Hebert*, [1993] 2 R.C.S. 159. L'indemnisation des

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the broad claim for collective breach of fiduciary duty, the necessary record to permit consideration of past policy wrongs is lacking.

87 I conclude that Mr. Barney's contention that the trial judge erred in failing to properly consider wrongs other than the actionable sexual assaults in assessing damages cannot succeed.

2.8 *General and Aggravated Damages: Quantum*

88 The trial judge awarded Mr. Barney $125,000 in general damages, plus $20,000 aggravated damages. Mr. Barney argues that these amounts should be increased to $300,000 having regard to the awards in other cases, exacerbating factors and non-sexual brutalization suffered by him while at AIRS.

89 This ground of appeal cannot succeed. The trial judge considered the correct factors in arriving at the damages award. He emphasized the nature and frequency of the assaults and their dreadful physiological and psychological effect on the victim. He referred to numerous decisions of a similar nature, in order to arrive at a fair figure. No basis for interfering with his award of general and aggravated damages has been made out.

2.9 *Punitive Damages*

90 The trial judge awarded punitive damages only against Plint. The appellant asks for $25,000 of punitive damages to be awarded against Canada as well.

91 No compelling reason exists to disturb the trial judge's award. Punitive damages are awarded against a defendant only in exceptional

effets du placement dans les pensionnats est controversée et problématique. En l'espèce, comme pour l'allégation générale d'un manquement collectif à une obligation fiduciaire, la preuve requise pour l'examen d'actes fautifs découlant d'une politique antérieure fait défaut.

Je conclus que la prétention de M. Barney selon laquelle le juge de première instance a commis une erreur en ne tenant pas dûment compte, pour la fixation des dommages-intérêts, d'autres actes fautifs que ceux conférant le droit d'action — les agressions sexuelles — n'est pas fondée.

2.8 *Dommages-intérêts généraux et majorés : montants*

Le juge de première instance a accordé à M. Barney des dommages-intérêts généraux de 125 000 $, plus 20 000 $ à titre de dommages-intérêts majorés. M. Barney soutient que l'indemnité doit être portée à 300 000 $, eu égard aux sommes accordées dans d'autres affaires, aux facteurs aggravants et aux sévices à caractère non sexuel qui lui ont été infligés au Pensionnat.

Ce motif d'appel ne saurait être retenu. Le juge de première instance a tenu compte des bons facteurs pour fixer les dommages-intérêts. Il a souligné la nature et la fréquence des sévices, ainsi que leurs terribles répercussions physiologiques et psychologiques sur la victime. Il s'est référé à de nombreuses décisions rendues dans des affaires apparentées pour fixer un juste montant. Je ne vois aucune raison de modifier les dommages-intérêts généraux et majorés.

2. *Dommages-intérêts exemplaires*

Seul M. Plint a été condamné à des dommages-intérêts exemplaires. L'appelant demande que le gouvernement du Canada soit également condamné à lui verser 25 000 $ à titre de dommages-intérêts exemplaires.

Aucune raison valable ne justifie de modifier la décision du juge de première instance à cet égard. Les dommages-intérêts exemplaires ne sont

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circumstances for "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 94. The trial judge made no finding that Canada's behaviour in this case met any of those thresholds. He correctly stated that punitive damages cannot be awarded in the absence of reprehensible conduct specifically referable to the employer. While he found the Church liable on the basis of vicarious liability and Canada liable vicariously and on the basis of a non-delegable statutory duty, this was by virtue of the relationship between the parties and Plint, not because of any specific misconduct.

I conclude that the contention that the punitive damage award should include Canada should be rejected.

2.10 *Loss of Future Earning Opportunity*

The trial judge did not order any damages for loss of future earning ability. The Court of Appeal allowed an award of $20,000. The appellant is now asking this Court to raise the award to $240,000.

The Court of Appeal held that "the trial judge overlooked the reality that [Mr. Barney's] psychological injury would, at least for a period of time in the future, foreclose for him some occupations that might otherwise be available" (para. 221). The trial judge had found that Mr. Barney was likely to have become a logger in any event, as that was the occupation of both of his brothers. The trial judge had also found that Mr. Barney was disabled from working as a logger for reasons that had nothing to do with the sexual assaults (2001 decision, at para. 527). Finally, the trial judge had found that Mr. Barney did not have the intellectual capacity to pursue vocational or retraining programs "save for the briefest and most practically oriented" (para. 527).

accordés qu'exceptionnellement, en cas de « conduite malveillante, arbitraire ou extrêmement répréhensible, qui déroge nettement aux normes ordinaires de bonne conduite » : *Whiten c. Pilot Insurance Co.*, [2002] 1 R.C.S. 595, 2002 CSC 18, par. 94. Le juge de première instance n'a pas conclu que la conduite du gouvernement du Canada satisfaisait en l'espèce à l'un ou l'autre de ces critères. Il a dit à juste titre que des dommages-intérêts exemplaires ne pouvaient être octroyés si l'employeur n'avait pas eu lui-même une conduite répréhensible. Il a tenu l'Église et le gouvernement du Canada responsables du fait d'autrui, ajoutant dans le cas du second défendeur le manquement à une obligation légale intransmissible, mais ce, en raison de leur lien avec M. Plint, et non d'une inconduite de leur part.

92 Il y a lieu de rejeter l'allégation selon laquelle le gouvernement du Canada devrait également être condamné à des dommages-intérêts exemplaires.

2.10 *Perte de capacité de gain ultérieure*

93 Le juge de première instance n'a pas indemnisé l'appelant de la perte de capacité de gain ultérieure. La Cour d'appel lui a accordé 20 000 $ à ce titre. L'appelant demande aujourd'hui à notre Cour de porter ce montant à 240 000 $.

94 Selon la Cour d'appel, [TRADUCTION] « le juge de première instance a fait abstraction de ce que le préjudice psychologique de M. Barney l'empêcherait, du moins un certain temps, d'exercer des métiers qui, autrement, auraient été à sa portée » (par. 221). Le juge avait estimé que, de toute façon, M. Barney serait vraisemblablement devenu bûcheron, comme ses deux frères. Il avait également conclu que M. Barney n'était pas apte à travailler comme bûcheron pour des motifs qui n'avaient rien à voir avec les agressions sexuelles (décision de 2001, par. 527). Enfin, à son avis, M. Barney n'avait pas la capacité intellectuelle requise pour suivre un programme de formation professionnelle ou de recyclage, [TRADUCTION] « à moins que celui-ci ne soit très court et axé sur la pratique » (par. 527).

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95 Canada does not contest the award for future loss of earnings by the Court of Appeal. However, Canada argues that a detailed tabular approach is not appropriate on the evidence here.

96 I am satisfied that no evidentiary record exists to specifically quantify any future loss of earnings and that the Court of Appeal, noting the inadequacy of the evidentiary record on this point, was correct to award a conventional amount.

3. Conclusion

97 I conclude that the Court of Appeal erred in finding that the Church was not vicariously liable for the sexual abuse to Mr. Barney. The Court of Appeal also misapplied *Bazley* to find the Church immune from liability. The trial judge erred in finding a non-delegable statutory duty on the terms of the *Indian Act*. The trial judge correctly apportioned the damages unequally between the Church and Canada. No basis has been established for finding negligence, breach of fiduciary duty or for reassessing the damage awards in this case.

98 The appeal of Mr. Barney is dismissed. The appeal of Canada is allowed in part. The judgment of the trial judge on the issues of joint vicarious liability against the Church and Canada, and assessment and apportionment of damages, is restored. The judgment of the Court of Appeal on the issue of charitable immunity is set aside. The Court of Appeal's award to Mr. Barney for loss of future earning opportunity is upheld. In the circumstances, I would make no order as to costs, leaving each party to bear its own costs.

APPENDIX

Indian Act, S.C. 1951, c. 29

113. The Governor in Council may authorize the Minister, in accordance with this Act,

Le gouvernement du Canada ne conteste pas le montant accordé par la Cour d'appel au titre de la perte de capacité de gain ultérieure. Il fait cependant valoir que, vu la preuve, le calcul à partir de tables détaillées n'est pas opportun en l'espèce.

Je suis convaincue qu'aucun élément de la preuve ne permet précisément de quantifier une perte de capacité de gain ultérieure et que la Cour d'appel a eu raison, à défaut de la preuve voulue, d'accorder un montant fondé sur la jurisprudence.

3. Conclusion

Je conclus que la Cour d'appel a eu tort de ne pas tenir l'Église responsable du fait d'autrui pour l'agression sexuelle de M. Barney. De plus, elle a mal appliqué l'arrêt *Bazley* en exonérant l'Église de toute responsabilité. Le juge de première instance a commis une erreur en dégageant de la *Loi sur les Indiens* une obligation légale intransmissible. Il a eu raison de répartir les dommages-intérêts inégalement entre l'Église et le gouvernement du Canada. Aucun élément n'a été avancé pour justifier une conclusion de négligence ou de manquement à une obligation fiduciaire ou la modification du montant des dommages-intérêts.

Je suis d'avis de rejeter l'appel de M. Barney et d'accueillir en partie celui du gouvernement du Canada. Le jugement de première instance est rétabli en ce qui concerne la responsabilité solidaire du fait d'autrui de l'Église et du gouvernement du Canada, ainsi que la détermination et la répartition des dommages-intérêts. Le jugement de la Cour d'appel est annulé quant à l'exonération d'un organisme de bienfaisance. Sa décision d'accorder à M. Barney une indemnité pour la perte de capacité de gain ultérieure est confirmée. Aucun dépens ne seront adjugés dans les circonstances, chacune des parties assumant les siens.

ANNEXE

Loi sur les Indiens, S.C. 1951, ch. 29

113. Le gouverneur en conseil peut, en conformité de la présente loi, autoriser le Ministre

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(*a*) to establish, operate and maintain schools for Indian children,

(*b*) to enter into agreements on behalf of His Majesty for the education in accordance with this Act of Indian children, with

(i) the government of a province,

(ii) the council of the Northwest Territories,

(iii) the council of the Yukon Territory,

(iv) a public or separate school board, and

(v) a religious or charitable organization.

114. The Minister may

(*a*) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools,

(*b*) provide for the transportation of children to and from school,

(*c*) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations, and

(*d*) apply the whole or any part of moneys that would otherwise be payable to or on behalf of a child who is attending a residential school to the maintenance of that child at that school.

115. (1) Subject to section one hundred and sixteen, every Indian child who has attained the age of seven years shall attend school.

(2) The Minister may

(*a*) permit an Indian who has attained the age of six years to attend school,

(*b*) require an Indian who becomes sixteen years of age during the school term to continue to attend school until the end of that term, and

(*c*) require an Indian who becomes sixteen years of age to attend school for such further period as the Minister considers advisable, but no Indian shall be required to attend school after he becomes eighteen years of age.

. . .

a) À établir, diriger et entretenir des écoles pour les enfants indiens;

b) À conclure, au nom de Sa Majesté et pour l'instruction des enfants indiens conformément à la présente loi, des accords avec

(i) le gouvernement d'une province,

(ii) le conseil des Territoires du Nord-Ouest,

(iii) le conseil du Territoire du Yukon,

(iv) une commission d'écoles publiques ou séparées, et

(v) une institution religieuse ou de charité.

114. Le Ministre peut

a) Pourvoir à des normes de construction, d'installation, d'enseignement, d'éducation, d'inspection et de discipline relativement aux écoles, et établir des règlements à cet égard;

b) Assurer le transport, aller et retour, des enfants à l'école;

c) Conclure des accords avec des institutions religieuses pour le soutien et l'entretien des enfants qui reçoivent leur instruction dans les écoles dirigées par ces institutions, et

d) Appliquer la totalité ou une partie des deniers qui seraient autrement payables en faveur ou pour le compte d'un enfant qui fréquente un pensionnat, à l'entretien dudit enfant à cette école.

115. (1) Sous réserve de l'article cent seize, tout enfant indien qui a atteint l'âge de sept ans doit fréquenter l'école.

(2) Le Ministre peut

a) Autoriser un Indien qui a atteint l'âge de six ans à fréquenter l'école;

b) Exiger qu'un Indien qui atteint l'âge de seize ans pendant une période scolaire continue à fréquenter l'école jusqu'à la fin de cette période, et

c) Exiger qu'un Indien qui atteint l'âge de seize ans fréquente l'école durant la période additionnelle que le Ministre juge à propos, mais aucun Indien ne doit être tenu de fréquenter l'école après avoir atteint l'âge de dix-huit ans.

. . .

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117. Every Indian child who is required to attend school shall attend such school as the Minister may designate, but no child whose parent is a Protestant shall be assigned to a school conducted under Roman Catholic auspices and no child whose parent is a Roman Catholic shall be assigned to a school conducted under Protestant auspices, except by written direction of the parent.

Indian Residential School Regulations

. . .

2. "Superintendent" means the Superintendent of Education, Indian Affairs Branch, Department of Citizenship and Immigration.

. . .

13. The principal of every school shall maintain standards acceptable to the Superintendent in respect of,

(a) the adequacy in numbers and qualifications of the school staff;

(b) the number of pupils served by the school;

(c) diet and all phases of food preparation and service;

(d) clothing and bedding;

(e) dormitory accommodation;

(f) heating and ventilation;

(g) cleanliness, sanitation, water supply and laundry service;

(h) lighting;

(i) interior decoration;

(j) safety precautions;

(k) classroom instruction;

(l) recreational activities;

(m) counselling and guidance;

(n) home and school relationships;

(o) the maintenance of records; and

117. Tout enfant indien tenu de fréquenter l'école doit fréquenter celle que le Ministre peut désigner, mais aucun enfant dont le père ou la mère, selon le cas, est protestant ou protestante, ne doit être assigné à une école dirigée sous les auspices de catholiques romains, et aucun enfant dont le père ou la mère, selon le cas, est catholique romain ou catholique romaine, ne doit être assigné à une école dirigée sous les auspices de protestants, sauf sur des instructions écrites du père ou de la mère, suivant le cas.

Indian Residential School Regulations

[TRADUCTION]

. . .

2. « surintendant » Le surintendant de l'Éducation, Direction des affaires indiennes, ministère de la Citoyenneté et de l'Immigration.

. . .

13. Le directeur de chacun des pensionnats établit relativement à ce qui suit des normes convenant au surintendant :

a) le nombre d'employés et leurs compétences;

b) le nombre d'élèves;

c) l'alimentation et toutes les étapes de la préparation des aliments et de leur service;

d) les vêtements et la literie;

e) le dortoir;

f) le chauffage et la ventilation;

g) la propreté, l'assainissement, l'approvisionnement en eau et la lessive;

h) l'éclairage;

i) la décoration intérieure;

j) les mesures de sécurité;

k) l'enseignement en classe;

l) les loisirs;

m) la conseillance et l'orientation;

n) les relations à la maison et à l'école;

o) la tenue de dossiers;

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(p) the accounting for funds, stock and equipment.

14. Every school shall be subject to inspection by such officials of the Government of Canada and by such other persons as the Superintendent may authorize.

15. (1) The principal of every school shall be responsible for,

(a) the maintenance and operation of the school buildings, grounds and equipment;

(b) the assignment of duties to the staff and the supervision of the performance thereof;

(c) the preparation and dissemination of rules relating to the functioning of the school;

(d) the provision and supervision of measures to ensure the health, safety, welfare and educational progress of the pupils;

. . .

(h) the practice of fire drill not less than once a month.

Appeal of Frederick Leroy Barney dismissed. Appeal of Canada allowed in part.

Solicitors for the appellant/respondent Frederick Leroy Barney and for the respondents R.A.F., R.J.J., M.L.J. and M.W. (2): Hutchins Grant & Associates, Vancouver; Diane Soroka, Barrister & Solicitor Inc., Vancouver.

Solicitor for the appellant/respondent Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development: Attorney General of Canada, Vancouver.

Solicitors for the respondent the United Church of Canada: Harper Grey Easton, Vancouver.

Solicitors for the respondent Patrick Dennis Stewart: David Paterson Law Corporation, Surrey.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

p) la comptabilisation des fonds, des stocks et du matériel.

14. Chacun des pensionnats est inspecté par le représentant du gouvernement du Canada et toute autre personne que désigne le surintendant.

15. (1) Le directeur d'un pensionnat veille à ce qui suit :

a) l'entretien et le fonctionnement des bâtiments, des terrains et du matériel;

b) l'attribution de tâches au personnel et la surveillance de l'exécution de ces taches;

c) l'établissement et la diffusion de règles de fonctionnement;

d) l'adoption et le respect de mesures visant à assurer la santé, la sécurité, le bien-être et l'apprentissage des élèves;

. . .

h) le déroulement d'un exercice d'évacuation en cas d'incendie, au moins une fois par mois.

Pourvoi de Frederick Leroy Barney rejeté. Pourvoi du gouvernement du Canada accueilli en partie.

Procureurs de l'appelant/intimé Frederick Leroy Barney et des intimés R.A.F., R.J.J., M.L.J. et M.W. (2) : Hutchins Grant & Associates, Vancouver; Diane Soroka, Barrister & Solicitor Inc., Vancouver.

Procureur de l'appelante/intimée Sa Majesté la Reine du chef du Canada, représentée par le ministre des Affaires indiennes et du Nord Canada : Procureur général du Canada, Vancouver.

Procureurs de l'intimée l'Église unie du Canada : Harper Grey Easton, Vancouver.

Procureurs de l'intimé Patrick Dennis Stewart : David Paterson Law Corporation, Surrey.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Pitblado, Winnipeg.

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Solicitor for the interveners the Women's Legal Education and Action Fund, the Native Women's Association of Canada and the Disabled Women's Network of Canada: Women's Legal Education and Action Fund, Toronto.

Procureur des intervenants le Fonds d'action et d'éducation juridiques pour les femmes, l'Association des femmes autochtones du Canada et le Réseau d'action des femmes handicapées du Canada : Fonds d'action et d'éducation juridiques pour les femmes, Toronto.

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TAB 21

[IN THE COURT OF APPEAL.]

C. A.
1898
Aug. 2, 3;
Nov. 30.

BONNER AND ANOTHER *v.* TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY.

Lease—Sub-lease by Assignee—Liability of Sub-lessee—Rent reserved by original Lease—Payment by Lessee—Indemnity—Money paid.

The lessees of premises having assigned the term, the assignee mortgaged the premises by way of sub-demise. The mortgage provided that, upon default by the mortgagor, the mortgagees might enter into possession, or receipt of the rents and profits of the premises, and demise or sell the same, and out of moneys so received by them, whether as rents and profits or purchase-money, should in the first place pay the rent reserved by the original lease. The mortgagees, having entered into possession, did not pay rent which accrued due under the lease while they were in possession. The lessees, having been compelled to pay it, sued the mortgagees to recover the amount so paid by them.

Held, that the action was not maintainable.

Moule v. *Garrett*, (1870) L. R. 5 Ex. 132; (1872) 7 Ex. 101, distinguished.

APPEAL from the judgment of Channell J. in an action tried by him without a jury.

The action was brought by the plaintiffs, who were lessees of certain premises, to recover from the defendants, who were mortgagees of the premises by way of sub-demise from one Price, to whom the plaintiffs had assigned the term, the amount of rent which the plaintiffs had been compelled to pay to the lessor and which had accrued while the defendants had been in possession of the premises.

By indenture of lease dated April 3, 1882, the premises, numbered 12 and 14, Lordship Lane, Tottenham, were demised by one Moore to the plaintiffs at the yearly rent of 20*l.*, payable quarterly, for a term of ninety-nine years. The lease contained the usual covenants for payment of the rent reserved, repair, and insurance by the lessees, and a condition of re-entry for non-payment of rent or breach of covenant. By indenture dated April 5, 1889, the plaintiffs assigned the premises for the remainder of the term to Edward Price, who by the said

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indenture covenanted with the plaintiffs to pay the rent reserved by the lease, and indemnify the plaintiffs therefrom. By an indenture dated October 18, 1889, which recited that Price had applied to the defendants' society to lend him 400*l.* in respect of his forty advanced shares therein for the term of fifteen years, and had offered to pay a premium for that advance which, being calculated according to the rules of the society, amounted to 60*l.*, and was to be added to and treated as part of the principal sum advanced, it was witnessed that, in consideration of the sum of 400*l.* paid to Price by the defendants, he demised the above-mentioned premises to the defendants for the residue of the term granted by the lease, except the last day, by way of mortgage for securing to the defendants the payment by him of 180 advance instalments of 3*l.* 14*s.* each, one of such instalments to become due and be paid on the first Monday in every month, commencing with the month of December then next, and also the payment of all fines and other sums, if any, which, according to the rules of the society, might become payable by him to the defendants. The deed provided for the mortgagor's remaining in possession until default by him in payment of any instalment or fine, or in payment of the rent reserved by the lease under which he held the premises, and that, if such default should be made, the defendants might distrain for the amount of any monthly payments or fines in arrear, and of any payment made by the defendants under the powers by the deed conferred upon them, as for rent in arrear upon a common demise, or enter into possession of, or receipt of the rents and profits of, the premises, and might demise or sell the premises, and should out of the moneys so received by them, whether the same were rents and profits or purchase-money, in the first place pay the rent reserved by the lease under which the mortgagor held the premises, and certain other expenses thereby specified, and in the next place retain for the society all advance instalments, fines, and other moneys which under the deed or the rules of the society were then due to them from the mortgagor, and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would have to be paid by

the mortgagor in case he were about to redeem, and should pay the surplus, if any, to the mortgagor. On November 13, 1891, Price was adjudicated bankrupt. The defendants entered into possession of the premises, and had continued in possession ever since. The defendants not having paid rent reserved by the original lease during the time they were so in possession to the amount of 97*l.* 0*s.* 5*d.* the plaintiffs were compelled to pay that rent to the lessor. The learned judge gave judgment for the defendants.

Aug. 2, 3. *Bray, Q.C.*, and *H. Tindal Atkinson*, for the plaintiffs. The plaintiffs have been compelled to pay that which the defendants by the terms of the instrument under which they held the premises ought to have paid, and the defendants have had the benefit of that payment; for, in the absence of it, the term, upon which their interest in the premises depended, might have been forfeited. The defendants really took the premises subject to the charge of paying this rent, and it is by reason of their default that this burthen has fallen upon the plaintiffs. The case therefore falls within the proposition laid down by Cockburn C.J. in *Moule* v. *Garrett* (1) to the effect that, "where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid." It is not necessary in a case of this description that there should be between the parties either privity of contract or privity of estate in the sense that the defendants must have the same estate as the plaintiffs had. It is sufficient that the plaintiffs were compellable and have been compelled to pay a sum of money through the default of the defendants, which payment has enured for the defendants' benefit. In such a case the law, in order to do justice, implies a request by the defendants to the plaintiffs to make the payment, which was for the defendants' benefit, and a promise by the defendants to repay the plaintiffs. There was neither privity of contract nor privity of estate between the plaintiffs and the defendants in *Moule* v. *Garrett*. (2)

(1) L. R. 7 Ex. 101. (2) L. R. 5 Ex. 132; 7 Ex. 101.

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[They also cited *Sapsford* v. *Fletcher* (1); *Exall* v. *Partridge* (2); *Crouch* v. *Tregonning* (3); *Taylor* v. *Zamira* (4); *Penley* v. *Watts* (5); *Dawson* v. *Linton* (6); *Edmunds* v. *Wallingford.* (7)]

Jelf, Q.C., and *Grimwood Mears* (*G. Spencer Bower* with them), for the defendants. There must be some privity either by contract or estate between the plaintiffs and defendants in order to support such an action as this. It is essential to the right to indemnity in such a case that the defendants and the plaintiffs should have been both compellable by law to pay the same debt to the same person, and that the defendants should, as between themselves and the plaintiffs, be the parties primarily liable, the payment being thus for their benefit. In *Moule* v. *Garrett* (8) the defendants were assignees of the term, not sub-lessees, and therefore the plaintiff as lessee, and the defendants as assignees of the term, were both liable to pay the rent, the one by contract and the other by estate; and there was privity of estate in the sense that the defendants had the estate which had belonged to the lessee. Here the defendants have not the same estate as the plaintiffs had, and the plaintiffs are not parties to the contract by which the defendants undertook to pay rent. No request can be implied by the defendants to the plaintiffs to pay the rent due on the original lease, which the defendants were not liable to the lessor to pay.

[They also cited *England* v. *Marsden* (9); *Deering* v. *Winchelsea.* (10)]

H. T. Atkinson, in reply.

Cur. adv. vult.

Nov. 30. A. L. SMITH L.J. read the following judgment:— This is an action by plaintiffs who are lessees of premises for a long term to recover from the defendants 97*l.*, being rent they

(1) (1792) 4 T. R. 511.
(2) (1799) 8 T. R. 308.
(3) (1872) L. R. 7 Ex. 88.
(4) (1816) 6 Taunt. 524.
(5) (1841) 7 M. & W. 601.
(6) (1822) 5 B. & A. 521.
(7) (1885) 14 Q. B. D. 811.
(8) L. R. 5 Ex. 132; 7 Ex. 101.
(9) (1866) L. R. 1 C. P. 529.
(10) (1800) 2 B. & P. 270.

have had to pay to their lessor under the covenant in their lease, which rent accrued during the time the defendants were in possession of the premises as mortgagees by way of demise from an assignee of the term. Between the plaintiffs and the defendants there exists neither contract nor privity of estate; the defendants were not liable to pay to the plaintiffs the rent in question, nor were they liable to pay it to the plaintiffs' lessor. In these circumstances my brother Channell gave judgment for the defendants, being of opinion that the action was not maintainable, and that the principle of the decision in *Moule* v. *Garrett* (1) did not apply, the defendants being underlessees and not assignees of the term as in the case cited. My brother Channell held, as I read his judgment, that no request by the defendants to the plaintiffs to pay their lessor the rent in question on their behalf could be implied whereon to maintain the action, and I am of opinion that he was right.

The facts are these. On April 3, 1882, the owner of the premises, Moore, demised them to the plaintiffs for a term of ninety-nine years at the rent of 20*l.* per annum, which the plaintiffs covenanted to pay. On April 5, 1889, the plaintiffs assigned to Price the residue of the term, Price covenanting with the plaintiffs to pay the covenanted rent and indemnify the plaintiffs therefrom. On October 18, 1889, Price demised by way of mortgage the term less one day to the defendants to secure advances made by them to him, and the defendants covenanted with Price that, if they should enter into possession of the premises and receive the rents and profits, they would pay the yearly rent of 20*l.* per annum reserved by the lease of April 3, 1882. In November, 1891, Price was adjudicated bankrupt. The defendants have entered into possession of the premises under their mortgage, and have received the rents and profits thereof in part satisfaction of their mortgage debt, and they have remained in possession ever since. The defendants have not paid the rent which accrued whilst they were in possession, and Moore, the landlord, has compelled the plaintiffs, his lessees, under the covenant in their lease with him to do so;

(1) L. R. 5 Ex. 132; 7 Ex. 101.

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they have done so, and they now sue the defendants to recover the amount they have thus had to pay to Moore.

It is clear that no contract or privity of estate exists between the plaintiffs and the defendants, or between the original lessor, Moore, and the defendants; and, unless there be circumstances from which a request to pay can be implied, or, in other words, a contract can be implied between the defendants and the plaintiffs that the defendants would indemnify the plaintiffs if they paid to their landlord the rent accruing whilst they, the defendants, were in possession, there are no circumstances which will support an action by the plaintiffs against the defendants to recover the amount so paid. It is true that Moore could sue the plaintiffs, his lessees, upon their covenant with him in the lease. It is also true that the plaintiffs, the lessees, could sue their assignee, Price, upon his covenant with them. It is also true that Price could sue the defendants, his underlessees, upon their covenant with him. But how can the plaintiffs sue the defendants? I omit Price's trustee in bankruptcy, for he, in my opinion, does not affect this case. It is said that the case of *Moule* v. *Garrett* (1) shews that the plaintiffs can sue the defendants to recover what they have been compelled to pay to their lessor, and that this case falls within the principle of that case. Now what was the case of *Moule* v. *Garrett* (1)? It was a case in which there had been two assignments of the term, the defendants being the second assignees thereof. First of all there was, as here, a lease from a lessor to the lessee, Moule, the plaintiff in the action, containing the usual covenants by a lessee. Moule afterwards assigned the term to Bartley, who afterwards assigned the term to the defendants, Garrett & Co., who then committed breaches of covenants in the lease. Moule, having been compelled under his covenant with his lessor to pay to him damages for these breaches committed by the defendants, Garrett & Co., the assignees of Bartley, sued Garrett & Co. to recover the amount so paid by him, Moule, to his lessor. It was held that, inasmuch as both the plaintiff and the defendants were compellable to pay to the original lessor the damages accruing to him for the breaches

(1) L. R. 5 Ex. 132; 7 Ex. 101.

of covenant by the defendants whilst assignees of the term, the former by reason of his covenant with the original lessor and the latter by reason of their being assignees of the term and having committed the breaches whilst assignees, and inasmuch as the plaintiff had been compelled to pay damages to his lessor for these breaches of covenant by the defendants, for which the defendants were also compellable under privity of estate to pay to the lessor, they, the defendants, were liable to indemnify the plaintiff in respect of these payments of which the defendants had had the benefit. For, as Willes J. puts it in *Roberts* v. *Crowe* (1), the lessee is liable for breaches of covenant committed by the assignee, but being only secondarily liable he has his remedy over against the person primarily liable—that is, the assignee. The ratio decidendi of *Moule* v. *Garrett* (2) is this: If A. is compellable to pay B. damages which C. is also compellable to pay B., then A., having been compelled to pay B., can maintain an action against C. for money so paid, for the circumstances raise an implied request by C. to A. to make such payment in his ease. In other words, A. can call upon C. to indemnify him. See the notes to *Lampleigh* v. *Brathwait* (3), and cases there cited. To raise this implied request, both A. and C. must, in my judgment, be compellable to pay B.; otherwise, as it seems to me, the payment by A. to B. so far as regards C. is a voluntary payment, which raises no implication of a request by C. to A. to pay. If Cockburn C.J., in his alternative reason in *Moule* v. *Garrett* (4) for holding the defendants liable meant this by the expression "by the legal default of another," I agree; but, if it means by a default for which they were not compellable to pay in that case to the original lessor, I do not agree, and none of the other learned judges who decided that case adopted what Cockburn C.J. then said, and, indeed, Willes J. expressly points out that the obligation of the contract must be common to the plaintiff and the defendant, and that the whole benefit was taken by the defendants. In the present case the defendants are under-

(1) (1872) L. R. 7 C. P. 629, at p. 637.
(2) L. R. 5 Ex. 132; 7 Ex. 101.
(3) 1 Sm. L. C. 9th ed. p. 160.
(4) L. R. 7 Ex. 101.

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lessees of an assignee of the term, and are not liable at all to the original lessor for rent whenever it accrued, there being between them and the original lessor neither contract nor privity of estate, and there is no suggestion that there were goods upon the demised premises available for distress other than the goods of the mortgagor Price, even if this would have sufficed to maintain the action, about which I say nothing, for it is not before me. The above, in my judgment, is what was decided in *Moule* v. *Garrett* (1), and the present case, as it appears to me, is an attempt to stretch the decision of that case, and to say that the principle therein laid down applies equally to the case of an underlessee of an assignee who is not compellable to pay the original lessor as to the case of an assignee who is compellable to pay the original lessor. It will be seen upon looking at the case of *Penley* v. *Watts* (2) that Parke B. deals with this exact point. He says: "The lessee and his assignee are liable to precisely the same extent, and the assignee is a surety for the lessee, but that is not the case in a sub-lease." And, again, in *Moule* v. *Garrett* (3), in the Exchequer Chamber, when it was suggested that the case of an underlessee of an assignee and an assignee of an assignee were the same, Blackburn J. said.: "No, because the underlessee has never come under any obligation to the lessor, but here the defendant, by taking the same estate which the plaintiff had, has become liable to the same obligation," and this is the foundation of the judgment of the Court of Exchequer delivered by Channell B., and the ground upon which the judgment was upheld in the Exchequer Chamber. The fact that in this case the defendants covenanted with Price, the assignee, that if they, the defendants, became mortgagees in possession they would pay the rent, gives Price a remedy against them subject to any set-off which may exist between him and them and does not give the present plaintiffs a right of action against them.

In my judgment, for the reasons above, this action is not maintainable. I agree in the judgment of my brother

(1) L. R. 5 Ex. 132; 7 Ex. 101. (2) 7 M. & W. 601, at p. 608.
(3) L. R. 7 Ex. 101, at p. 102.

Channell and think that this appeal must be dismissed with costs.

RIGBY L.J. read the following judgment:—The only question in this case is as to the liability of the defendants, who are mortgagees by sub-lease of an assignee of a lease originally granted to the plaintiffs, to indemnify the plaintiffs in respect of rent recovered by the lessor against them on their covenant in the lease. The mortgagees entered into possession of the leasehold property by virtue of their sub-term in 1890, and the assignee became bankrupt in 1891.

Now primâ facie a sub-lessee of a lessee or assignee of a term comes under no liability to the original lessor either for payment of rent or performance of covenants in the original lease. This is true whether the sub-lease be by way of sale or by way of mortgage, and entry into possession of the sub-term does not make the sub-lessee liable to the lessor. But it is said that the present case is distinguishable from the ordinary case by the fact that the mortgagees expressly covenanted with their mortgagor (assignee of the lease) that, if they entered into possession, they would out of the rents and profits received by them (among other things) pay the rent, and that they have been, as they have, in possession during the whole time during which the rents recovered by the lessor against the plaintiffs, original lessees, have been accruing. The argument is that they are thus placed in the position of the defendants in *Moule* v. *Garrett* (1), who were held liable to repay to the plaintiff money which the latter had been compelled to pay to the original lessors for breach of covenant in the original lease. In that case the plaintiff, like the plaintiffs here, was an original lessee who had assigned the term before the breach on which he was sued; but the defendants were not, like the defendants here, holders of a sub-term, but were the actual holders at the time of the breach by puisne assignment of the whole of the original term, and in that capacity liable by privity of estate to the original lessors for the very damages which had been recovered by them against the original lessee, who in the action was

(1) L. R. 5 Ex. 132; 7 Ex. 101.

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seeking to recover them over. Both plaintiff and defendants were under a direct obligation to pay the rent to the lessors; but the defendants reaped all the benefit of the payment. It was treated as plain that, as between the plaintiff and defendants, the liability of the defendants to the original lessors by privity of estate was in the nature of a primary liability, that of the plaintiff by privity of contract being secondary; and on this ground the plaintiff was held entitled to recover over against the defendants, as though he were in a manner surety for them for payment of their debt. Here there is no privity either of estate or contract between the defendants and either the original lessor or the plaintiffs in this action, so that there can be nothing analogous to the relation of principal and surety between them. The reasoning in *Moule* v. *Garrett* (1), therefore, has no application.

If the assignee had been solvent, the plaintiffs would have had a sufficient remedy in recourse to him. The fact of his having become bankrupt can give no right of action against the defendants on the principle of *Moule* v. *Garrett* (1) which did not otherwise exist. The Legislature has made provision in the Bankruptcy Acts for the adjustment of rights of bankrupt holders of leases and other parties interested; and it is in Bankruptcy, if anywhere, that the plaintiffs must find their remedy.

VAUGHAN WILLIAMS L.J. read the following judgment:— In this case Moore, by an indenture of lease dated April 3, 1882, let to the plaintiffs two houses numbered 12 and 14, Lordship Lane, Tottenham, at the yearly rent of 20*l.* The plaintiffs on April 5, 1889, assigned the term to Edward Price, who covenanted to pay the rent of 20*l.* a year reserved by the lease of April 3, 1882, and to indemnify the plaintiffs therefrom. By an indenture of mortgage dated October 18, 1889, Price, in consideration of the sum of 400*l.* lent him by the defendants, the Tottenham and Edmonton Permanent Investment Building Society, demised to the defendants the said houses for the remainder of the said term of ninety-nine years, except the last

(1) L. R. 5 Ex. 132; 7 Ex. 101.

day of such term, by way of mortgage for securing to the society the payment by the mortgagor of one hundred and eighty advance instalments of 3*l.* 14*s.* each, payable monthly, and all fines and other sums which, according to the rules of the society, might become payable by him. The mortgage deed provided for the mortgagor remaining in possession until default by the mortgagor in the payment of the instalments and fines, or in the payment of the rent reserved by the lease under which the mortgagor held, and that, if such default should be made, the society might distrain for the amount of the monthly payments and fines, and the amount of any payments made by the society under the powers thereby conferred upon them, as for rent in arrear upon a common demise, and might enter into possession of the premises or the rents and profits thereof, and might demise or sell the premises, and should, out of moneys so received by them, whether the same were the rents and profits or purchase-money, pay in the first place the rent reserved by the lease under which the mortgagor held, and in the next place retain for the said society all advance instalments, fines, &c., and also such further sum of money as should be equivalent to the sum which, according to the rules of the society, would have to be paid by the mortgagor in case he were about to redeem, and pay the surplus, if any, to the mortgagor. Price has become bankrupt, and the defendants have gone into possession. There is no evidence what rents, profits, or proceeds they have actually received. The only remaining fact is that the plaintiffs have been called on to pay, and have paid, the principal rents since April, 1892.

The question raised in this case, namely, whether an underlessee, who is a mortgagee by way of demise from an assignee of the lessee, and who is in possession of the demised lands, can be sued for money paid by the lessee, who has been compelled according to his covenant to pay the rent reserved by the principal lease, has not, so far as I know, been directly determined until now. It is plain that, generally speaking, an underlessee, whether holding of the lessee or of the assignee of the lessee, cannot be under any obligation to indemnify the lessee against the claim of the lessor for the rent reserved by

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the lease, because the underlessor generally is presumed to indemnify the underlessee against the rent payable by the principal lease: see *Jones* v. *Morris* (1): and the payment of the rent would not therefore be for his relief. The case of *Moule* v. *Garrett* (2) does not determine the question, although it goes far to define the principles upon which the question must be decided. In *Moule* v. *Garrett* (2) the defendants were not underlessees, but assignees of the term, and the ground upon which they were held to be liable was that, the lessee and the defendants both being liable to the lessor upon all the covenants in the lease, which ran with the land, the former by contract and the latter by privity of estate, the defendants, having had the whole benefit for which the covenant was entered into by the plaintiff as lessee, were liable to recoup to the plaintiff the amount which he had been compelled to pay the lessor for breaches of covenant occurring during the defendants' possession. Channell B. in delivering the judgment of the majority of the Court says: "It is true that there is no express covenant between the parties, but they are each liable to the lessor for the performance of the covenants; they are each directly liable, and the lessor may sue either at his option; but the assignee having at the time the estate which has been the consideration for the covenants ought, as between himself and the lessee, to perform them"; and in *Moule* v. *Garrett* (3) in the Exchequer Chamber Blackburn J. says, "I express my entire concurrence in what fell from Channell B."; and Willes J. says: "I concur upon the ground that where two parties have become bound, the one by contract and the other by estate, to perform the same covenant, the former is entitled to indemnity against the latter to the extent of his interest, although there is no immediate privity of contract between them; and I think that the defendants are liable in this action by reason of their having had the whole benefit for which the covenant was entered into by the plaintiff as lessee. The principle of the decision in *Deering* v. *Earl of Winchelsea* (4) appears to

(1) (1849) 3 Ex. 742.
(2) L. R. 5 Ex. 132; 7 Ex. 101; 39 L. J. (Ex.) 69; 41 L. J. (Ex.) 62.
(3) 41 L. J. (Ex.) 62.
(4) 2 Bos. & P. 270.

govern the case." Cockburn C.J. bases his judgment on precisely the same ground, but adds: "there is another ground upon which the judgment of the Court below may be upheld, namely, that the premises, the subject-matter of this lease, being in the possession of the defendants, they were the parties whose duty it was to perform the covenants to be performed upon and in respect of those premises, and whose immediate duty it was to keep those premises in repair. By reason of their default the plaintiff, the original lessee, became liable (although he had parted with the estate) by the terms of his covenant to make good to his lessor the damage which had arisen from the default of the defendants; and I take it to be a general proposition applicable to such a case as this, that, where one man is compelled to pay damages by reason of the default of another, he is entitled to recover compensation from the person through whose default that damage is occasioned. The reason for this rule appears to be well stated in Mr. Leake's excellent work on Contracts." (1) The passage referred to runs thus: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount." Now what (according to the judgments of Channell B., Blackburn J., and Willes J.) were the conditions upon which the liability of the defendants to the plaintiff was based? First, that the plaintiff and defendants were both liable to be sued by the lessor for the same breaches of the same covenant. Secondly, that the defendants had had at the date of those breaches the whole benefit of the land the subject of the lease containing that covenant.

These being the conditions upon which the defendants in *Moule* v. *Garrett* (2), the sub-assignees of the lease, were held liable, it is necessary to consider whether one finds these conditions in principle present in a case in which lessees, who have been compelled to pay the rent reserved by the lease, are seeking to get recoupment from underlessees of an assignee

(1) 1st ed. p. 41. (2) L. R. 5 Ex. 132; 7 Ex. 101.

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of the lease, who are in possession as mortgagees. Now first, as to the common liability of the lessee and underlessee, they clearly are not both liable to be sued by the lessor for rent. The lessee alone can be sued, and the underlessee is only liable to the lessor in the sense that the lessor has a remedy in rem by distress on goods on the property demised and by the power of re-entry for non-payment of rent or breach of covenant. It is in this sense only that the underlessee can be said to be liable to the lessor for the rent, and, so far as distress is concerned, his direct liability is limited to cases in which he happens to have goods on the land, although he may have an indirect liability to indemnify against distress those who by his licence having goods on the land have been compelled to redeem their goods from distraint. Is this a common liability within the reason upon which the condition is based? I think it is not. I am now dealing only with the principle upon which the common law liability is based. There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued. The two principles are well illustrated by the case of *Hunter* v. *Hunt* (1) and the observations of Eyre C.B. in *Deering* v. *Winchelsea*. (2) The former was a case in which one underlessee of a separate portion of premises, the whole of which were held under one original lease at an entire rent, who had paid the whole rent under

(1) (1845) 1 C. B. 300.

(2) 2 Bos. & P. 270.

threat of distress, brought an action against an underlessee to recover from him a proportion of the money which he had so paid as money paid to his use, and it was held that at law he had no right of action. In the latter case, the Lord Chief Baron, in dealing with the principle in equity, takes as an illustration of the equitable principle a series of cases, in some of which the defendant seems to have been under no liability to be sued, but in which the goods of one had been legally taken or sacrificed for the benefit, not of himself alone, but of himself and others, and says, that "the reason is that they are all in æquali jure, and, as the law requires equality, they shall equally bear the burden. This is considered as founded in equity. The principle operates more clearly in a court of equity than at law. At law the party is driven to an audita querela or scire facias to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law." The audita querela, which is a defendant's writ, and the scire facias both assume a legal liability to judgment or execution in some person other than him against whom judgment has been obtained. The case also of *Leigh* v. *Dickeson* (1), in which it was held that one tenant in common of a house who expends money upon the repairs of the house has no right of action against his co-tenant in common for contribution in respect of money so expended, is based upon the consideration that there is no common liability to repair, and seems further to shew that in equity as well as at law there must at least be a legal liability on the plaintiff to pay the sum or bear the burden in respect of which he seeks recoupment or contribution from the defendant. This seems to me to account for the common law condition that the defendant cannot be liable to be sued for money paid unless he is personally liable to be sued for the money which the plaintiff claims to have paid to his use. The common law condition may also be explained by reference to the form of action, "money paid to the use of the defendant at his request," for it seems that, unless the defendant is under a personal liability to pay the money which the plaintiff has

(1) (1884) 15 Q. B. D. 60.

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assumed to pay for him, one cannot imply the authority from the defendant to the plaintiff to make the payment on his behalf. This proposition does not of course extend to cases where the contractual relation of the parties, whether by express contract or by contract to be implied from their dealings with one another, raises a request or authority to pay, but otherwise I believe it of universal application in an action for money paid: see *Lewis* v. *Campbell.* (1) For these reasons I think that the right of the lessor to distrain or re-enter does not constitute a liability in the underlessee to the lessor within the meaning of the condition of the common law principle. But the plaintiff may be entitled to recover within the equitable principle, if he has been compelled to pay or bear the burden, and can establish that the defendant has such an interest or benefit as to make the maxim apply "Qui sentit commodum sentire debet et onus"; but in my judgment an underlessee has no such interest in the lease or benefit from the payment of the rent as to make that maxim apply or to bring him within the equitable principle. The equitable principle seems to me based upon natural justice requiring that equity should neutralise "inter se" the accident that the burden has been borne by one for the benefit of others associated with him in interest, whether such incidence of burden is the result of election of a plaintiff who might have sued all those interested, or whether it is the result of the requirements of the law as to the parties to actions, or whether it is the result of what may be more properly called "accident" like the "jettison" of a part of a cargo severally owned, or the seizure of wines on behalf of the Crown in right of prisage. In each of these cases the application of the equitable principle depends on community of interest in something in respect of which one has borne a burden for the benefit of another or others. The covenant in accordance with which a lessee pays rent or expends money in repairs is a covenant in a lease in which the underlessee has no interest. He has no contractual interest, and no estate is vested in him; the only sense in which it can be said that he has an interest in the lease is that the lessee or assignee of the

(1) (1849) 8 C. B. 541, at p. 549.

lease who has granted the underlease cannot defeat his own grant by a collusive surrender of the lease to the original lessor; and it does not seem to me that this fact constitutes such an interest in him that he can within the equitable principle be said to have an interest in the lease containing the covenant under which the lessee is compellable to do the act alleged to have been done for the benefit of the underlessee. The case of the assignee of a lease on the contrary does shew the necessary interest, as is well illustrated by the judgment of Popham C.J. and the whole Court in the Dean and Chapter of Windsor's case, quoted by Tindal C.J. in *Tremeere* v. *Morison* (1), "that the action of covenant did lie although the lessee had not covenanted for him and his assigns; for such covenant which extends to the support of the thing demised is quodammodo appurtenant to it and goes with it: And in respect the lessee hath taken upon him to bear the charges of the reparations the yearly rent was the less which goes to the benefit of the assignee and qui sentit commodum sentire debet et onus." It may be remarked on this passage that the rent payable by the underlessee has no necessary relation to the rent reserved by the lease.

In conclusion, in my judgment the defendants have not, within either the equitable or common law principle, such an interest in the lease that it can be said that the payment by the lessees of the rent reserved by the lease was a payment for their benefit or relief, and I do not think that it makes any difference that the underlease was in fact a mortgage by demise.

The only other question with which I have to deal is the question whether there is anything in the provision in the underlease or mortgage by demise, for the application of the rents and profits to the payment of the rent reserved by the lease in case the mortgagees go into possession, which will enable the plaintiffs to maintain this action. I think not. It is plain that, apart from the provision for the application of rents and profits, an underlessee who has bought an interest by way of underlease from an assignee of the lease by the

(1) (1834) 1 Bing. N. C. 89, at p. 98.

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payment of a lump sum cannot, according to any principle, be called on to pay again for that for which he has already once paid, by indemnifying the lessee against the periodical rent as it accrues from time to time. Now, so far as the clause for the application of the rents and profits is concerned: first, it is plain that the lessee cannot at law take advantage of a contract to which he is not a party. It may be true that the trustee in Price's bankruptcy, who does not seem to have disclaimed, may be entitled to compel application of the rents, profits, and proceeds to the payment of the paramount rent, as being a fund held by the defendants in trust for that purpose, and the plaintiffs are, I think, entitled to insist upon the trustee in Price's bankruptcy on proper terms taking proceedings to enforce the application of the fund; but I do not think that the lessees can, at all events in this action, as framed and with these parties, enforce that trust. It is not as if the defendant society was in course of liquidation, and the lessees were attempting to carry in a proof to enforce the indemnity due from the estate to their debtor. It is sufficient, however, to say that the judgment of Channell J. in the action before him was quite right, and that the plaintiffs cannot in it recover any indemnity from the defendants.

With regard to the second ground upon which Cockburn C.J. based his judgment in *Moule* v. *Garrett* (1), I do not think that it is anything more than a statement of the principle of *Deering* v. *Winchelsea* (2), which principle is the foundation of all the cases in which the assignee has been held liable to recoup a lessee who has been compelled to pay rent as it were as surety for the assignee.

It seems to me that no injustice is done to the plaintiffs by holding that they must fail in this action, for I am of opinion that, if they take proper steps against the trustee in bankruptcy, they can in effect recover this rent from the defendants, provided the state of things is such that the trustee can compel the defendants to apply moneys received to the payment of these rents in arrear; and moreover, as the trustee has not disclaimed, they have, it seems, a remedy against the trustee

(1) L. R. 7 Ex. 101; 41 L. J. (Ex.) 62. (2) 2 B. & P. 270.

personally as an assignee of the lease in respect of such rents as have accrued since the bankruptcy, unless and until the trustee assigns over. I have only to add with regard to the cases of *Sapsford* v. *Fletcher* (1), *Taylor* v. *Zamira* (2), *Dawson* v. *Linton* (3), and *Exall* v. *Partridge* (4), which were cited to us, that each of these cases turned really on the contractual relations of the parties.

Appeal dismissed.

Solicitor for plaintiffs: *Albert Saunders.*

Solicitors for defendants: *Howard & Shelton, for C. E. Burrows, Tottenham.*

E. L.

[IN THE COURT OF APPEAL.]

THE LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION *v.* SEDGWICK.

Insurance, Marine—Reinsurance—"Subject to same terms as Original Policy"—Policies in existence at Date of Reinsurance—Policies coming into existence subsequently—Limit of Liability of Reinsurer.

A time policy of insurance on a ship was expressed to be "a reinsurance of policy or policies" (here there was a blank space not filled in) "and subject to the same terms, conditions, and clauses as original policy or policies, and to pay as may be paid thereon." The assured had underwritten two time policies on the ship, and these were in force when the reinsurance was effected. Subsequently, during the currency of the reinsurance policy, the two other policies came to an end, and he underwrote a fresh time policy of insurance of the same subject-matter, differing as to the valuation of the ship and in other respects from the two earlier policies. A loss occurred and was paid under the fresh policy:—

Held, that the original policies referred to in the reinsurance policy were the policies then in existence, and that the liability of the reinsurer did not extend to losses which might be incurred by the assured under a policy not containing the same terms, conditions, and clauses as the original policies.

Judgment of Kennedy J., [1898] 1 Q. B. 739, reversed.

APPEAL from a judgment of Kennedy J., reported [1898] 1 Q. B. 739.

The action was brought to recover back money paid by the

(1) 4 T. R. 511.
(2) 6 Taunt. 523.
(3) 5 B. & A. 521.
(4) 8 T. R. 308.

TAB 22

Husky Oil Operations Ltd. *Appellant (Plaintiff)*

v.

Saint John Shipbuilding Limited, Raychem Canada Limited and Raychem Corporation *Respondents (Defendants)*

and

Bow Valley Husky (Bermuda) Ltd. and Bow Valley Industries Ltd. *(Plaintiffs)*

and between

Bow Valley Industries Ltd. *Appellant (Plaintiff)*

v.

Saint John Shipbuilding Limited, Raychem Canada Limited and Raychem Corporation *Respondents (Defendants)*

and

Bow Valley Husky (Bermuda) Ltd. and Husky Oil Operations Ltd. *(Plaintiffs)*

and by way of cross-appeal between

Saint John Shipbuilding Limited *Appellant by Cross-Appeal (Defendant)*

v.

Bow Valley Husky (Bermuda) Ltd., Husky Oil Operations Ltd. and Bow Valley Industries Ltd. *Respondents by Cross-Appeal (Plaintiffs)*

and

Raychem Canada Limited and Raychem Corporation *(Defendants)*

Husky Oil Operations Ltd. *Appelante (Demanderesse)*

c.

Saint John Shipbuilding Limited, Raychem Canada Limited et Raychem Corporation *Intimées (Défenderesses)*

et

Bow Valley Husky (Bermuda) Ltd. et Bow Valley Industries Ltd. *(Demanderesses)*

et entre

Bow Valley Industries Ltd. *Appelante (Demanderesse)*

c.

Saint John Shipbuilding Limited, Raychem Canada Limited et Raychem Corporation *Intimées (Défenderesses)*

et

Bow Valley Husky (Bermuda) Ltd. et Husky Oil Operations Ltd. *(Demanderesses)*

et par voie de pourvoi incident entre

Saint John Shipbuilding Limited *Appelante dans le pourvoi incident (Défenderesse)*

c.

Bow Valley Husky (Bermuda) Ltd., Husky Oil Operations Ltd. et Bow Valley Industries Ltd. *Intimées dans le pourvoi incident (Demanderesses)*

et

Raychem Canada Limited et Raychem Corporation *(Défenderesses)*

1997 CanLII 307 (SCC)

and by way of cross-appeal between

Raychem Canada Limited and Raychem Corporation *Appellants by Cross-Appeal (Defendants)*

v.

Bow Valley Husky (Bermuda) Ltd., Husky Oil Operations Ltd. and Bow Valley Industries Ltd. *Respondents by Cross-Appeal (Plaintiffs)*

and

Saint John Shipbuilding Limited *(Defendant)*

and by way of cross-appeal between

Bow Valley Husky (Bermuda) Ltd. *Appellant by Cross-Appeal (Plaintiff)*

v.

Saint John Shipbuilding Limited, Raychem Canada Limited and Raychem Corporation *Respondents by Cross-Appeal (Defendants)*

and

Husky Oil Operations Ltd. and Bow Valley Industries Ltd. *(Plaintiffs)*

INDEXED AS: BOW VALLEY HUSKY (BERMUDA) LTD. *v.* SAINT JOHN SHIPBUILDING LTD.

File No.: 24855.

1997: June 19; 1997: December 18.

Present: La Forest, Sopinka,* Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

* Sopinka J. took no part in the judgment.

et par voie de pourvoi incident entre

Raychem Canada Limited et Raychem Corporation *Appelantes dans le pourvoi incident (Défenderesses)*

c.

Bow Valley Husky (Bermuda) Ltd., Husky Oil Operations Ltd. et Bow Valley Industries Ltd. *Intimées dans le pourvoi incident (Demanderesses)*

et

Saint John Shipbuilding Limited *(Défenderesse)*

et par voie de pourvoi incident entre

Bow Valley Husky (Bermuda) Ltd. *Appelante dans le pourvoi incident (Demanderesse)*

c.

Saint John Shipbuilding Limited, Raychem Canada Limited et Raychem Corporation *Intimées dans le pourvoi incident (Défenderesses)*

et

Husky Oil Operations Ltd. et Bow Valley Industries Ltd. *(Demanderesses)*

RÉPERTORIÉ: BOW VALLEY HUSKY (BERMUDA) LTD. *c.* SAINT JOHN SHIPBUILDING LTD.

N° du greffe: 24855.

1997: 19 juin; 1997: 18 décembre.

Présents: Les juges La Forest, Sopinka*, Gonthier, Cory, McLachlin, Iacobucci et Major.

* Le juge Sopinka n'a pas pris part au jugement.

1997 CanLII 307 (SCC)

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND

Torts — Duty to warn — Manufacturer and supplier — Fire on oil drilling rig causing major damage requiring extensive repairs — Fire started by arcing in heat trace system — Whether shipbuilder and system manufacturer had duty to warn rig owner of inflammability of product used in system — Whether shipbuilder's duty to warn excluded by its contract with rig owner — Whether manufacturer entitled to rely on learned intermediary defence.

Torts — Causation — Fire on oil drilling rig causing major damage requiring extensive repairs — Fire started by arcing in heat trace system — Whether failure to warn rig owner of inflammability of product used in heat trace system caused loss.

Torts — Contractual relational economic loss — Fire on oil drilling rig causing major damage requiring extensive repairs — Whether companies leasing rig can recover economic loss resulting from shutdown of rig for repairs.

Torts — Contributory negligence — Fire on oil drilling rig causing major damage requiring extensive repairs — Fire started by arcing in heat trace system — Whether rig owner's contributory negligence in operating heat trace system without ground fault circuit breaker system bars its claims — Whether maritime contributory negligence bar should be eliminated.

Husky Oil Operations Ltd. ("HOOL") and Bow Valley Industries Ltd. ("BVI") made arrangements to have an oil drilling rig constructed by Saint John Shipbuilding Limited ("SJSL"). In order to take advantage of government financing, HOOL and BVI incorporated an

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE

Responsabilité délictuelle — Obligation de mise en garde — Fabricant et fournisseur — Un incendie s'est déclaré à bord d'une plate-forme pétrolière et a causé des dommages considérables qui ont nécessité des réparations importantes — La formation d'arcs électriques dans le système de réchauffage des conduites est à l'origine de l'incendie — Le constructeur naval et le fabricant du système étaient-ils tenus de prévenir le propriétaire de la plate-forme de l'inflammabilité du produit utilisé dans le système? — L'obligation de mise en garde du constructeur naval était-elle écartée en raison du contrat conclu avec le propriétaire de la plate-forme? — Le fabricant a-t-il le droit d'invoquer le moyen de défense fondé sur l'intermédiaire compétent?

Responsabilité délictuelle — Lien de causalité — Un incendie s'est déclaré à bord d'une plate-forme pétrolière et a causé des dommages considérables, qui ont nécessité des réparations importantes — La formation d'arcs électriques dans le système de réchauffage des conduites est à l'origine de l'incendie — Le défaut de mettre en garde le propriétaire de la plate-forme contre l'inflammabilité du produit utilisé dans le système de réchauffage des conduites a-t-il causé la perte?

Responsabilité délictuelle — Perte économique relationnelle découlant d'un contrat — Un incendie s'est déclaré à bord d'une plate-forme pétrolière et a causé des dommages considérables qui ont nécessité des réparations importantes — Les sociétés qui ont loué la plate-forme peuvent-elles être indemnisées de la perte économique subie à la suite de l'arrêt d'exploitation de la plate-forme pendant les réparations?

Responsabilité délictuelle — Négligence contributive — Un incendie s'est déclaré à bord d'une plate-forme pétrolière et a causé des dommages considérables, qui ont nécessité des réparations importantes — La formation d'arcs électriques dans le système de réchauffage des conduites est à l'origine de l'incendie — La négligence contributive du propriétaire de la plate-forme qui a fait fonctionner le système de réchauffage des conduites sans disjoncteur de fuite à la terre constitue-t-elle une fin de non-recevoir à ses réclamations? — La fin de non-recevoir tirée de la négligence contributive en droit maritime devrait-elle être supprimée?

La société Husky Oil Operations Ltd. («HOOL») et la société Bow Valley Industries Ltd. («BVI») ont pris des dispositions pour faire construire une plate-forme pétrolière par la société Saint John Shipbuilding Limited («SJSL»). Dans le but de tirer avantage du financement

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offshore company, Bow Valley Husky (Bermuda) Ltd. ("BVHB"). Before construction began, ownership of the rig and the construction contract with SJSL were transferred to BVHB. HOOL and BVI entered into contracts with BVHB for the hire of the rig to conduct drilling operations at sites chosen by HOOL and BVI. These contracts provided that HOOL and BVI would continue to pay day rates to BVHB in the event that the rig was out of service. A heat trace system was required in order to prevent the rig's pipes from freezing during the winter. BVHB chose the Raychem system, which used Thermaclad wrap to keep moisture from the insulation and heat trace wire. The specifications for the Raychem heat trace system required the installation of a ground fault circuit breaker system to cut off the power in the event of an electrical fault, to prevent arcing of the heat trace wire. A functioning system was not installed until after a fire broke out on the rig, causing damage to a tray of electrical and communications cables. As a result of the damage, the rig had to be towed to port for repairs and was out of service for several months. BVHB, HOOL and BVI commenced an action against SJSL alleging breach of contract and negligence, and an action against Raychem for negligence. BVHB claimed both for the cost of the repairs to the rig and for the revenue lost as a result of the rig being out of service for several months. HOOL and BVI sought to recover the day rates that they were contractually required to pay to BVHB during the period the rig was out of service, as well as expenses they incurred for supplies to the rig, including food, drilling mud and additional equipment.

The trial judge held that the defendant SJSL was liable in contract and tort for failing to provide certificates of approval for the Thermaclad, and in tort for breach of duty to warn of the inflammability of Thermaclad. He also held that the defendant Raychem was liable in tort for breach of its duty to warn. The trial judge went on to hold that the major fault lay with BVHB for its operation of the heat trace system without a functioning ground fault circuit breaker system. Moreover, it kept the heat trace system on, even when it might not have been required, despite incidents of arcing on the heat trace wires. He apportioned the fault 60 percent to

d'un organisme gouvernemental, HOOL et BVI ont constitué, à l'étranger, une société appelée Bow Valley Husky (Bermuda) Ltd. («BVHB»). Avant le début des travaux de construction, la propriété de la plate-forme et le contrat de construction passé avec SJSL ont été transférés à BVHB. HOOL et BVI ont conclu des contrats avec BVHB pour la location de la plate-forme en vue d'opérations de forage sur des sites choisis par les premières. Ces contrats stipulaient que HOOL et BVI continueraient de payer un taux journalier à BVHB dans le cas où la plate-forme serait hors-service. Il fallait installer un système de réchauffage des conduites pour empêcher les tuyaux de la plate-forme de geler durant l'hiver. BVHB a choisi le système de la société Raychem («Raychem») qui utilisait le revêtement Thermaclad pour protéger de l'humidité l'isolant et le câble de réchauffage des conduites. Les caractéristiques techniques du système de réchauffage des conduites de Raychem exigeaient l'installation d'un système de disjoncteur de fuite à la terre (DFT) pour couper le courant en cas de défectuosité du système électrique afin d'éviter que le câble de réchauffage des conduites ne provoque des arcs électriques. On a installé un système efficace seulement après qu'un incendie se fut déclaré à bord de la plate-forme et eut causé des dommages à un chemin de câbles électriques et de transmission. Par conséquent, la plate-forme a dû être remorquée jusqu'au port pour être réparée et elle a été hors-service durant plusieurs mois. BVHB, HOOL et BVI ont pris action contre SJSL pour négligence et rupture de contrat et contre Raychem pour négligence. BVHB a réclamé à la fois le coût des réparations effectuées sur la plate-forme et la perte de revenus découlant de la mise hors-service de la plate-forme durant plusieurs mois. HOOL et BVI ont demandé d'être indemnisées du taux journalier qu'elles avaient été tenues, en vertu du contrat, de payer à BVHB pendant que la plate-forme était hors-service, ainsi que des dépenses qu'elles avaient faites pour approvisionner la plate-forme, notamment en nourriture, en boue de forage et en matériel supplémentaire.

Le juge de première instance a retenu la responsabilité contractuelle et délictuelle de la défenderesse SJSL pour le motif qu'elle n'a pas fourni de certificats d'approbation concernant le Thermaclad, et il a reconnu sa responsabilité délictuelle parce qu'elle a manqué à l'obligation de prévenir les parties concernées de l'inflammabilité du Thermaclad. Il a également conclu à la responsabilité délictuelle de la défenderesse Raychem parce qu'elle a manqué à son obligation de mise en garde. Il a ensuite décidé qu'il fallait imputer la faute principale à BVHB, qui a fait fonctionner le système de réchauffage des conduites sans un système de disjonc-

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BVHB and 40 percent to SJSL and Raychem. He did not award damages for breach of contract. The trial judge dismissed the plaintiffs' claim, however, on the ground that the case arose out of negligence at sea and was governed by Canadian maritime law, which precluded application of the Newfoundland *Contributory Negligence Act* and made contributory negligence a bar to recovery.

The Court of Appeal held that because the loss suffered by HOOL and BVI was economic in nature, it was not recoverable. It agreed with the trial judge that maritime law applied, but held that provincial negligence legislation applied to maritime cases in some situations, including this case. Alternatively, if the Newfoundland *Contributory Negligence Act* did not apply, the court held that maritime law no longer made contributory negligence a bar to recovery. In the result, BVHB was held entitled to recover 40 percent of its loss from SJSL and Raychem.

Held (La Forest and McLachlin JJ. dissenting on SJSL's cross-appeal): The appeal should be dismissed. The cross-appeal of SJSL with regard to the duty to warn should be allowed. The other cross-appeals should be dismissed.

Per Gonthier, Cory, Iacobucci and Major JJ.: BVHB was not entitled to claim against SJSL based on the tort duty to warn. In clause 907 of the contract between them, which states that "Builder's liability with respect to the Owner Directed Supply shall extend only to installation thereof", the parties have chosen to specify the only ground of builder liability related to the use of Thermaclad, namely, negligence in the installation thereof. By expressly limiting liability to only these circumstances, the parties have by necessary implication excluded all other grounds of builder liability, including the duty to warn. This reading of clause 907 is reinforced by the fact that Thermaclad is "owner directed supply". Where, as here, the owner specifies a particular product to be used, it is generally the owner and not the builder who, unless otherwise specified in the contract, should bear the losses that flow from the risk associated

teur de fuite à la terre efficace. De plus, elle a laissé fonctionner le système de réchauffage des conduites, même lorsque cela n'était peut-être pas nécessaire, malgré le fait que des arcs électriques s'étaient produits sur les câbles de réchauffage des conduites. Il a réparti la faute dans une proportion de 60 pour 100 à BVHB et de 40 pour 100 à SJSL et à Raychem. Il n'a pas accordé de dommages-intérêts pour rupture de contrat. Toutefois, le juge de première instance a débouté les demanderesses pour le motif que l'affaire résultait d'une négligence commise en mer et était régie par le droit maritime canadien, ce qui excluait l'application de la *Contributory Negligence Act* et faisait de la négligence contributive une fin de non-recevoir à toute demande d'indemnisation.

La Cour d'appel a jugé que, comme la perte subie par HOOL et BVI était de nature économique, elle ne pouvait donner lieu à indemnisation. Elle a convenu avec le juge de première instance que le droit maritime s'appliquait, mais elle a conclu que la législation provinciale relative à la négligence s'appliquait aux affaires maritimes dans certaines situations, dont le présent cas. Subsidiairement, pour le cas où la *Contributory Negligence Act* de Terre-Neuve ne s'appliquerait pas, la cour a statué que la négligence contributive ne constituait plus une fin de non-recevoir à toute demande d'indemnisation en droit maritime. Par conséquent, elle a jugé que BVHB avait le droit d'être indemnisée par SJSL et Raychem de 40 pour 100 de sa perte.

Arrêt (les juges La Forest et McLachlin sont dissidents quant au pourvoi incident de SJSL): Le pourvoi est rejeté. Le pourvoi incident de SJSL au sujet de l'obligation de mise en garde est accueilli. Les autres pourvois incidents sont rejetés.

Les juges Gonthier, Cory, Iacobucci et Major: BVHB n'avait pas le droit de poursuivre SJSL en invoquant l'obligation de mise en garde en matière délictuelle. À la clause 907 du contrat qu'elles ont conclu, lequel stipule que «[l]a responsabilité du constructeur à l'égard du matériel imposé par le propriétaire s'étend seulement à son installation», les parties ont choisi de préciser le seul fondement permettant d'établir la responsabilité du constructeur relativement à l'utilisation du Thermaclad, à savoir la négligence commise dans son installation. En limitant expressément la responsabilité à ces seules circonstances, les parties ont écarté, par déduction nécessaire, tous les autres fondements de responsabilité en ce qui concerne le constructeur, dont l'obligation de mise en garde. Cette interprétation de la clause 907 est renforcée par le fait que le Thermaclad est du «matériel imposé par le propriétaire». Lorsque le propriétaire,

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with that product's use. The placement of clauses within a contract, while a factor to be considered, is not determinative. Rather, the contract as a whole should be examined with a view to searching for the intention of the parties by recognizing the natural meaning that flows from the language chosen. By the wording of clause 905, SJSL is relieved of any liability arising from defects. Clause 907 states that SJSL's liability shall extend only to installation of owner-directed supply and that in all other instances, BVHB bears the risk and responsibility for these products. The natural meaning of these clauses thus indicates that the only head of liability upon which these clauses can bite is negligence in installation. Based on the authority of *Miida Electronics*, SJSL should thus be relieved of any liability for failing to warn BVHB of the dangers associated with the use of Thermaclad. It is not open to Raychem to seek contribution from SJSL, as a contractor which has protected itself against liability cannot be said to have contributed to any actionable loss suffered by the plaintiff. Consequently, Raychem is liable for the entire 40 percent quantum found by the trial judge.

In all other respects, McLachlin J.'s analysis was agreed with.

Per La Forest and McLachlin JJ. (dissenting on SJSL's cross-appeal with regard to the duty to warn): Manufacturers and suppliers are required to warn all those who may reasonably be affected by potentially dangerous products. This duty extends even to those persons who are not party to the contract of sale. The potential user must be reasonably foreseeable to the manufacturer or supplier. BVHB was clearly within the class of persons that SJSL and Raychem ought to have known might reasonably be affected by the use of Thermaclad. SJSL was in a contractual relationship with BVHB, and Raychem had directly approached BVHB's predecessor (a subsidiary of BVI) to encourage the use of its products in the construction of the rig. The manufacturer or supplier remains liable unless the consumer's knowledge negates reasonable reliance. This occurs where the consumer has so much knowledge that a reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by use of the product. Here BVHB did not have the degree of knowledge necessary to negate reliance on SJSL and Raychem. SJSL and Raychem did not demonstrate that

comme en l'espèce, spécifie le produit qu'il faut utiliser, à moins de stipulations contraires du contrat, c'est habituellement lui et non le constructeur qui devrait supporter les pertes découlant du risque lié à l'utilisation de ce produit. L'endroit où figurent les clauses dans un contrat, tout en constituant un facteur à prendre en considération, n'est pas décisif. On devrait plutôt examiner le contrat dans son ensemble afin de découvrir l'intention des parties en donnant aux termes qu'elles ont employés le sens qui s'en dégage naturellement. En vertu du libellé de la clause 905, SJSL est dégagée de toute responsabilité à l'égard des vices. La clause 907 stipule que la responsabilité de SJSL s'étend seulement à l'installation du matériel imposé par le propriétaire et que, dans tous les autres cas, BVHB assume les risques et la responsabilité pour ces produits. Par conséquent, selon le sens naturel de ces clauses, elles ne peuvent viser que la responsabilité due à une négligence dans l'installation. Compte tenu du poids de l'arrêt *Miida Electronics*, SJSL devrait donc être dégagée de toute responsabilité pour avoir omis d'informer BVHB des dangers liés à l'utilisation du Thermaclad. Raychem ne peut pas réclamer une contribution de SJSL car on ne peut pas dire que l'entrepreneur qui s'est protégé de toute responsabilité a contribué à une perte l'exposant aux poursuites du demandeur. Par conséquent, Raychem est seule responsable de la part de 40 pour 100 fixée par le juge de première instance.

L'analyse du juge McLachlin a été acceptée à tous les autres égards.

Les juges La Forest et McLachlin (dissidents quant au pourvoi incident de SJSL au sujet de l'obligation de mise en garde): Les fabricants et les fournisseurs ont l'obligation de mettre en garde tous ceux qui peuvent être raisonnablement concernés par des produits potentiellement dangereux. Cette obligation s'étend même aux personnes qui ne sont pas parties au contrat de vente. Le fabricant ou le fournisseur doit pouvoir raisonnablement prévoir qui sera l'utilisateur. BVHB faisait manifestement partie de la catégorie des personnes qui, comme SJSL et Raychem auraient dû le savoir, pouvaient raisonnablement être concernées par l'utilisation du Thermaclad. SJSL avait des rapports contractuels avec BVHB, et Raychem avait communiqué directement avec la société remplacée par BVHB (une filiale de BVI) pour l'inciter à utiliser ses produits durant la construction de la plate-forme. À moins que les connaissances du consommateur n'écartent la confiance qu'il accorde légitimement au fabricant ou au fournisseur, ces derniers restent responsables. C'est le cas lorsque le consommateur est à ce point renseigné qu'une personne raisonnable conclurait qu'il a pleinement apprécié et

BVHB accepted the risk of using Thermaclad. It follows that both SJSL and Raychem owed BVHB a duty to warn, subject to the special defences raised.

SJSL's duty to warn was not excluded by its contract with BVHB. While BVHB's claim sounds in tort, the contract remains relevant to determining whether a tort duty arises, and if so, its scope, since parties are free to contract to limit or waive the duties which the common law would impose on them for negligence. In order to determine the extent to which the parties' planned obligations affect their tort liabilities, it is necessary to ascertain the intention of the parties with respect to the particular issue from the contract documents as a whole. In doing so, it must be kept in mind that generally limitation and exclusion clauses are strictly construed against the party seeking to invoke the clause. The provisions of the contract relied on by SJSL do not directly address responsibility for negligence or duty to warn. While the absence of a term expressly excluding tort liability is not determinative, the contract provisions, considered as a whole, relate to the finding of and responsibility for defects. They function, as the heading states, as a "warranty" of workmanship and materials. More specifically, clauses 702, 905 and 907, taken in combination, provide that in situations of "owner directed supply", SJSL bears the responsibility for installation while BVHB bears the responsibility for defects. Warranties usually relate to the quality of goods and workmanship and do not relate to warnings about the risks associated with the use of products. BVHB's claim against SJSL is not for negligence relating to the choice of, installation of, or defects in, the Thermaclad or other materials, but for failure to warn of the inflammability of Thermaclad. SJSL's duty to warn arose independently of the contract, through its greater knowledge of the inflammability characteristics of Thermaclad. Clause 907, which excludes liability for owner-directed supply, must be narrowly construed. It applies to defects in materials or

volontairement accepté le risque que présentait l'utilisation du produit. En l'espèce, BVHB ne possédait pas suffisamment de connaissances pour exclure la confiance mise en SJSL et Raychem. SJSL et Raychem n'ont pas montré que BVHB avait accepté le risque que présentait l'utilisation du Thermaclad. Il s'ensuit que SJSL et Raychem étaient toutes deux tenues d'une obligation de mise en garde au profit de BVHB, sous réserve des moyens de défense particuliers soulevés.

L'obligation de mise en garde de SJSL n'était pas écartée en raison du contrat conclu avec BVHB. Bien que la réclamation de BVHB soit fondée sur les règles de la responsabilité délictuelle, le contrat reste pertinent pour déterminer s'il existe une obligation en matière délictuelle et, si oui, quelle est son étendue, puisque les parties peuvent passer un contrat pour limiter les obligations que la common law leur impose en matière de négligence, ou renoncer à celles-ci. Pour établir dans quelle mesure les obligations prévues par les parties influent sur leur responsabilité délictuelle, il faut dégager de l'ensemble des documents contractuels l'intention des parties en ce qui concerne la question particulière en jeu. Ce faisant, il ne faut pas oublier que, généralement, les clauses de limitation ou d'exclusion sont interprétées de façon stricte à l'encontre de la partie qui les invoque. Les clauses du contrat sur lesquelles s'appuie SJSL ne traitent pas directement de la responsabilité fondée sur la négligence ni de l'obligation de mise en garde. Bien que l'absence d'une condition excluant expressément la responsabilité délictuelle ne soit pas déterminante, prises dans leur ensemble, les clauses du contrat se rapportent à la constatation des vices et à la responsabilité engagée à ce titre. Elles jouent le rôle d'une «garantie» quant à la fabrication et aux matériaux, comme le mentionne le titre. Plus précisément, les clauses 702, 905 et 907, prises ensemble, prévoient que, dans le cas du «matériel imposé par le propriétaire», SJSL est responsable de l'installation tandis que BVHB est responsable des vices. Les garanties portent habituellement sur la qualité des marchandises et de leur fabrication et non sur les mises en garde concernant les risques liés à leur utilisation. La réclamation de BVHB contre SJSL n'est pas fondée sur la négligence dans le choix du Thermaclad ou d'autres matériaux, leur installation ou des vices dont ils seraient affectés, mais plutôt sur le défaut de mise en garde au sujet de l'inflammabilité du Thermaclad. L'obligation de mise en garde incombant à SJSL a pris naissance indépendamment du contrat et découlait du fait qu'elle était mieux informée des caractéristiques d'inflammabilité du Thermaclad. La clause 907, qui exclut toute responsabilité dans le cas du matériel imposé par le propriétaire, doit

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their installation and workmanship and does not exclude liability for breach of duty to warn.

Raychem is not entitled to rely on the learned intermediary defence, which is an exception to the general rule requiring manufacturers to provide a warning to the ultimate consumers of their product. The learned intermediary defence will generally only apply either where the product is highly technical and is to be used with expert supervision, or where the nature of the product is such that it is unrealistic for the consumer to receive a warning directly from the manufacturer. Thermaclad was not a highly technical product, and its use and application did not require expert supervision. Nor was it unrealistic to expect Raychem to have warned BVHB, the ultimate consumer, directly. Raychem had both the opportunity and the duty to warn BVHB directly and therefore its duty to warn the plaintiffs was not discharged through its communications with SJSL.

Causation is established, on either a subjective or an objective standard. A reasonable plaintiff or BVHB itself would have either declined to use Thermaclad or taken steps to deal with its inflammability had it been warned. The equal apportionment of fault between SJSL and Raychem should not be interfered with. While SJSL might have had less knowledge of the specific characteristics of Thermaclad, its knowledge of the general regulatory requirements was arguably greater, and it had greater contact with BVHB.

The contractual relational economic loss suffered by HOOL and BVI is not recoverable. The defendants owed a *prima facie* duty of care to BVI and HOOL. They knew of the existence of these plaintiffs and others like them and knew or ought to have known that they stood to lose money if the drilling rig was shut down. However, this *prima facie* duty of care is negatived by policy considerations. The most serious problem is that of indeterminate liability. If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged. Moreover, the facts of this case do not support liability to BVI and HOOL as an additional deterrent against negligence. Since BVHB, the owner of the drilling rig, suffered a significant amount of property damage, it is not apparent that

être interprétée de façon stricte. Elle s'applique aux vices affectant les matériaux ou leur installation et leur fabrication et n'écarte pas la responsabilité pour manquement à l'obligation de mise en garde.

Raychem n'a pas le droit d'invoquer le moyen de défense fondé sur l'intermédiaire compétent, qui constitue une exception à la règle générale voulant que les fabricants mettent le consommateur final en garde contre les dangers que présentent leurs produits. En général, ce moyen de défense s'appliquera seulement si le produit a une forte teneur technique et est destiné à être utilisé sous la surveillance d'un expert, ou si la nature du produit est telle qu'il n'est pas réaliste de penser que le consommateur recevra une mise en garde directe du fabricant. Le Thermaclad n'était pas un produit à forte teneur technique, et son utilisation et son application n'exigeaient pas la surveillance d'un expert. Il n'était pas non plus irréaliste de s'attendre à ce que Raychem prévienne directement BVHB, le consommateur final. Raychem avait à la fois la possibilité et l'obligation de mettre BVHB en garde directement et par conséquent, elle ne s'est pas acquittée de son obligation de mise en garde dans le cadre de ses communications avec SJSL.

Le lien de causalité est établi, selon une norme subjective ou une norme objective. Si un demandeur raisonnable ou BVHB elle-même avait été mis en garde, il aurait soit refusé d'utiliser le Thermaclad ou soit pris des mesures concernant l'inflammabilité de ce produit. La répartition de la faute en parts égales entre SJSL et Raychem ne doit pas être modifiée. Même si SJSL en savait peut-être moins sur les caractéristiques particulières du Thermaclad, elle avait plus de contacts avec BVHB et il est possible de prétendre qu'elle connaissait mieux les exigences réglementaires générales.

La perte économique relationnelle découlant d'un contrat subie par HOOL et BVI ne donne pas lieu à indemnisation. Les défenderesses avaient une obligation de diligence *prima facie* envers BVI et HOOL. Elles connaissaient l'existence des demanderesses et d'autres personnes comme elles, et elles savaient ou auraient dû savoir que ces dernières risquaient de perdre de l'argent si la plate-forme de forage cessait de fonctionner. Cependant, cette obligation de diligence *prima facie* est annihilée par des considérations de principe. Le problème le plus sérieux est celui de la responsabilité indéterminée. Si les défenderesses avaient l'obligation de mettre en garde les demanderesses, il est difficile de voir pourquoi elles n'auraient pas la même obligation envers une foule d'autres personnes dont les pertes étaient prévisibles si la plate-forme cessait ses activités en raison des dommages subis. De plus, les faits de l'espèce ne

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increasing the defendants' potential liability would have led to different behaviour and avoidance of the loss. Nor was this a case where the plaintiff's ability to allocate the risk to the property owner by contract is slight, either because of the type of transaction or inequality of bargaining power. BVI and HOOL not only had the ability to allocate their risks, but did just that.

BVHB was contributorily negligent, as found by the courts below. The trial judge apportioned the majority of the fault to BVHB on the ground that its negligence in continuing to operate the heat trace system, even when unnecessary, outweighed the defendants' negligence. Since there was no demonstrable error in the trial judge's appreciation of the facts or applicable legal principles, his finding that the liability should be apportioned 60 percent to BVHB and 40 percent to the defendants Raychem and SJSL should not be disturbed.

BVHB's right to recover is not barred by its contributory negligence. The issues for resolution in this case are integrally connected with maritime matters, and fall to be resolved under Canadian maritime law. Policy considerations support the conclusion that maritime law governs the plaintiffs' tort claim, since the application of provincial laws to maritime torts would undercut the uniformity of maritime law. While the federal government has not passed contributory negligence legislation for maritime torts, the common law principles embodied in Canadian maritime law remain applicable in the absence of federal legislation. Although contributory negligence barred recovery at common law, the maritime contributory negligence bar should be removed. This is an appropriate case for this Court to make an incremental change to the common law in compliance with the requirements of justice and fairness. The proposed change falls within the test for judicial reform of the law which has been developed. First, the change is required to keep the maritime common law in step with the dynamic and evolving fabric of our society. Second, removal of the contributory negligence bar will not have unforeseeable or complex ramifications beyond the cognizance of the judiciary. The principle of apportionment

justifient pas d'étendre la responsabilité en faveur de BVI et de HOOL à titre de moyen de dissuasion supplémentaire contre la négligence. Comme BVHB, le propriétaire de la plate-forme de forage, a subi des dommages matériels importants, il n'est pas évident que le fait d'accroître la responsabilité potentielle des défenderesses aurait amené un comportement différent et permis d'éviter la perte. Ce n'était pas non plus un cas où la capacité du demandeur de faire assumer le risque par le propriétaire du bien dans un contrat est faible, en raison soit du genre d'opération, soit de l'inégalité du pouvoir de négociation. Non seulement BVI et HOOL avaient-elles la capacité de répartir leurs risques; mais c'est exactement ce qu'elles ont fait.

Il y a eu négligence contributive de BVHB, ainsi que l'ont conclu les juridictions inférieures. Le juge de première instance a attribué la plus grande partie de la faute à BVHB pour le motif que la négligence dont celle-ci a fait montre en continuant de faire fonctionner le système de réchauffage des conduites, même lorsque ce n'était pas nécessaire, l'emportait sur la négligence des défenderesses. Comme le juge de première instance n'a pas commis d'erreur démontrable dans l'appréciation des faits ou des principes juridiques applicables, il n'y a pas lieu de modifier sa conclusion selon laquelle la responsabilité devrait être attribuée dans une proportion de 60 pour 100 à BVHB et dans une proportion de 40 pour 100 aux défenderesses Raychem et SJSL.

La négligence contributive de BVHB ne fait pas obstacle au droit de celle-ci d'être indemnisée. Les questions qui se posent en l'espèce relèvent intégralement du domaine maritime et doivent être tranchées en vertu du droit maritime canadien. Des considérations de principe viennent étayer la conclusion selon laquelle le droit maritime régit la réclamation fondée sur la responsabilité délictuelle excercée par les demanderesses, car l'application des lois provinciales aux délits en matière maritime nuirait à l'uniformité du droit maritime. Bien que le gouvernement fédéral n'ait pas adopté de loi concernant la négligence contributive en matière de délits maritimes, les principes de common law incorporés dans le droit maritime canadien restent applicables en l'absence de législation fédérale. Même si, en common law, la négligence contributive constituait une fin de non-recevoir à l'indemnisation, la fin de non-recevoir tirée de la négligence contributive en matière maritime devrait être abolie. Il s'agit d'un cas où il convient que notre Cour apporte un changement progressif à la common law conformément aux exigences de la justice et de l'équité. Le changement proposé satisfait au critère élaboré en ce qui concerne la réforme du droit par les tribunaux. Premièrement, le changement est nécessaire pour

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for non-maritime torts is universally accepted in every part of Canada and around the world. Contributory negligence may reduce recovery but does not bar the plaintiff's claim. The defendants SJSL and Raychem are jointly and severally liable to the plaintiff BVHB for 40 percent of its loss, subject to a right of contribution between defendants.

SJSL is not liable to BVHB in contract since the contractual issues have been settled and are no longer litigable.

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By Iacobucci J.

Applied: *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; **distinguished:** *Falcon Lumber Ltd. v. Canada Wood Specialty Co.* (1978), 95 D.L.R. (3d) 503; **referred to:** *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Lamport & Holt Lines Ltd. v. Coubro & Scrutton (M. & I.) Ltd. (The "Raphael")*, [1982] 2 Lloyd's Rep. 42; *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.* (1992), 89 D.L.R. (4th) 722; *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346.

By McLachlin J. (dissenting on the cross-appeal of SJSL)

Distinguished: *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346; **referred to:** *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *University of Regina v. Pettick* (1991), 45 C.L.R. 1; *Queen v. Cognos*

que la common law en matière maritime suive l'évolution et le dynamisme de la société. Deuxièmement, l'abolition de la fin de non-recevoir tirée de la négligence contributive n'aura pas de conséquences imprévisibles ou complexes qui échappent aux tribunaux. Le principe de la répartition en matière de délits non maritimes est accepté universellement, partout au Canada et à travers le monde. La négligence contributive peut réduire l'indemnité, mais elle ne constitue pas une fin de non-recevoir à la réclamation présentée par la demanderesse. Les défenderesses SJSL et Raychem sont solidairement responsables envers la demanderesse BVHB de 40 pour 100 de la perte subie par cette dernière, sous réserve du droit de chacune des défenderesses de demander une contribution à l'autre.

SJSL n'est pas responsable envers BVHB en matière contractuelle puisque les questions d'ordre contractuel ont été réglées et ne sont plus litigieuses.

Jurisprudence

Citée par le juge Iacobucci

Arrêt suivi: *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752; **distinction faite d'avec l'arrêt:** *Falcon Lumber Ltd. c. Canada Wood Specialty Co.* (1978), 95 D.L.R. (3d) 503; **arrêts mentionnés:** *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021; *Lamport & Holt Lines Ltd. c. Coubro & Scrutton (M. & I.) Ltd. (The «Raphael»)*, [1982] 2 Lloyd's Rep. 42; *Upper Lakes Shipping Ltd. c. St. Lawrence Cement Inc.* (1992), 89 D.L.R. (4th) 722; *Giffels Associates Ltd. c. Eastern Construction Co.*, [1978] 2 R.C.S. 1346.

Citée par le juge McLachlin (dissidente quant au pourvoi incident de SJSL)

Distinction faite d'avec l'arrêt: *Giffels Associates Ltd. c. Eastern Construction Co.*, [1978] 2 R.C.S. 1346; **arrêts mentionnés:** *Lambert c. Lastoplex Chemicals Co.*, [1972] R.C.S. 569; *Hollis c. Dow Corning Corp.*, [1995] 4 R.C.S. 634; *Rivtow Marine Ltd. c. Washington Iron Works*, [1974] R.C.S. 1189; *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12; *London Drugs Ltd. c. Kuehne & Nagel International Ltd.*, [1992] 3 R.C.S. 299; *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Hunter Engineering Co. c. Syncrude Canada Ltd.*, [1989] 1 R.C.S. 426; *University of Regina c. Pettick* (1991), 45

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Anthony J. Jordan, Q.C., Eric P. Groody and *Susan M. Purcell*, for Husky Oil Operations Ltd.

W. Ian C. Binnie, Q.C., Harry Underwood, Bonita Croft and *Camille A. Nelson*, for Bow Valley Industries Ltd.

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Anthony J. Jordan, c.r., Eric P. Groody et *Susan M. Purcell*, pour Husky Oil Operations Ltd.

W. Ian C. Binnie, c.r., Harry Underwood, Bonita Croft et *Camille A. Nelson*, pour Bow Valley Industries Ltd.

Michael F. Harrington, Q.C., and *Colm St. R. Seviour*, for Bow Valley Husky (Bermuda) Ltd.

J. Edgar Sexton, Q.C., *John F. Rook, Q.C.*, *Stephen J. May* and *Donald D. Hanna*, for Saint John Shipbuilding Limited.

W. Wylie Spicer, Q.C., and *Aidan J. Meade*, for Raychem Canada Limited and Raychem Corporation.

The reasons of La Forest and McLachlin JJ. were delivered by

MCLACHLIN J. (dissenting in part) —

I. Introduction

1 On April 21, 1987, a fire broke out on the Bow Drill III, which was drilling for oil on the Grand Banks of Newfoundland. The Bow Drill III suffered major damage. Extensive repairs were required and the companies which had contracted for the lease of the rig suffered financial loss while it was out of commission. At issue in this appeal is the legal responsibility for the damages and the extent of the damages recoverable. Among the more interesting legal issues are the applicability of contributory negligence principles under Canadian maritime law and the recovery of damages for contractual relational economic loss.

II. Facts

2 In the early 1980s, Husky Oil Operations Ltd. ("HOOL") and Bow Valley Industries Ltd. ("BVI") decided to take advantage of a drilling opportunity off the east coast of Canada. They purchased one oil rig and made arrangements to have two others constructed. To this end, a subsidiary of BVI contracted with Saint John Shipbuilding Limited ("SJSL") for the construction of the drilling rig Bow Drill III.

Michael F. Harrington, c.r., et *Colm St. R. Seviour*, pour Bow Valley Husky (Bermuda) Ltd.

J. Edgar Sexton, c.r., *John F. Rook, c.r.*, *Stephen J. May* et *Donald D. Hanna*, pour Saint John Shipbuilding Limited.

W. Wylie Spicer, c.r., et *Aidan J. Meade*, pour Raychem Canada Limited et Raychem Corporation.

Version française des motifs des juges La Forest et McLachlin rendus par

LE JUGE MCLACHLIN (dissidente en partie) —

I. Introduction

Le 21 avril 1987, un incendie s'est déclaré à bord de la plate-forme de forage Bow Drill III, utilisée pour la recherche de pétrole sur les Grands Bancs de Terre-Neuve. La plate-forme a subi des dommages considérables, qui ont nécessité des réparations importantes, et les sociétés qui l'avaient louée par contrat ont subi une perte financière pendant qu'elle était hors-service. Le présent pourvoi consiste à déterminer qui est responsable en droit des dommages et quelle est l'étendue des dommages indemnisables. Parmi les points de droit soulevant le plus d'intérêt, mentionnons l'applicabilité des principes de la négligence contributive en droit maritime canadien et l'indemnisation des dommages en cas de perte économique relationnelle découlant d'un contrat.

II. Les faits

Au début des années 1980, la société Husky Oil Operations Ltd. («HOOL») et la société Bow Valley Industries Ltd. («BVI») ont décidé de profiter des possibilités de forage qui s'offraient à elles au large de la côte est du Canada. Elles ont acheté une plate-forme pétrolière et pris des dispositions pour en faire construire deux autres. À cette fin, une filiale de BVI a passé un contrat avec la société Saint John Shipbuilding Limited («SJSL») pour la construction de la plate-forme de forage Bow Drill III.

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In order to take advantage of Export Development Corporation financing, HOOL and BVI incorporated an offshore company, Bow Valley Husky (Bermuda) Ltd. ("BVHB"). Before construction of Bow Drill III began, ownership of the rig was transferred to BVHB, and the contract with SJSL for the construction of the rig was assigned to BVHB. HOOL and BVI entered into contracts with BVHB for the hire of Bow Drill III to conduct drilling operations at sites chosen by HOOL and BVI. These contracts were for four years (with an optional extension for a further year), and provided that HOOL and BVI would continue to pay day rates to BVHB in the event that the rig was out of service.

3 Dans le but de tirer avantage du financement de la Société pour l'expansion des exportations, HOOL et BVI ont constitué, à l'étranger, une société appelée Bow Valley Husky (Bermuda) Ltd. («BVHB»). Avant le début des travaux de construction de la plate-forme Bow Drill III, la propriété de celle-ci a été transférée à BVHB, et le contrat passé avec SJSL pour la construction de la plate-forme a été cédé à BVHB. HOOL et BVI ont conclu des contrats avec BVHB pour la location de la plate-forme Bow Drill III en vue d'opérations de forage sur des sites choisis par les premières. Il s'agissait de contrats d'une durée de quatre ans (assortis d'une possibilité de prolongation pour une année supplémentaire), qui stipulaient que HOOL et BVI continueraient de payer un taux journalier à BVHB dans le cas où la plate-forme serait hors-service.

A heat trace system was required in order to prepare the rig for winter operation. The purpose of a heat trace system is to prevent the rig's pipes or "mud lines" from freezing. The heat trace system SJSL originally started to install was changed to the Raychem system at the owner's request. BVHB chose the Raychem system after consultation with Raychem representatives because it had a self-regulating heater. Raychem's heat trace system used Thermaclad wrap to keep moisture from the insulation and heat trace wire. The specifications for the Raychem heat trace system required the installation of a ground fault circuit breaker ("GFCB") system. The purpose of the GFCB system was to cut off the power in the event of an electrical fault, to prevent arcing of the heat trace wire. The GFCB system initially installed by SJSL was unsuitable. A functioning GFCB system was not installed on the rig until after the incident that forms the basis of this case.

4 Il fallait installer un système de réchauffage des conduites afin de préparer la plate-forme pour l'hiver. Un tel système vise à empêcher les tuyaux de la plate-forme ou «conduites de boue» flexibles de geler. Celui que SJSL avait commencé à installer à l'origine a été remplacé par le système de la société Raychem («Raychem») à la demande du propriétaire. BVHB a choisi ce système après avoir consulté des représentants de Raychem parce qu'il était muni d'un réchauffeur autoréglable. Le système de réchauffage des conduites de Raychem utilisait le revêtement Thermaclad pour protéger de l'humidité l'isolant et le câble de réchauffage des conduites. Les caractéristiques techniques du système de réchauffage des conduites de Raychem exigeaient l'installation d'un système de disjoncteur de fuite à la terre «DFT». Ce système DFT avait pour but de couper le courant en cas de défectuosité du système électrique afin d'éviter que le câble de réchauffage des conduites ne provoque des arcs électriques. Le système DFT installé initialement par SJSL ne convenait pas. C'est seulement après l'incident à l'origine de la présente affaire qu'on a installé sur la plate-forme un système DFT efficace.

On April 21, 1987, during the drilling of an exploratory well on the Grand Banks of Newfoundland, a fire broke out on Bow Drill III. The

5 Le 21 avril 1987, pendant le forage d'un puits d'exploration sur les Grands Bancs de Terre-Neuve, un incendie s'est déclaré à bord de la plate-

fire caused damage to a tray of cables that held in excess of 300 electrical and communications cables. As a result, the rig had to be towed to port for repairs and was out of service for several months.

6 BVHB, HOOL and BVI commenced an action against SJSL alleging breach of contract and negligence, and an action against Raychem for negligence. BVHB claimed both for the cost of the repairs to the rig and for the revenue lost as a result of the rig being out of service for several months. HOOL and BVI sought to recover the day rates that they were contractually required to pay to BVHB during the period the rig was out of service, as well as expenses they incurred for supplies to the rig, including food, drilling mud and additional equipment.

III. Judgments Below

A. *Supreme Court of Newfoundland, Trial Division*

7 At trial (1994), 118 Nfld. & P.E.I.R. 271, Riche J. held that the fire started when an electrical fault occurred in the heat trace wire, causing an arc in the heat trace system. The arcing occurred because no GFCB system was being used at that time. Riche J. held that it was likely the Thermaclad caught fire, which then caused an oily residue on the cables to catch fire. He concluded that as the fire spread much more than would be expected with Thermaclad alone, the fire must have been assisted by residue in the cable tray. Riche J. determined that the plaintiffs had not proven that the heat tracing and wrap on the pipe had been installed by SJSL or Raychem.

forme de forage Bow Drill III. L'incendie a causé des dommages à un chemin de câbles qui portait plus de 300 câbles électriques et de transmission. Par conséquent, la plate-forme a dû être remorquée jusqu'au port pour être réparée et elle a été hors-service durant plusieurs mois.

BVHB, HOOL et BVI ont pris action contre SJSL pour négligence et rupture de contrat et contre Raychem pour négligence. BVHB a réclamé à la fois le coût des réparations effectuées sur la plate-forme et la perte de revenus découlant de la mise hors-service de la plate-forme durant plusieurs mois. HOOL et BVI ont demandé d'être indemnisées du taux journalier qu'elles avaient été tenues, en vertu du contrat, de payer à BVHB pendant que la plate-forme était hors-service, ainsi que des dépenses qu'elles avaient faites pour approvisionner la plate-forme, notamment en nourriture, en boue de forage et en matériel supplémentaire.

III. Les décisions des juridictions inférieures

A. *La Section de première instance de la Cour suprême de Terre-Neuve*

Au procès (1994), 118 Nfld. & P.E.I.R. 271, le juge Riche a statué que l'incendie avait commencé lorsqu'une défectuosité du système électrique s'était produite dans le câble de réchauffage des conduites, causant un arc électrique dans le système de réchauffage des conduites. L'arc électrique s'était produit parce qu'aucun système DFT n'était utilisé à l'époque. Le juge Riche a conclu qu'il était probable que le Thermaclad avait pris feu, ce qui avait amené un résidu d'huile se trouvant sur les câbles à prendre feu à son tour. Comme la croissance du foyer était très supérieure à celle à laquelle on se serait attendu s'il avait été alimenté par le Thermaclad seulement, il a conclu que la présence du résidu dans le chemin de câbles avait dû contribuer à l'incendie. Le juge Riche a décidé que les demanderesses n'avaient pas prouvé que le système de réchauffage des conduites et le revêtement enveloppant les tuyaux avaient été installés par SJSL ou Raychem.

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Riche J. found that BVHB had assumed responsibility for the installation of a functioning GFCB system, and that BVHB was negligent: in continuing to operate the heat tracing system without ground fault protection; in allowing the cables to accumulate the oily residue; and, in the absence of evidence that the fault for the arcing rested on someone else, for the defects in the wire or junction box that had caused the arc. Riche J. found that HOOL and BVI shared in the contributory negligence of BVHB as they were informed during construction of the need for ground fault protection. Alternatively, had HOOL and BVI not known of the need for ground fault protection, Riche J. would have found them negligent on the ground that BVHB, HOOL and BVI were involved in a joint venture.

8 Le juge Riche a dit que BVHB avait assumé la responsabilité de l'installation d'un système DFT efficace et qu'elle avait été négligente en continuant de faire fonctionner le système de réchauffage des conduites sans la protection d'un disjoncteur de fuite à la terre ainsi qu'en permettant l'accumulation d'un résidu d'huile sur les câbles, et en l'absence d'une preuve établissant que l'arc électrique était imputable à la faute de quelqu'un d'autre, relativement aux défectuosités du câble ou de la boîte de jonction qui avaient été à l'origine de l'arc électrique. Le juge Riche a statué que HOOL et BVI avaient participé à la négligence contributive de BVHB, car elles avaient été informées, au cours de la construction, de la nécessité de recourir à la protection d'un disjoncteur de fuite à la terre. Subsidiairement, si HOOL et BVI n'avaient pas été au courant de la nécessité de recourir à la protection d'un tel disjoncteur, le juge Riche aurait conclu à leur négligence pour le motif que BVHB, HOOL et BVI participaient à une entreprise conjointe.

Riche J. found that all parties were aware of the inflammability of the Thermaclad. He held that the defendant SJSL was liable in contract and tort for failing to provide certificates of approval for the Thermaclad, and in tort for breach of duty to warn of the inflammability of Thermaclad. He also held that the defendant Raychem was liable in tort for breach of its duty to warn. He found that the contract between SJSL and BVHB did not negate BVHB's right to sue for negligence or breach of contract for failure to provide certificates of approval for Thermaclad, or for negligent failure to warn. Riche J. went on to hold that the major fault lay with BVHB for its operation of the heat trace system without a functioning GFCB system. It knew that arcing could occur and that it could cause fires. Moreover, it kept the heat trace system on, even when it might not have been required, despite incidents of arcing on the heat trace wires. In the result, Riche J. apportioned the fault 60 percent to the plaintiffs and 40 percent to SJSL and

9 Le juge Riche a conclu que toutes les parties étaient au courant de l'inflammabilité du Thermaclad. Il a retenu la responsabilité contractuelle et délictuelle de la défenderesse SJSL pour le motif qu'elle n'a pas fourni de certificats d'approbation concernant le Thermaclad et, il a reconnu sa responsabilité délictuelle parce qu'elle a manqué à l'obligation de prévenir les parties concernées de l'inflammabilité du Thermaclad. Il a également conclu à la responsabilité délictuelle de la défenderesse Raychem parce qu'elle a manqué à son obligation de mise en garde. Il a jugé que le contrat entre SJSL et BVHB ne faisait pas échec au droit de BVHB d'intenter des poursuites pour négligence ou rupture de contrat en raison du défaut de fournir des certificats d'approbation à l'égard du Thermaclad ou pour défaut par négligence de faire une mise en garde. Le juge Riche a ensuite conclu qu'il fallait imputer la faute principale à BVHB qui a fait fonctionner le système de réchauffage des conduites sans un système DFT efficace. Elle savait qu'il pouvait se produire un arc électrique susceptible de causer un incendie. De plus, elle a laissé fonctionner le système de réchauffage des conduites, même lorsque cela n'était peut-être pas

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Raychem. He did not award damages for breach of contract.

10 However, Riche J. dismissed the plaintiffs' claim on the ground that the case arose out of negligence at sea and was governed by Canadian maritime law, which precluded application of the Newfoundland *Contributory Negligence Act*, R.S.N. 1990, c. C-33, and made contributory negligence a bar to recovery. In supplementary reasons, (1994), 120 Nfld. & P.E.I.R. 228, Riche J. held that if the Newfoundland *Contributory Negligence Act* did apply, he would have apportioned the liability of Raychem and SJSL equally, making each 20 percent responsible.

B. *Newfoundland Court of Appeal*

11 The Newfoundland Court of Appeal, (1995), 130 Nfld. & P.E.I.R. 92, *per* Cameron J.A., began by finding that the trial judge's conclusions with respect to the origins of the fire should not be disturbed. However, it rejected the trial judge's conclusion that there was a joint venture between HOOL and BVI with respect to the Bow Drill III, and held further there was no basis for lifting the corporate veil and denying the separate legal identities of the three corporations.

12 Cameron J.A. upheld the trial judge's finding that BVHB had been contributorily negligent, although she rejected Riche J.'s finding that BVHB was negligent with respect to the existence of the oily residue on the cables. She held that the damage suffered by BVHB was a reasonably foreseeable consequence of BVHB's failure to use a GFCB system.

13 With respect to SJSL's failure to provide certificates of approval, Cameron J.A. held that through

nécessaire, malgré le fait que des arcs électriques s'étaient produits sur les câbles de réchauffage des conduites. Le juge Riche a donc réparti la faute dans une proportion de 60 pour 100 aux demanderesses et de 40 pour 100 à SJSL et à Raychem. Il n'a pas accordé de dommages-intérêts pour rupture de contrat.

Toutefois, le juge Riche a débouté les demanderesses pour le motif que l'affaire résultait d'une négligence commise en mer et était régie par le droit maritime canadien, ce qui excluait l'application de la *Contributory Negligence Act*, R.S.N. 1990, ch. C-33, de Terre-Neuve, et faisait de la négligence contributive une fin de non-recevoir à toute demande d'indemnisation. Dans des motifs supplémentaires, (1994), 120 Nfld. & P.E.I.R. 228, le juge Riche a statué que, si la *Contributory Negligence Act* de Terre-Neuve s'était appliquée, il aurait réparti la responsabilité également entre Raychem et SJSL, c'est-à-dire en leur imputant chacune 20 pour 100.

B. *La Cour d'appel de Terre-Neuve*

La Cour d'appel de Terre-Neuve (1995), 130 Nfld. & P.E.I.R. 92, sous la plume du juge Cameron, a d'abord statué que les conclusions du juge de première instance relativement à l'origine de l'incendie ne devraient pas être modifiées. Cependant, elle a rejeté sa conclusion qu'il existait une entreprise conjointe entre HOOL et BVI en ce qui concerne la plate-forme de forage Bow Drill III, et elle a en outre déclaré que rien ne justifiait de lever le voile de la personnalité morale et de nier l'identité juridique distincte des trois sociétés.

Le juge Cameron a confirmé la conclusion tirée par le juge de première instance, qui a reconnu la négligence contributive de BVHB, mais elle a rejeté sa conclusion voulant que BVHB ait fait preuve de négligence relativement à l'existence du résidu d'huile sur les câbles. Elle a statué que les dommages subis par BVHB étaient une conséquence raisonnablement prévisible de la non-utilisation par BVHB d'un système DFT.

Quant au défaut de SJSL de fournir des certificats d'approbation, le juge Cameron a conclu que,

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an exchange of letters and cheques in November 1985, the parties had reached an accord and satisfaction disposing of their respective rights under the contract. Therefore, BVHB had no basis for a claim of breach of contract. Cameron J.A. declined to disturb the trial judge's finding that BVHB's representatives made the decision to use the Raychem system, including the Thermaclad. It followed that Thermaclad was "owner directed supply" for which the contract excluded recovery. Cameron J.A. further held that SJSL's provision of Thermaclad was not a negligent act.

par un échange de lettres et de chèques en novembre 1985, il y avait eu accord et satisfaction entre les parties réglant la question de leurs droits respectifs en vertu du contrat. Par conséquent, BVHB n'était nullement justifiée de prétendre qu'il y avait eu rupture de contrat. Le juge Cameron a refusé de modifier la conclusion du juge de première instance selon laquelle les représentants de BVHB avaient décidé d'utiliser le système de Raychem, y compris le Thermaclad. En conséquence, le Thermaclad était du «matériel imposé par le propriétaire» pour lequel le contrat excluait toute indemnisation. Le juge Cameron a de plus statué que la fourniture du Thermaclad par SJSL n'était pas un acte négligent.

Cameron J.A. confirmed that both Raychem and SJSL had a duty to warn BVHB about the inflammability of Thermaclad, and that the duty had not been discharged. She rejected Raychem's argument that it could rely on the learned intermediary exception. Although Raychem and SJSL had no duty to warn HOOL or BVI, SJSL and Raychem owed HOOL and BVI a duty of care that was breached by their failure to warn BVHB. However, because the loss suffered by HOOL and BVI was economic in nature, it was not recoverable.

14 Le juge Cameron a confirmé que tant Raychem que SJSL avaient l'obligation de mettre BVHB en garde contre l'inflammabilité du Thermaclad et qu'elles ne s'étaient pas acquittées de cette obligation. Elle a rejeté l'argument de Raychem selon lequel cette dernière pouvait invoquer l'exception fondée sur l'intermédiaire compétent. Même si Raychem et SJSL n'étaient pas tenues de mettre en garde HOOL ni BVI, les premières avaient envers les secondes une obligation de diligence qui n'a pas été respectée en raison de leur omission de mettre BVHB en garde. Cependant, comme la perte subie par HOOL et BVI était de nature économique, elle ne pouvait donner lieu à indemnisation.

Despite reversing some of the trial judge's findings with respect to liability, the Court of Appeal did not consider it necessary to change his apportionment of liability.

15 Même si elle a infirmé certaines des conclusions du juge de première instance relativement à la responsabilité, la Cour d'appel n'a pas estimé nécessaire de modifier la façon dont il avait réparti la responsabilité.

The Court of Appeal agreed with Riche J. that maritime law applied. Nevertheless it held that provincial negligence legislation applied to maritime cases in some situations, including this case. Alternatively, if the Newfoundland *Contributory Negligence Act* did not apply, the court held that maritime law no longer made contributory negligence a bar to recovery. In the result, BVHB was

16 La Cour d'appel a convenu avec le juge Riche que le droit maritime s'appliquait. Néanmoins, elle a conclu que la législation provinciale relative à la négligence s'appliquait aux affaires maritimes dans certaines situations, dont le présent cas. Subsidiairement, pour le cas où la *Contributory Negligence Act* de Terre-Neuve ne s'appliquerait pas, la cour a statué que la négligence contributive ne constituait plus une fin de non-recevoir à toute demande d'indemnisation en droit maritime. Par conséquent, elle a jugé que BVHB avait le droit d'être indem-

held entitled to recover 40 percent of its loss from SJSL and Raychem.

IV. Issues

17 (1) Are the defendants liable to the plaintiffs in tort?

(a) Did the circumstances impose on SJSL and Raychem a duty to warn BVHB of the risks associated with using Thermaclad?

(b) Was SJSL's duty to warn excluded by its contract with BVHB?

(c) Is Raychem entitled to rely on the "learned intermediary" defence?

(d) Is causation established?

(e) How should fault be allocated between SJSL and Raychem?

(f) Did SJSL and Raychem owe BVI and HOOL a duty to warn? (Recovery of contractual relational economic loss)

(g) Was BVHB contributorily negligent?

(h) Does BVHB's contributory negligence bar its claims?

(2) Is SJSL liable to BVHB in contract?

V. Are the Defendants Liable to the Plaintiffs in Tort?

A. *Did the Circumstances Impose on SJSL and Raychem a Duty to Warn BVHB of the Risks Associated With Using Thermaclad*?

18 SJSL and Raychem submit that the Court of Appeal erred in finding that they were under a duty to warn BVHB of the dangers of Thermaclad.

nisée par SJSL et Raychem de 40 pour 100 de sa perte.

IV. Les questions en litige

(1) Les défenderesses sont-elles responsables envers les demanderesses en matière délictuelle?

a) Dans les circonstances, SJSL et Raychem avaient-elles l'obligation de mettre BVHB en garde contre les risques liés à l'utilisation du Thermaclad?

b) L'obligation de mise en garde de SJSL était-elle écartée en raison du contrat conclu avec BVHB?

c) Raychem a-t-elle le droit d'invoquer le moyen de défense fondé sur «l'intermédiaire compétent»?

d) A-t-on prouvé l'existence d'un lien de causalité?

e) Comment faudrait-il répartir la faute entre SJSL et Raychem?

f) SJSL et Raychem avaient-elles l'obligation de mettre en garde HOOL et BVI? (Indemnisation de la perte économique relationnelle découlant d'un contrat)

g) Y a-t-il eu négligence contributive de BVHB?

h) La négligence contributive de BVHB constitue-t-elle une fin de non-recevoir à ses réclamations?

(2) SJSL est-elle responsable envers BVHB en matière contractuelle?

V. Les défenderesses sont-elles responsables envers les demanderesses en matière délictuelle?

A. *Dans les circonstances, SJSL et Raychem avaient-elles l'obligation de mettre BVHB en garde contre les risques liés à l'utilisation du Thermaclad*?

SJSL et Raychem soutiennent que la Cour d'appel a fait erreur en concluant qu'elles avaient l'obligation de mettre BVHB en garde contre les

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SJSL argues that in order for a duty to warn to arise, there must be an "informational imbalance" between the manufacturer or supplier and the party who is owed the warning. SJSL submits that the plaintiff BVHB knew as much about the inflammability of the Thermaclad as it did.

dangers du Thermaclad. Selon SJSL, pour que cette obligation prenne naissance, il doit exister un «déséquilibre informationnel» entre le fabricant ou le fournisseur et la partie à laquelle doit être faite la mise en garde. SJSL affirme que la demanderesse BVHB en savait autant qu'elle sur l'inflammabilité du Thermaclad.

The law may be simply stated. Manufacturers and suppliers are required to warn all those who may reasonably be affected by potentially dangerous products: *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569, and *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634. This duty extends even to those persons who are not party to the contract of sale: *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189. The potential user must be reasonably foreseeable to the manufacturer or supplier — manufacturers and suppliers (including a builder-supplier like SJSL) do not have the duty to warn the entire world about every danger that can result from improper use of their product.

19 Le droit peut être énoncé de façon simple sur ce point. Les fabricants et les fournisseurs ont l'obligation de mettre en garde tous ceux qui peuvent être raisonnablement concernés par des produits potentiellement dangereux: *Lambert c. Lastoplex Chemicals Co.*, [1972] R.C.S. 569, et *Hollis c. Dow Corning Corp.*, [1995] 4 R.C.S. 634. Cette obligation s'étend même aux personnes qui ne sont pas parties au contrat de vente: *Rivtow Marine Ltd. c. Washington Iron Works*, [1974] R.C.S. 1189. Le fabricant ou le fournisseur doit pouvoir raisonnablement prévoir qui sera l'utilisateur — les fabricants et les fournisseurs (y compris un constructeur-fournisseur comme SJSL) n'ont pas l'obligation de mettre en garde le monde entier contre tout danger susceptible de résulter d'un usage inapproprié de leur produit.

The plaintiff BVHB was clearly within the class of persons that SJSL and Raychem ought to have known might reasonably be affected by the use of Thermaclad. SJSL was in a contractual relationship with BVHB, and Raychem had directly approached BVHB's predecessor (a subsidiary of BVI) to encourage the use of its products in the construction of the rig.

20 La demanderesse BVHB faisait manifestement partie de la catégorie des personnes qui, comme SJSL et Raychem auraient dû le savoir, pouvaient raisonnablement être concernées par l'utilisation du Thermaclad. SJSL avait des rapports contractuels avec BVHB, et Raychem avait communiqué directement avec la société remplacée par BVHB (une filiale de BVI) pour l'inciter à utiliser ses produits durant la construction de la plate-forme.

The defendant SJSL submits that there is an additional requirement for a duty to warn: a knowledge imbalance between the manufacturer or supplier and the consumer. It goes on to argue that since BVHB knew about the inflammability of Thermaclad no duty to warn arose. The Court of Appeal held that knowledge may be a defence, but only where the plaintiff can be viewed as accepting the risk (*volenti non fit injuria*).

21 La défenderesse SJSL soutient qu'une autre condition doit être remplie pour faire naître l'obligation de mise en garde: il doit y avoir un déséquilibre informationnel entre le fabricant ou le fournisseur et le consommateur. Elle prétend également que, comme BVHB était au courant de l'inflammabilité du Thermaclad, aucune obligation de mise en garde n'a pris naissance. La Cour d'appel a jugé que la connaissance peut constituer un moyen de défense, mais seulement lorsqu'il est possible de considérer que le demandeur a accepté le risque (*volenti non fit injuria*).

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22 I agree with the Court of Appeal that knowledge that there may be a risk in some circumstances does not negate a duty to warn. Liability for failure to warn is based not merely on a knowledge imbalance. If that were so every person with knowledge would be under a duty to warn. It is based primarily on the manufacture or supply of products intended for the use of others and the reliance that consumers reasonably place on the manufacturer and supplier. Unless the consumer's knowledge negates reasonable reliance, the manufacturer or supplier remains liable. This occurs where the consumer has so much knowledge that a reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by use of the product, making the maxim *volenti non fit injuria* applicable: *Lambert*, *supra*.

Je suis d'accord avec la Cour d'appel pour dire que le fait de savoir qu'il peut exister un risque dans certaines circonstances ne supprime pas l'obligation de mise en garde. La responsabilité pour manquement à l'obligation de mise en garde n'est pas fondée uniquement sur le déséquilibre informationnel. Si tel était le cas, toute personne possédant de l'information serait soumise à une obligation de mise en garde. Cette responsabilité prend appui principalement sur la fabrication ou la fourniture de produits destinés à l'usage d'autrui et sur la confiance légitimement accordée au fabricant et au fournisseur par le consommateur. À moins que les connaissances du consommateur n'écartent cette confiance, le fabricant ou le fournisseur reste responsable. C'est le cas lorsque le consommateur est à ce point renseigné qu'une personne raisonnable conclurait qu'il a pleinement apprécié et volontairement accepté le risque que présentait l'utilisation du produit, rendant ainsi applicable la maxime *volenti non fit injuria*: *Lambert*, précité.

23 The evidence establishes that the plaintiff BVHB knew that Thermaclad would burn under some circumstances. The defendants SJSL and Raychem, however, had much more detailed knowledge of the specific inflammability characteristics of the Thermaclad. Raychem gained this knowledge through its own testing as manufacturer. SJSL gained it through its request to Raychem for information on Thermaclad's inflammability. BVHB did not have the degree of knowledge necessary to negate reliance on SJSL and Raychem. SJSL and Raychem did not demonstrate that BVHB accepted the risk of using Thermaclad. It follows that both SJSL and Raychem owed BVHB a duty to warn, subject to the special defences raised by SJSL and Raychem, to which I now turn.

Il ressort de la preuve que la demanderesse BVHB savait que le Thermaclad brûle dans certaines circonstances. Cependant, les défenderesses SJSL et Raychem possédaient des connaissances beaucoup plus précises sur les caractéristiques d'inflammabilité du Thermaclad. Raychem les a acquises en effectuant ses propres essais en tant que fabricant. SJSL s'est renseignée en demandant à Raychem de lui fournir de l'information sur l'inflammabilité du Thermaclad. BVHB ne possédait pas suffisamment de connaissances pour exclure la confiance mise en SJSL et Raychem. SJSL et Raychem n'ont pas montré que BVHB avait accepté le risque que présentait l'utilisation du Thermaclad. Il s'ensuit que SJSL et Raychem étaient toutes deux tenues d'une obligation de mise en garde au profit de BVHB, sous réserve des moyens de défense particuliers soulevés par SJSL et Raychem, que je vais maintenant examiner.

B. *Was SJSL's Duty to Warn Excluded by Its Contract With BVHB*?

B. *L'obligation de mise en garde de SJSL était-elle écartée en raison du contrat conclu avec BVHB*?

24 SJSL argues that any duty to warn BVHB which might otherwise arise from the circumstances is

SJSL soutient que toute obligation de mettre en garde BVHB qui pourrait par ailleurs naître dans

negatived by the contract between them. The trial judge rejected this submission, as did the Court of Appeal, on the ground that the contract provisions did not deal with or impact on SJSL's duty to warn. I agree.

les circonstances est annihilée par le contrat entre les parties. Le juge de première instance a rejeté cet argument, tout comme la Cour d'appel, pour le motif que les clauses du contrat ne traitaient pas de l'obligation de mise de garde de SJSL et n'avaient aucune incidence sur cette obligation. Je suis d'accord.

SJSL relies on clauses 702, 905 and 907 of its contract with BVHB. Clause 702, under Article VII (Inspection), stipulates that upon delivery SJSL's "sole obligation with respect to the Vessel shall be as specified in Article IX" (Warranties). Clause 905 excludes claims for defects except as provided in the warranty provision:

SJSL s'appuie sur les clauses 702, 905 et 907 de son contrat avec BVHB. La clause 702, qui figure à l'article VII (Inspection), stipule qu'au moment de livraison, la [TRADUCTION] «seule obligation de [SJSL] en ce qui concerne le bâtiment est celle précisée à l'article IX» (Garanties). La clause 905 limite les réclamations pour vices à celles qui sont prévues dans la disposition relative aux garanties: 25

[TRADUCTION]

905. The remedies provided in this Article are exclusive, and Builder shall have no liability whatever for any consequential loss, damage or expense arising from any defects.

905. Les recours prévus au présent article sont exclusifs, et le constructeur n'assume aucune responsabilité en cas des pertes, frais ou dommages indirects découlant de quelque vice que ce soit.

Finally, clause 907 excludes liability for "owner directed supply":

Enfin, la clause 907 exclut toute responsabilité à l'égard du «matériel imposé par le propriétaire»:

[TRADUCTION]

907. Builder's liability with respect to the Owner Directed Supply shall extend only to installation thereof in accordance with the certified equipment drawings and manuals furnished by the supplier in those instances where such equipment is actually installed by Builder. In all other instances, the sole risk and responsibility for Owner Directed Supply shall, as between Builder and Owner, be borne by Owner.

907. La responsabilité du constructeur à l'égard du matériel imposé par le propriétaire s'étend seulement à son installation conformément aux plans et aux manuels certifiés concernant l'équipement remis par le fournisseur dans les cas où cet équipement est effectivement installé par le constructeur. Dans tous les autres cas, c'est le propriétaire qui supporte seul les risques et la responsabilité — entre le constructeur et le propriétaire — relativement au matériel imposé par le propriétaire.

While BVHB's claim sounds in tort, the contract remains relevant to determining whether a tort duty arises, and if so, its scope. As this Court stated in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, *per* La Forest and McLachlin JJ., parties are free to contract "to limit or waive the duties which the common law would impose on them for negligence" (pp. 26-27). However, "[i]n so far as the tort duty is not contradicted by the

Bien que la réclamation de BVHB soit fondée sur les règles de la responsabilité délictuelle, le contrat reste pertinent pour déterminer s'il existe une obligation en matière délictuelle et, si oui, quelle est son étendue. Comme notre Cour l'a déclaré dans l'arrêt *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12 (les juges La Forest et McLachlin), les parties peuvent passer un contrat pour «limiter les obligations que la common law leur impose en matière de négligence, ou renoncer à celles-ci» (p. 27). Cependant, «[d]ans la mesure où le contrat ne déroge pas à l'obligation en 26

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contract, it remains intact and may be sued upon" (p. 27).

27 To borrow the language of La Forest J. in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at p. 327, tort liability in a case such as this falls to be assessed in a contractual matrix. The parties' planned obligations must be given appropriate pre-eminence. Where those planned obligations negate tort liability, contract "trumps" tort: see J. Fleming, "Tort in a Contractual Matrix" (1993), 5 *Canterbury L. Rev.* 269, at p. 270, citing P. Cane, *Tort Law and Economic Interests* (1991), at p. 293. It follows that a tort claim cannot be used to escape an otherwise applicable contractual exclusion or limitation clause: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147.

28 In order to determine the extent to which the parties' planned obligations affect their tort liabilities, it is necessary to ascertain the intention of the parties with respect to the particular issue from the contract documents as a whole: *BG Checo*, *supra*. In doing so, it must be kept in mind that generally limitation and exclusion clauses are strictly construed against the party seeking to invoke the clause: see e.g. *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, *per* Wilson J., at p. 497.

29 The provisions of the contract relied on by SJSL do not directly address responsibility for negligence or duty to warn. While the absence of a term expressly excluding tort liability is not determinative, the contract provisions, considered as a whole, relate to the finding of and responsibility for defects. They function, as the label of Article IX states, as a "warranty" of workmanship and materials. More specifically, clauses 702, 905 and 907, taken in combination, provide that in situations of "owner directed supply", SJSL bears the

responsabilité délictuelle, celle-ci demeure intacte et elle ouvre droit à un recours» (p. 27).

Pour utiliser les termes du juge La Forest dans l'arrêt *London Drugs Ltd. c. Kuehne & Nagel International Ltd.*, [1992] 3 R.C.S. 299, à la p. 327, dans une affaire comme celle dont nous sommes saisis, on tend à évaluer la responsabilité délictuelle dans un cadre contractuel. Il faut accorder la prééminence appropriée aux obligations prévues par les parties. Lorsque ces obligations écartent toute responsabilité délictuelle, le contrat [TRADUCTION] «l'emporte sur» le délit: voir J. Fleming, «Tort in a Contractual Matrix» (1993), 5 *Canterbury L. Rev.* 269, à la p. 270, qui cite P. Cane, *Tort Law and Economic Interests* (1991), à la p. 293. Il s'ensuit que la réclamation fondée sur la responsabilité délictuelle ne peut pas être utilisée pour échapper à une clause contractuelle exclusive ou limitative de responsabilité par ailleurs applicable: *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147.

Pour établir dans quelle mesure les obligations prévues par les parties influent sur leur responsabilité délictuelle, il faut dégager de l'ensemble des documents contractuels l'intention des parties en ce qui concerne la question particulière en jeu: *BG Checo*, précité. Ce faisant, il ne faut pas oublier que, généralement, les clauses de limitation ou d'exclusion sont interprétées de façon stricte à l'encontre de la partie qui les invoque: voir, par ex., *Hunter Engineering Co. c. Syncrude Canada Ltd.*, [1989] 1 R.C.S. 426, le juge Wilson, à la p. 497.

Les clauses du contrat sur lesquelles s'appuie SJSL ne traitent pas directement de la responsabilité fondée sur la négligence ni de l'obligation de mise en garde. Bien que l'absence d'une condition excluant expressément la responsabilité délictuelle ne soit pas déterminante, prises dans leur ensemble, les clauses du contrat se rapportent à la constatation des vices et à la responsabilité engagée à ce titre. Elles jouent le rôle d'une «garantie» quant à la fabrication et aux matériaux, comme le mentionne l'article IX. Plus précisément, les clauses 702, 905 et 907, prises ensemble, prévoient que, dans le cas du «matériel imposé par le proprié-

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responsibility for installation while BVHB bears the responsibility for defects.

Warranties usually relate to the quality of goods and workmanship and do not relate to warnings about the risks associated with the use of products. In *University of Regina v. Pettick* (1991), 45 C.L.R. 1, a majority of the Saskatchewan Court of Appeal dismissed a contractor's argument that a one-year warranty it gave to the owner excluded any liability that it might have in tort. In concluding that a warranty does not necessarily exclude tort liability, Sherstobitoff J.A. stated (at pp. 52-53):

> There is nothing in a warranty by itself that suggests that further liability should be excluded. The warranty is a bargain that holds the contractor liable irrespective of negligence for a period of time. A tort claim requires proof of negligence. That it should continue beyond the warranty period does not interfere with the legitimate expectations of the parties as to their contractual relationship.

Without concluding decisively that warranty provisions could never negative a duty to warn, it may be noted that we have been referred to no case in which a warranty like that set out in Articles VII and IX was found to limit tort liability for duty to warn.

This case is distinguishable from *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, where a warranty coupled with a provision excluding liability for "all claims by the Owner" except those under the warranty (p. 1351) was held to exclude recovery for negligence in "the performance of the contract" (pp. 1354-55). First, the wording of clause 702 (obligations "with respect to the Vessel") is narrower than the wording of the contract in *Giffels* ("all claims by the Owner"). Second, the claim in *Giffels* was for damage due to faulty workmanship, which was specifically covered by the warranty clauses. The tort claim constituted an attempt to avoid express

taire», SJSL est responsable de l'installation tandis que BVHB est responsable des vices.

30 Les garanties portent habituellement sur la qualité des marchandises et de leur fabrication et non sur les mises en garde concernant les risques liés à leur utilisation. Dans *University of Regina c. Pettick* (1991), 45 C.L.R. 1, la Cour d'appel de la Saskatchewan a rejeté, à la majorité, l'argument avancé par un entrepreneur selon lequel la garantie d'un an qu'il avait donnée au propriétaire excluait toute responsabilité qu'il pouvait avoir en matière délictuelle. Concluant que la garantie n'exclut pas nécessairement la responsabilité délictuelle, le juge Sherstobitoff a déclaré ce qui suit (aux pp. 52 et 53):

> [TRADUCTION] La garantie en elle-même n'implique nullement l'exclusion de toute responsabilité supplémentaire. La garantie est un marché par lequel l'entrepreneur engage sa responsabilité pendant une période donnée, sans égard à la négligence. Dans une action en responsabilité délictuelle il faut prouver la négligence. Que cela se poursuive au-delà de la période de garantie ne frustre pas les attentes légitimes des parties relativement à leurs rapports contractuels.

Sans conclure de façon décisive que les clauses relatives à la garantie ne peuvent jamais écarter l'obligation de mise en garde, il convient de souligner qu'on ne nous a cité aucune affaire dans laquelle on aurait statué qu'une garantie analogue à celle énoncée aux articles VII et IX limitait la responsabilité délictuelle fondée sur l'obligation de mise en garde.

31 La présente affaire se distingue de l'arrêt *Giffels Associates Ltd. c. Eastern Construction Co.*, [1978] 2 R.C.S. 1346, où une garantie, conjuguée à une clause stipulant que «le propriétaire renonce à toute réclamation» autre que celles prévues par la garantie (p. 1351), a été considérée comme excluant l'indemnisation pour négligence dans «l'exécution du contrat» (pp. 1354 et 1355). Premièrement, le texte de la clause 702 (obligations «relatives au navire») est plus limitatif que celui du contrat dans l'arrêt *Giffels* («le propriétaire renonce à toute réclamation»). Deuxièmement, dans *Giffels*, la réclamation portait sur les dommages résultant de vices de construction, qui

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contractual exclusions, something that cannot be done: see *Central Trust, supra*. BVHB's claim against SJSL, by contrast, is not for negligence relating to the choice of, installation of, or defects in, the Thermaclad or other materials, but for failure to warn of the inflammability of Thermaclad. SJSL's duty to warn arose independently of the contract, through its greater knowledge of the inflammability characteristics of Thermaclad: see e.g. *Rivtow*, *supra*, at pp. 1207 and 1214, and, more generally, *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87.

étaient expressément couverts par les clauses relatives à la garantie. La réclamation en matière délictuelle constituait une tentative en vue d'éluder les exclusions expressément prévues par le contrat, chose qu'il n'est pas possible de faire: voir *Central Trust*, précité. Par contraste, la réclamation de BVHB contre SJSL n'est pas fondée sur la négligence dans le choix du Thermaclad ou d'autres matériaux, leur installation ou des vices dont ils seraient affectés, mais plutôt sur le défaut de mise en garde au sujet de l'inflammabilité du Thermaclad. L'obligation de mise en garde incombant à SJSL a pris naissance indépendamment du contrat et découlait du fait qu'elle était mieux informée des caractéristiques d'inflammabilité du Thermaclad: voir, par ex., *Rivtow*, précité, aux pp. 1207 et 1214, et, plus généralement, *Queen c. Cognos Inc.*, [1993] 1 R.C.S. 87.

32 SJSL places special emphasis on the fact that Thermaclad was "owner directed supply". Clause 907, it submits, excludes all liability for owner-directed supply, including liability for breach of duty to warn of the risks associated with the use of a product. I do not read clause 907 as extending to duty to warn. The starting point in construing clause 907 is that it functions to exclude or exempt from liability. As such, it must be narrowly construed. With this in mind, one turns to the wording and context of the clause 907 exemption. The first thing to note is that it falls under Article IX, entitled "Warranties". This suggests, as argued earlier, that the parties intended clause 907 to apply to defects in materials and workmanship. The words of clause 907 are consistent with this interpretation. The words "owner directed supply" connote goods supplied, not damages that might flow from the inappropriate use of a product. The purpose of owner-directed supply clauses in the context of construction contract warranties is to narrow the scope of the warranty for owner-directed materials or "supply". The builder is not responsible for defects in the materials chosen by the owner, only for defective installation. This is fair, since the owner has directed the use of the materials. In this sense, SJSL limited its liability "for the choice of Thermaclad": *per* Cameron J.A., at p. 114. Through its contract, it stated that it would not be

SJSL insiste tout particulièrement sur le fait que le Thermaclad constituait du «matériel imposé par le propriétaire». La clause 907, soutient-elle, exclut toute responsabilité dans le cas du matériel imposé par le propriétaire, y compris la responsabilité en cas de manquement à l'obligation de mise en garde contre les risques liés à l'utilisation d'un produit. J'estime que la clause 907 ne s'étend pas à l'obligation de mise en garde. Le point de départ de l'interprétation de la clause 907 est qu'elle vise à exclure la responsabilité ou à mettre en œuvre une exemption. Elle doit donc être interprétée de façon stricte. Cela établi, on passe au libellé et au contexte de l'exemption de la clause 907. La première chose qu'il convient de noter est qu'elle figure à l'article IX, intitulé «Garanties». Cela laisse supposer, ainsi qu'il a été avancé précédemment, que les parties entendaient que la clause 907 s'applique aux vices affectant les matériaux et la fabrication. Le libellé de la clause 907 est compatible avec cette interprétation. Les mots «matériel imposé par le propriétaire» suggèrent l'idée de marchandises fournies, non pas de dommages susceptibles de résulter de l'utilisation inadéquate d'un produit. Dans le contexte des garanties prévues par les contrats de construction, les clauses relatives au matériel imposé par le propriétaire ont pour objectif de limiter la portée de la garantie de ces matériaux. Le constructeur n'est pas responsa-

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liable for defects in the product supplied. Clause 907, however, does not address the quite different problem of whether, in all the circumstances, SJSL was under a duty to warn BVHB of the fire risks associated with the use of Thermaclad. That duty arose independently of the contract. It is grounded not in the contract but in SJSL's particular knowledge of the inflammability of Thermaclad.

ble des vices des matériaux choisis par le propriétaire, il répond seulement de leur installation. C'est équitable, puisque c'est le propriétaire qui a ordonné l'utilisation des matériaux. En ce sens, SJSL a limité sa responsabilité [TRADUCTION] «quant au choix du Thermaclad»: le juge Cameron, à la p. 114. Par contrat, elle a stipulé qu'elle ne serait pas responsable des vices affectant le produit fourni. Cependant, la clause 907 n'aborde pas la question tout à fait différente de savoir si, dans les circonstances, SJSL avait l'obligation de mettre BVHB en garde contre les risques liés à l'utilisation du Thermaclad. Cette obligation a pris naissance indépendamment du contrat. Elle est fondée non pas sur le contrat mais sur les renseignements particuliers que possède SJSL sur l'inflammabilité du Thermaclad.

To put it another way, clause 907 addresses defects in products or their installation. If BVHB alleged that the Thermaclad supplied was defective, clause 907 would provide a complete defence. But BVHB does not allege that the Thermaclad supplied was defective. It makes the quite different claim that perfectly sound Thermaclad, properly installed, introduced a risk which SJSL was under a duty to warn it about. To that claim, clause 907 provides no defence.

33 Autrement dit, la clause 907 porte sur les vices des produits ou de leur installation. Si BVHB soutenait que le Thermaclad fourni était affecté d'un vice, la clause 907 fournirait un moyen de défense complet. Mais ce n'est pas ce qu'affirme BVHB. Elle prétend, ce qui est bien différent, que le Thermaclad, en parfait état et installé correctement, présentait un risque contre lequel SJSL avait l'obligation de la mettre en garde. La clause 907 ne fournit aucun moyen de défense contre cette prétention.

I conclude that the contractual matrix in which the duty to warn of the inflammability of Thermaclad arose does not negate or "contradict", to use the language of *BG Checo*, *supra*, that duty. It follows that BVHB was entitled to claim against SJSL based on the tort duty to warn.

34 Je conclus que le cadre contractuel dans lequel a pris naissance l'obligation de mise en garde au sujet de l'inflammabilité du Thermaclad ne supprime pas cette obligation et n'y «déroge» pas, pour reprendre les termes utilisés dans l'arrêt *BG Checo*, précité. Il s'ensuit que BVHB avait le droit de poursuivre SJSL en se fondant sur l'obligation de mise en garde en matière délictuelle.

C. *Is Raychem Entitled to Rely on the "Learned Intermediary" Defence*?

C. *Raychem a-t-elle le droit d'invoquer le moyen de défense fondé sur l'«intermédiaire compétent»*?

Raychem argues that if it owed the plaintiff BVHB a duty to warn, it fulfilled that duty by advising the rig builder, SJSL, that the cladding was inflammable and was not flame retardant. Additional testing by Raychem merely confirmed what it told SJSL. Raychem submits that it is enti-

35 Raychem soutient que, si elle avait l'obligation de mettre en garde la demanderesse BVHB, elle s'est acquittée de cette obligation en informant SJSL, le constructeur de la plate-forme, que le revêtement était inflammable et n'avait aucune propriété ignifugeante. D'autres essais effectués

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tled to rely on the "learned intermediary" defence because SJSL, which was aware of the regulatory requirements, actually had greater knowledge than it about the suitability of Thermaclad, upon which Raychem was entitled to rely. It was up to SJSL, armed as it was with the knowledge of Thermaclad's inflammability, to take steps to accommodate its proper use or, alternatively, warn BVHB and obtain different instructions. Raychem argues that it is too onerous to expect every supplier of a product used in the construction of a large undertaking such as a drilling rig to advise the ultimate owner. A strict duty to warn should apply only when the product is intended for direct use by the public. Raychem submits that since the Thermaclad was sold to an experienced shipbuilder, not the public, and there was no knowledge imbalance between SJSL and Raychem with respect to the performance of the product, it discharged any duty that it had to warn BVHB by warning SJSL, which was in the position of "learned intermediary" *vis-à-vis* Raychem and BVHB.

par Raychem sont simplement venus confirmer ce qu'elle avait dit à SJSL. Raychem prétend qu'elle a le droit d'invoquer le moyen de défense fondé sur «l'intermédiaire compétent» parce que SJSL, au fait des exigences réglementaires, en connaissait davantage sur la convenance du Thermaclad et qu'elle était fondée à s'appuyer sur cette connaissance. C'est à SJSL, qui était au courant de l'inflammabilité du Thermaclad, qu'il appartenait soit de prendre les mesures nécessaires pour bien l'utiliser, soit de mettre BVHB en garde et d'obtenir des instructions différentes. Raychem affirme que c'est trop exiger du fournisseur d'un produit utilisé dans la construction d'un grand ouvrage comme une plate-forme de forage que de s'attendre à ce qu'il informe le propriétaire final. L'obligation de mise en garde ne devrait être appliquée de façon stricte que dans les cas où le produit est destiné à être utilisé directement par le public. Raychem soutient que, comme le Thermaclad était vendu à un constructeur naval expérimenté et non au public, et qu'il n'existait aucun déséquilibre informationnel entre SJSL et Raychem au sujet de la tenue du produit, elle s'est acquittée de toute obligation de mise en garde qu'elle avait envers BVHB en prévenant SJSL, qui était un «intermédiaire compétent» vis-à-vis de Raychem et de BVHB.

36 In my view, the facts of this case do not fall within the learned intermediary defence. This Court has left open the possibility that a manufacturer might discharge its duty to warn by warning an intermediary: *Hollis*, *supra*, at p. 659. However, La Forest J., for the majority, made it clear that the rule was an exception to the general rule requiring manufacturers to provide a warning to the ultimate consumers of their product. The exception will generally only apply either where the product is highly technical and is to be used with expert supervision, or where the nature of the product is such that it is unrealistic for the consumer to receive a warning directly from the manufacturer. La Forest J. stated that since the rule operates to discharge the manufacturer's duty to the ultimate consumer, the intermediary must be "learned" in the sense that its knowledge of the product and its

À mon avis, les faits de l'espèce ne permettent pas d'invoquer le moyen de défense fondé sur l'intermédiaire compétent. Notre Cour n'a pas écarté la possibilité qu'un fabricant s'acquitte de son obligation de mise en garde en prévenant un intermédiaire: *Hollis*, précité, à la p. 659. Cependant, s'exprimant au nom de la majorité, le juge La Forest a clairement indiqué que la règle constituait une exception à la règle générale voulant que les fabricants mettent le consommateur final en garde contre les dangers que présentent leurs produits. En général, cette exception s'appliquera seulement si le produit a une forte teneur technique et est destiné à être utilisé sous la surveillance d'un expert, ou si la nature du produit est telle qu'il n'est pas réaliste de penser que le consommateur recevra une mise en garde directe du fabricant. Le juge La Forest a dit que, comme la règle a pour

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risks is essentially the same as that of the manufacturer.

Thermaclad was not a highly technical product, nor did its use and application require expert supervision. Nor was it unrealistic to expect Raychem to have warned BVHB, the ultimate consumer, directly. There was direct contact between BVHB and Raychem, independent of SJSL. Raychem actively sought the business of BVHB, and the trial judge found that the Thermaclad was owner-directed supply. In these circumstances Raychem had both the opportunity and the duty to warn BVHB directly. I conclude that Raychem's duty to warn the plaintiffs was not discharged through its communications with SJSL.

D. *Is Causation Established*?

SJSL submits that if BVHB's knowledge did not negate SJSL's duty to warn, it establishes that the failure to warn did not cause the loss. BVHB, it argues, did not prove that it would have acted differently had it been aware of Thermaclad's true characteristics. BVHB continued to operate the rig without a functioning GFCB system, knowing that the Thermaclad could burn and that there was risk of explosion from arcing. In response, BVHB argues, first, that it is not required to prove that it would have behaved differently had it been warned, and second, that the evidence supports its claim that it would have taken steps to address the risk had it been properly warned.

I am satisfied that causation is established, on either a subjective or an objective standard. There is evidence that had BVHB been aware of Thermaclad's specific inflammability characteris-

effet de permettre au fabricant de s'acquitter de son obligation de mise en garde envers le consommateur final, l'intermédiaire doit être «compétent» en ce sens que sa connaissance du produit et des risques que celui-ci présente doit être essentiellement la même que celle qu'a le fabricant.

37 Le Thermaclad n'était pas un produit à forte teneur technique, et son utilisation et son application n'exigeaient pas la surveillance d'un expert. Il n'était pas non plus irréaliste de s'attendre à ce que Raychem prévienne directement BVHB, le consommateur final. Il y a eu des contacts directs entre BVHB et Raychem, indépendants de SJSL. Raychem cherchait activement à faire affaires avec BVHB, et le juge de première instance a conclu que le Thermaclad était du matériel imposé par le propriétaire. Dans ces circonstances, Raychem avait à la fois la possibilité et l'obligation de mettre BVHB en garde directement. Je conclus que Raychem ne s'est pas acquittée de son obligation de mise en garde envers les demanderesses dans le cadre de ses communications avec SJSL.

D. *A-t-on prouvé l'existence d'un lien de causalité*?

38 SJSL prétend que, si les connaissances de BVHB ne l'ont pas déchargée de l'obligation de mettre en garde cette dernière, elles établissent que le non-respect de cette obligation n'a pas causé la perte. Selon elle, BVHB n'a pas prouvé qu'elle aurait agi différemment si elle avait connu les véritables caractéristiques du Thermaclad. BVHB a continué d'exploiter la plate-forme sans un système DFT efficace, tout en sachant que le Thermaclad pouvait brûler et qu'il y avait un risque d'explosion en cas d'arcs électriques. En réponse, BVHB soutient, premièrement, qu'elle n'a pas à prouver qu'elle se serait comportée différemment si elle avait été mise en garde et, deuxièmement, que la preuve étaye sa prétention selon laquelle elle aurait pris des mesures pour se protéger du risque si elle avait été mise en garde convenablement.

39 Je suis convaincue que le lien de causalité est établi selon une norme subjective ou une norme objective. Il ressort de la preuve que si BVHB avait été au courant des caractéristiques particu-

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tics, it would not have been used, or alternatively, that BVHB would have taken additional steps to compensate for its inflammability. BVHB, in accordance with applicable standards, would not have permitted inflammable materials to be used without careful consideration and investigation into the availability of nonflammable alternatives. I conclude that a reasonable plaintiff or BVHB itself would have either declined to use Thermaclad or taken steps to deal with its inflammability had it been warned. This suffices to meet the argument that the loss was not caused by the defendants' breach of their duty to warn.

lières d'inflammabilité du Thermaclad, elle aurait pris des mesures supplémentaires pour neutraliser l'inflammabilité. Conformément aux normes applicables, BVHB n'aurait pas permis l'utilisation de matériaux inflammables sans enquêter soigneusement sur l'existence de matériaux de rechange ininflammables. Je conclus que si un demandeur raisonnable ou BVHB elle-même avait été mis en garde, il aurait soit refusé d'utiliser le Thermaclad ou soit pris des mesures concernant l'inflammabilité de ce produit. Cela suffit pour répondre à l'argument selon lequel la perte n'a pas été causée par le manquement des défenderesses à leur obligation de mise en garde.

E. *How Should Fault Be Allocated Between SJSL and Raychem*?

E. *Comment faudrait-il répartir la responsabilité entre SJSL et Raychem*?

40 The next question is how fault should be allocated between SJSL and Raychem. The trial judge, affirmed by the Court of Appeal, apportioned liability equally. SJSL submits that the relative fault of itself and Raychem should have been reapportioned in light of the Court of Appeal's finding that SJSL's failure to provide certificates of approval was not negligent. It argues that Raychem's knowledge of Thermaclad's characteristics was much higher and that Raychem should therefore bear a correspondingly higher degree of fault.

La question suivante est celle de savoir comment la faute devrait être répartie entre SJSL et Raychem. Le juge de première instance a partagé la responsabilité de façon égale, et sa décision a été confirmée en Cour d'appel. SJSL prétend que le partage de la faute entre elle-même et Raychem aurait dû être modifié à la lumière de la conclusion de la Cour d'appel selon laquelle l'omission de SJSL de fournir des certificats d'approbation ne constituait pas une négligence. Elle fait valoir que Raychem était davantage au fait des caractéristiques du Thermaclad et qu'elle devrait en conséquence supporter un degré plus élevé de faute.

41 There was ample evidence before the trial judge to support his conclusion that the relative fault of Raychem and SJSL was equivalent. Both defendants had a greater degree of knowledge of the risks inherent in the use of Thermaclad than did BVHB. Neither of the defendants communicated or attempted to communicate their knowledge to BVHB. Although SJSL might have had less knowledge of the specific characteristics of Thermaclad, its knowledge of the general regulatory requirements was arguably greater, and it had greater contact with BVHB. I would not interfere with the equal apportionment of fault.

Il y avait amplement d'éléments de preuve devant le juge de première instance pour étayer sa conclusion que les fautes relatives de Raychem et de SJSL étaient équivalentes. Les deux défenderesses en savaient plus sur les risques inhérents à l'utilisation du Thermaclad que BVHB. Ni l'une ni l'autre des défenderesses n'ont communiqué ni tenté de communiquer leurs connaissances à BVHB. Même si SJSL en savait peut-être moins sur les caractéristiques particulières du Thermaclad, elle avait plus de contacts avec BVHB et il est possible de prétendre qu'elle connaissait mieux les exigences réglementaires générales. Je suis d'avis de ne pas modifier la répartition de la faute en parts égales.

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F. *Did SJSL and Raychem Owe BVI and HOOL a Duty to Warn*? *(Recovery of Contractual Relational Economic Loss)*

(1) The Law

The plaintiffs HOOL and BVI had contracts with BVHB for the use of the rig owned by BVHB. They seek damages for economic loss incurred as a result of the shutdown of the drilling rig during the period it was being repaired. In other words, the plaintiffs HOOL and BVI seek to recover the economic loss they suffered as a result of damage to the property of a third party. This sort of loss is often called "contractual relational economic loss". The issue is whether the loss suffered by HOOL and BVI is recoverable.

The issue arises because common law courts have traditionally regarded many types of contractual relational economic loss as irrecoverable. The reasons for this were summarized by this Court, *per* Major J., in *D'Amato v. Badger*, [1996] 2 S.C.R. 1071. First, economic interests have customarily been seen by the common law courts as less worthy of protection than either bodily security or property. Second, relational economic loss presents the spectre of "liability in an indeterminate amount for an indeterminate time to an indeterminate class": *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444, *per* Cardozo C.J. Third, it may be more efficient to place the burden of economic loss on the victim, who may be better placed to anticipate and insure its risk. Fourth, confining economic claims to contract discourages a multiplicity of lawsuits.

F. *SJSL et Raychem avaient-elles l'obligation de mettre en garde HOOL et BVI*? *(Indemnisation de la perte économique relationnelle découlant d'un contrat)*

(1) Le droit

42 Les demanderesses HOOL et BVI avaient passé des contrats avec BVHB pour l'utilisation de la plate-forme lui appartenant. Elles réclament des dommages-intérêts pour la perte économique subie à la suite de l'arrêt d'exploitation de la plate-forme de forage pendant les réparations. Autrement dit, les demanderesses HOOL et BVI demandent à être indemnisées de la perte économique qu'elles ont subie à la suite des dommages causés au bien d'un tiers. Cette sorte de perte est souvent désignée sous le nom de «perte économique relationnelle découlant d'un contrat». Il s'agit de savoir si la perte subie par HOOL et BVI peut donner lieu à indemnisation.

43 La question se pose parce que les tribunaux de common law ont traditionnellement considéré que plusieurs types de perte économique relationnelle découlant d'un contrat ne donnaient pas lieu à indemnisation. Les raisons invoquées ont été résumées par le juge Major, au nom de la Cour, dans l'arrêt *D'Amato c. Badger*, [1996] 2 R.C.S. 1071. Premièrement, les tribunaux de common law ont généralement considéré que les intérêts économiques ne méritaient pas la même protection que l'intégrité du corps humain ou les biens. Deuxièmement, la perte économique relationnelle fait apparaître le spectre d'une [TRADUCTION] «responsabilité pour un montant indéterminé, pendant un temps indéterminé à l'égard d'une catégorie indéterminée»: *Ultramares Corp. c. Touche*, 174 N.E. 441 (N.Y. 1931), à la p. 444, le juge en chef Cardozo. Troisièmement, il est peut-être plus efficace de faire assumer le fardeau d'une perte économique par la victime, qui est peut-être mieux placée pour prévoir ce risque et se prémunir contre lui en souscrivant une assurance. Quatrièmement, le fait de limiter les réclamations de nature économique au domaine contractuel décourage la multiplication des poursuites.

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44 In England the situation is clear — no relational economic loss can ever be recovered: *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.). Although *Murphy* concerned the liability of a public authority for approval of a negligently constructed building, not relational economic loss, the House of Lords stipulated that pure economic loss is recoverable only where there is actual physical damage to property of the plaintiff, thus excluding recovery for relational economic loss. In the civil law jurisdictions of Quebec and France, by contrast, the law does not distinguish between loss arising from damage of one's own property and loss arising from damage to the property of another. If civil law judges restrict recovery, it is not as a matter of law, but on the basis of the facts and causal connection. The law in the common law provinces of Canada falls somewhere between these two extremes. While treating recovery in tort of contractual relational economic loss as exceptional, it is accepted in Canadian jurisprudence that there may be cases where it may be recovered.

En Angleterre, la situation est claire — la perte économique relationnelle ne peut jamais donner lieu à indemnisation: *Murphy c. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.). Même si l'arrêt *Murphy* concernait la responsabilité d'un organisme public relativement à l'approbation d'un édifice construit avec négligence, et non une perte économique relationnelle, la Chambre des lords a jugé qu'une perte purement économique ne donnait lieu à indemnisation que dans les cas où des dommages matériels avaient été causés aux biens du demandeur, ce qui a pour effet d'exclure l'indemnisation de la perte économique relationnelle. Dans les systèmes de droit civil du Québec et de la France, par contraste, le droit ne fait pas de distinction entre la perte découlant des dommages causés aux biens d'une personne et la perte découlant des dommages causés aux biens d'autrui. Si les juges appliquant le droit civil restreignent l'indemnisation, ce n'est pas parce que le droit les y oblige mais parce que les faits et le lien de causalité le justifient. Dans les provinces de common law du Canada, le droit se situe entre ces deux extrêmes. Quoique l'indemnisation de la perte économique relationnelle découlant d'un contrat soit exceptionnelle en matière délictuelle, il est accepté, dans la jurisprudence canadienne, qu'il peut y avoir des cas où cette perte donne lieu à indemnisation.

45 The foregoing suggests the need for a rule to distinguish between cases where contractual relational economic loss can be recovered and cases where it cannot be recovered. Such a rule, as I wrote in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, should be morally and economically defensible and provide a logical basis upon which individuals can predicate their conduct and courts can decide future cases (p. 1147). Although this Court attempted to formulate such a rule in *Norsk*, a split decision prevented the emergence of a clear rule. Given the commercial importance of the issue, it is

Ce qui précède fait ressortir la nécessité d'énoncer une règle permettant de faire la distinction entre les cas où la perte économique relationnelle découlant d'un contrat peut donner lieu à indemnisation et les cas où elle ne le peut pas. Une telle règle, ainsi que je l'ai dit dans *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021, devrait être défendable sur les plans moral et économique et fournir un principe logique sur lequel les individus pourraient fonder leur conduite et à partir duquel les tribunaux pourraient trancher les affaires subséquentes (p. 1147). Bien que notre Cour ait essayé d'énoncer une telle règle dans l'arrêt *Norsk*, une décision partagée a empêché l'émergence d'une règle claire. Vu l'importance de la question sur le plan commercial, il est important d'établir cette

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important that the rule be settled. It is therefore necessary for this Court to revisit the issue.

The differences between the reasons of La Forest J. and myself in *Norsk* are of two orders: difference in result and difference in methodology. The difference in result, taken at its narrowest, is a difference in the definition of what constitutes a "joint venture" for the purposes of determining whether recovery for contractual relational economic loss should be allowed. We both agreed that if the plaintiff is in a joint venture with the person whose property is damaged, the plaintiff may claim consequential economic loss related to that property. We parted company because La Forest J. took a stricter view of what constituted a joint venture than I did.

The difference in methodology is not, on close analysis, as great as might be supposed. Broadly put, La Forest J. started from a general exclusionary rule and proceeded to articulate exceptions to that rule where recovery would be permitted. I, by contrast, stressed the two-step test for when recovery would be available, based on the general principles of recovery in tort as set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), and *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2: (1) whether the relationship between the plaintiff and defendant was sufficiently proximate to give rise to a *prima facie* duty of care; and (2) whether, if such a *prima facie* duty existed, it was negated for policy reasons and recovery should be denied.

Despite this difference in approach, La Forest J. and I agreed on several important propositions: (1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed. La Forest J. identified the catego-

règle. Il y a donc lieu pour notre Cour de revoir la question.

46 Les différences entre les motifs du juge La Forest et les miens dans l'arrêt *Norsk* sont de deux ordres: une différence quant au résultat et une différence quant à la méthodologie. La différence quant au résultat, prise au sens le plus strict, tient à la définition de l'expression «entreprise conjointe» aux fins de déterminer s'il y a lieu d'accorder une indemnisation pour la perte économique relationnelle découlant d'un contrat. Nous étions tous deux d'accord pour dire que, si le demandeur participe à une entreprise conjointe avec la personne dont le bien a été endommagé, il peut réclamer la perte économique indirecte qui se rapporte à ce bien. Cependant, nous nous sommes trouvés en désaccord parce que le juge La Forest a adopté une conception de l'entreprise conjointe plus stricte que la mienne.

47 Quand on y regarde de près, la différence quant à la méthodologie n'est pas aussi grande qu'on pourrait le supposer. Généralement parlant, le juge La Forest a posé au départ une règle générale d'exclusion et a ensuite énoncé des cas d'exceptions dans lesquels l'indemnisation est permise. Par contraste, pour déterminer les cas d'ouverture à indemnisation, j'ai mis l'accent sur un critère à deux volets fondé sur les principes généraux d'indemnisation en matière délictuelle qui ont été énoncés dans les arrêts *Anns c. Merton London Borough Council*, [1978] A.C. 728 (H.L.), et *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2: (1) Le lien entre le demandeur et le défendeur était-il suffisamment étroit pour donner naissance à une obligation de diligence *prima facie*? (2) Si cette obligation existait, était-elle écartée pour des raisons de principe et fallait-il refuser l'indemnisation?

48 Malgré cette différence d'approche, le juge La Forest et moi-même étions d'accord sur plusieurs points importants: (1) la perte économique relationnelle ne donne lieu à indemnisation que dans des circonstances spéciales lorsque sont réunies les conditions requises; (2) ces circonstances peuvent être définies par référence à des catégories, qui rendront le droit généralement prévisible;

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gories of recovery of relational economic loss defined to date as: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.

(3) ces catégories ne sont pas limitatives. Le juge La Forest a désigné les catégories d'indemnisation de perte économique relationnelle qui ont été définies à ce jour comme étant: (1) les cas où le demandeur a un droit de possession ou de propriété sur le bien endommagé; (2) les cas d'avarie commune; (3) les cas où le lien entre le demandeur et le propriétaire du bien est une entreprise conjointe.

49 The case at bar does not fall into any of the above three categories. The plaintiffs here had no possessory or proprietary interest in the rig and the case is not one of general averaging. While related contractually, the Court of Appeal correctly held that the plaintiff and the property owner cannot, on any view of the term, be viewed as joint venturers.

Le présent cas n'entre dans aucune des trois catégories susmentionnées. En l'espèce, les demanderesses n'avaient aucun droit de possession ou de propriété sur la plate-forme et il ne s'agit pas d'une affaire d'avarie commune. La Cour d'appel a conclu à juste titre que, même s'il existait un lien contractuel entre la demanderesse et le propriétaire du bien, il ne pouvait en aucun sens du terme être considéré comme une entreprise conjointe à laquelle ils auraient participé.

50 However, that is not the end of the matter. The categories of recoverable contractual relational economic loss in tort are not closed. Where a case does not fall within a recognized category the court may go on to consider whether the situation is one where the right to recover contractual relational economic loss should nevertheless be recognized. This is in accordance with *Norsk*, *per* La Forest J., at p. 1134:

Cependant, cela ne clôt pas la question. Les catégories de pertes économiques relationnelles découlant d'un contrat susceptibles d'indemnisation en matière délictuelle ne sont pas limitatives. Lorsqu'une affaire n'entre pas dans une catégorie reconnue, le tribunal peut se demander s'il s'agit d'une situation où le droit d'être indemnisé d'une perte économique relationnelle découlant d'un contrat devrait néanmoins être reconnu. Cela concorde avec les propos suivants du juge La Forest, dans l'arrêt *Norsk*, à la p. 1134:

> Thus I do not say that the right to recovery in all cases of contractual relational economic loss depends exclusively on the terms of the contract. Rather, I note that such is the tenor of the exclusionary rule and that departures from that rule should be justified on defensible policy grounds. [Emphasis added.]

> Ainsi, je ne dis pas que le droit à l'indemnisation, dans tous les cas de perte économique relationnelle découlant d'un contrat, dépend exclusivement des modalités du contrat. Je ferai plutôt remarquer que tel est le sens de la règle d'exclusion et que les dérogations à cette règle devraient se justifier par des raisons de principe défendables. [Je souligne.]

More particularly, La Forest J. suggested that the general rule against recovery for policy-based reasons might be relaxed where the deterrent effect of potential liability to the property owner is low, or, despite a degree of indeterminate liability, where the claimant's opportunity to allocate the risk by contract is slight, either because of the type of transaction or an inequality of bargaining power. I agreed with La Forest J. that policy considerations relating to increased costs of processing claims

De façon plus particulière, le juge La Forest a suggéré l'assouplissement de la règle générale faisant obstacle à l'indemnisation pour des raisons de principe lorsque l'effet dissuasif d'une responsabilité potentielle envers le propriétaire du bien est faible ou, malgré l'existence d'un degré de responsabilité indéterminée, lorsque la possibilité pour le demandeur de répartir contractuellement le risque est réduite, en raison soit du type d'opération en cause soit de l'inégalité du pouvoir de négociation.

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and contractual allocation of the risk are important (p. 1164). I concluded that the test for recovery "should be flexible enough to meet the complexities of commercial reality and to permit the recognition of new situations in which liability ought, in justice, to lie as such situations arise" (p. 1166). It thus appears that new categories of recoverable contractual relational economic loss may be recognized where justified by policy considerations and required by justice. At the same time, courts should not assiduously seek new categories; what is required is a clear rule predicting when recovery is available.

J'ai convenu avec le juge La Forest de l'importance des considérations de principe relatives à l'accroissement des coûts de règlement des demandes et à la répartition contractuelle du risque (p. 1164). J'ai conclu que le critère applicable à l'indemnisation «devrait être suffisamment souple pour tenir compte de la complexité des affaires et permettre la reconnaissance de nouvelles situations où, en toute justice, une responsabilité devrait être imposée, quand de telles situations se présentent» (p. 1166). Il paraît donc possible de reconnaître de nouvelles catégories de pertes économiques relationnelles découlant d'un contrat susceptibles d'indemnisation lorsqu'elles s'appuient sur des considérations de principe et que la justice commande de le faire. Toutefois, les tribunaux ne devraient pas chercher assidûment de nouvelles catégories; ce qu'il faut, c'est une règle claire, permettant de prédire les cas donnant ouverture à indemnisation.

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More recently, in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, this Court described the general approach that should be followed in determining when tort recovery for economic loss is appropriate. The plaintiffs in that case were shareholders in a company, Hercules Managements Ltd. The auditors for the company allegedly failed to disclose in their annual audits matters detrimental to the company. The company failed and the plaintiffs suffered financial loss. The plaintiff shareholders sued the auditors. The first issue was whether the plaintiffs' action against the auditors could be maintained in law. Although styled as an action for negligent misrepresentation, the plaintiffs' claim was treated as a case of relational economic loss owing to the fact that the services were performed pursuant to a contract with the company. The primary loser was the company, which had contracted with the auditors. The plaintiffs' loss was derivative of, or relational to, the company's loss. The defendant auditors asserted that their only duty was to the company with which they had contracted. They argued that no relational tort duty to third parties lay in the circumstances. To affirm such a duty, they maintained, would be contrary to the policy considerations that had led courts in the past to deny recovery for relational economic loss. The Court,

Plus récemment, dans l'arrêt *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165, notre Cour a décrit la méthode générale devant être suivie pour déterminer quand l'indemnisation d'une perte économique est appropriée en matière délictuelle. Dans cette affaire, les demandeurs étaient actionnaires d'une société, Hercules Managements Ltd. On reprochait aux vérificateurs de la société d'avoir omis de divulguer dans leur rapport annuel certains faits défavorables à la société. Celle-ci a fait faillite et les demandeurs ont subi une perte financière. Les actionnaires demandeurs ont poursuivi les vérificateurs. La première question était de savoir si l'action des demandeurs contre les vérificateurs pouvait être maintenue en droit. Même si elle avait été présentée comme une action pour déclaration inexacte faite par négligence, l'action des demandeurs a été traitée comme une affaire de perte économique relationnelle étant donné que les services avaient été rendus conformément à un contrat passé avec la société. La principale perdante était la société, qui avait conclu un contrat avec les vérificateurs. La perte des demandeurs dérivait de la perte de la société, elle avait un caractère relationnel. Les vérificateurs défendeurs ont prétendu n'avoir d'obligation qu'envers la société avec laquelle ils avaient passé le contrat. Ils ont plaidé qu'il n'exis-

per La Forest J., unanimously held that the shareholders had no cause of action against the auditors.

tait en matière délictuelle aucune obligation relationnelle envers des tiers dans les circonstances. Ils ont soutenu que confirmer l'existence d'une telle obligation irait à l'encontre des considérations de principe qui, par le passé, avaient amené les tribunaux à refuser l'indemnisation dans les cas de pertes économiques relationnelles. La Cour, dans des motifs exposés par le juge La Forest, a conclu à l'unanimité que les actionnaires n'avaient aucune cause d'action contre les vérificateurs.

52 La Forest J. set out the methodology that courts should follow in determining whether a tort action lies for relational economic loss. He held that the two-part methodology of *Anns*, *supra*, adopted by this Court in *Kamloops*, *supra*, should be followed: (1) whether a *prima facie* duty of care is owed; and (2) whether that duty, if it exists, is negated or limited by policy considerations. In applying the second step, La Forest J. wrote that while policy considerations will sometimes result in the *prima facie* duty being negated, in certain categories of cases such considerations may give way to other overriding policy considerations.

Le juge La Forest a énoncé la méthode que les tribunaux doivent suivre pour déterminer si une action en responsabilité délictuelle peut être intentée en cas de perte économique relationnelle. Il a statué que la méthode à deux volets proposée dans l'arrêt *Anns*, précité, et adoptée par notre Cour dans l'arrêt *Kamloops*, précité, devait être suivie: (1) Existe-t-il à une obligation de diligence *prima facie*? (2) Si oui, cette obligation est-elle annihilée ou limitée par des considérations de principe? En appliquant le second volet, le juge La Forest a écrit que, quoique des considérations de principe puissent parfois annihiler l'obligation *prima facie*, dans certains genres d'affaires il est possible que ces considérations cèdent le pas à d'autres considérations de principe impérieuses.

53 La Forest J. held that the existence of a relationship of "neighbourhood" or "proximity" distinguishes those circumstances in which the defendant owes a *prima facie* duty of care to the plaintiff from those where no such duty exists. The term "proximity" is a label expressing the fact of a relationship of neighbourhood sufficient to attract a *prima facie* legal duty. Whether the duty arises depends on the nature of the case and its facts. Policy concerns are best dealt with under the second branch of the test. Criteria that in other cases have been used to define the legal test for the duty of care can now be recognized as policy-based ways by which to curtail indeterminate or inappropriate recovery.

Le juge La Forest a conclu que l'existence d'un «lien étroit» permet de distinguer les cas où le défendeur a envers le demandeur une obligation de diligence *prima facie* de ceux où il n'existe aucune obligation de cette nature. L'expression «lien étroit» exprime le fait qu'il existe un rapport suffisamment étroit pour créer une obligation légale *prima facie*. L'existence de l'obligation dépend de la nature de l'affaire et des faits. Quant aux considérations de principe, il vaut mieux les examiner dans le cadre du deuxième volet du critère. Les critères qui ont servi dans d'autres affaires à définir le critère juridique permettant de déterminer s'il existe une obligation de diligence peuvent maintenant être reconnus comme un moyen — fondé sur des principes — de limiter les cas d'indemnisation inappropriée ou de responsabilité indéterminée.

54 Following this analysis, La Forest J. concluded that the first branch of the *Anns* test was satisfied and the defendant auditors owed a *prima facie* duty

Après cette analyse, le juge La Forest a conclu qu'on avait satisfait au premier volet du critère énoncé dans l'arrêt *Anns* et que les vérificateurs

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of care to the plaintiffs. First, the possibility that the plaintiffs would rely on the audited statements prepared for the company was reasonably foreseeable. Second, the relationship between the parties and nature of the statements themselves made the plaintiffs' reliance reasonable.

Policy considerations under the second branch of the test, however, negatived a duty of care. La Forest J. began by noting that while policy concerns surrounding indeterminate liability will serve to negate a *prima facie* duty of care in many auditors' negligence cases, there may be particular situations where such concerns do not inhere. The specific factual matrix of a given case may bring it within a category which, for policy reasons, is identified as an exception to the exclusionary rule; considerations of proximity may militate in favour of finding a *prima facie* duty of care at the first stage, and the policy considerations which usually negate it may be absent. In such cases, liability would appropriately lie. The main policy consideration at stake in *Hercules* was the spectre of indeterminate liability. Not everyone who picks up a financial statement and relies on it can sue for financial loss incurred as a result of reliance on the statement. Only persons that the makers of the statement can reasonably be expected to have foreseen relying on the statements can sue, and then only for uses that the auditors could reasonably have foreseen. The question thus became whether the plaintiffs had used the statements for the purpose for which they had been prepared. The Court held they had not. The statements had been prepared for the purpose of permitting the shareholders to collectively oversee the management of the company, not for the purpose of assisting individual shareholders in investment decisions. The policy considerations surrounding indeterminate liadéfendeurs avaient une obligation de diligence *prima facie* envers les demandeurs. Premièrement, il était raisonnablement prévisible que les demandeurs se fieraient aux états vérifiés préparés pour la société. Deuxièmement, vu le lien existant entre les parties et la nature des états vérifiés eux-mêmes, il était raisonnable que les demandeurs se fient à ces états.

55 Cependant, les considérations de principe examinées dans le cadre du deuxième volet du critère annihilaient l'obligation de diligence. Le juge La Forest a d'abord souligné que, même si dans beaucoup d'affaires de négligence visant des vérificateurs, des considérations de principe concernant la responsabilité indéterminée ont pour effet d'annihiler l'existence d'une obligation de diligence *prima facie*, il peut y avoir des cas particuliers où de telles considérations ne jouent pas. Il est possible que les faits particuliers d'une affaire la fassent entrer dans une catégorie qui, pour des raisons de principe, est considérée comme une exception à la règle d'exclusion; il se peut que des considérations touchant l'existence d'un lien étroit incitent à conclure, à la première étape, à l'existence d'une obligation de diligence *prima facie*, et que les considérations de principe qui écartent habituellement cette obligation soient absentes. Dans de tels cas, la responsabilité serait à juste titre retenue. La principale considération de principe en jeu dans l'arrêt *Hercules* était le spectre de la responsabilité indéterminée. Tous ceux qui consultent des états financiers et s'y fient ne peuvent intenter des poursuites pour les pertes financières qu'ils subissent parce qu'ils se sont fiés à ces états. Seules les personnes dont on peut raisonnablement s'attendre que les auteurs des états financiers avaient prévu qu'elles se fieraient aux états financiers peuvent poursuivre et seulement pour les fins que les vérificateurs avaient pu raisonnablement prévoir. La question qui se posait alors était de savoir si les demandeurs s'étaient servis des états financiers aux fins pour lesquelles ils avaient été préparés. La Cour a jugé que non. Les états financiers avaient été préparés afin de permettre aux actionnaires de surveiller collectivement la gestion de la société et non pas afin d'aider chaque actionnaire à prendre des décisions en matière de place-

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bility accordingly inhered, negating the *prima facie* duty of care.

56 The same approach may be applied to the contractual relational economic loss at stake in the case at bar. The first step is to inquire whether the relationship of neighbourhood or proximity necessary to found a *prima facie* duty of care is present. If so, one moves to the second step of inquiring whether the policy concerns that usually preclude recovery of contractual relational economic loss, such as indeterminacy, are overridden.

(2) Application of the Law

57 Before applying the law set out above to the facts of this case, a preliminary point arises: is the loss claimed by the plaintiffs contractual relational economic loss at all? The plaintiffs argue that the loss they claim against the defendants is really loss transferred from BVHB, the rig owner. The plaintiffs argue that they were in a "common venture" (as distinguished from a joint venture) with BVHB, which resulted in BVHB's losses being transferred to them. Therefore, they argue, they should be able to claim the losses as though they stand in the shoes of BVHB. BVHB could have claimed consequential losses for loss of use of the drilling rig; so then, on this theory, can HOOL and BVI.

58 This argument suffers from a number of difficulties. First, insofar as courts have recognized transferred loss, it has been confined to physical damage: *Norsk, supra*. Applied to relational economic loss, it would need to meet the criteria for recovery of that category of loss, and hence would seem not to advance the plaintiffs' case. Second, the plaintiffs claim not only for loss of use of the drilling

ments. Par conséquent, les considérations de principe concernant la responsabilité indéterminée entraient en jeu, annihilant l'obligation de diligence *prima facie*.

La même méthode peut être appliquée à la perte économique relationnelle découlant d'un contrat dont il est question dans la présente affaire. La première étape consiste à statuer sur la présence ou l'absence du lien étroit nécessaire pour conclure à l'existence d'une obligation de diligence *prima facie*. Dans l'affirmative, on passe alors à la seconde étape, qui consiste à se demander si les considérations de principe qui font habituellement obstacle à l'indemnisation en cas de perte économique relationnelle découlant d'un contrat, par ex. l'indétermination, sont supplantées.

(2) L'application du droit

Avant d'appliquer les règles de droit énoncées précédemment aux faits de l'espèce, il faut répondre à une question préliminaire: est-ce que la perte dont les demanderesses veulent être indemnisées est vraiment une perte économique relationnelle découlant d'un contrat? Les demanderesses soutiennent que la perte pour laquelle elles réclament une indemnité aux défenderesses est en fait une perte transférée de BVHB, le propriétaire de la plate-forme. Elles plaident qu'elles participaient à une «entreprise commune» (par opposition à une entreprise conjointe) avec BVHB, et que de ce fait les pertes de BVHB leur ont été transférées. En conséquence, affirment-elles, elles devraient pouvoir demander à être indemnisées des pertes comme si elles étaient BVHB. Celle-ci aurait pu demander à être dédommagée des pertes indirectes subies en raison de la perte de l'usage de la plate-forme de forage; par conséquent, selon cette théorie, HOOL et BVI le peuvent également.

Cet argument se heurte à un certain nombre de problèmes. Premièrement, dans la mesure où les tribunaux ont reconnu la notion de perte transférée, elle a été limitée au préjudice physique: *Norsk*, précité. Appliquée à la perte économique relationnelle, elle devrait satisfaire aux critères relatifs à l'indemnisation pour cette catégorie de perte et, par conséquent, elle ne semble d'aucun secours

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rig, but for losses related to unavoidable expenses they incurred for other supplies, including food, drilling mud and additional equipment. It is more difficult to see how these losses, based entirely on contracts between the plaintiffs and others, independent of BVHB, can be said to be transferred from BVHB. Third, there is nothing to show that the day rates paid by HOOL and BVI while the rig was idle are identical to what BVHB's consequential losses would have been. Finally, what does one do about the contributory negligence of BVHB? Given that BVHB is 60 percent at fault, under the transferred loss theory would the plaintiffs be able to recover only 40 percent of their claim? These difficulties suggest that the plaintiffs' loss is not the transferred loss of BVHB, the owner of the damaged rig. It is contractual relational economic loss, and should be treated as such.

aux demanderesses. Deuxièmement, ces dernières demandent non seulement à être indemnisées de la perte d'usage de la plate-forme de forage, mais également des pertes relatives aux dépenses inévitables qu'elles ont exposées pour d'autres approvisionnements, y compris la nourriture, la boue de forage et le matériel supplémentaire. Il est plus difficile de voir comment ces pertes, fondées entièrement sur des contrats passés entre les demanderesses et d'autres sociétés, indépendantes de BVHB, peuvent être considérées comme des pertes transférées de BVHB. Troisièmement, rien ne prouve que les taux journaliers payés par HOOL et BVI pendant que la plate-forme ne servait pas correspondent aux pertes indirectes qu'aurait essuyées BVHB. Enfin, que fait-on au sujet de la négligence contributive de BVHB? Étant donné que BVHB est fautive dans une proportion de 60 pour 100, est-ce que, selon la théorie de la perte transférée, les demanderesses ne peuvent être indemnisées que de 40 pour 100 seulement de leur réclamation? Ces problèmes tendent à indiquer que la perte des demanderesses n'est pas la perte transférée de BVHB, le propriétaire de la plate-forme endommagée, mais plutôt une perte économique relationnelle découlant d'un contrat, et elle devrait être traitée comme telle.

I return to the question of whether, on the approach articulated in *Hercules*, *supra*, the plaintiffs' claim for contractual relational economic loss is actionable. The Newfoundland Court of Appeal, without the benefit of *Hercules*, essentially followed the two-step process outlined in that case. It held that the defendants owed a *prima facie* duty of care to BVI and HOOL. The duty arose because BVI and HOOL's economic interests could foreseeably have been affected by a failure to warn BVHB of the danger of fire resulting from the use of products supplied by the defendants. The Court of Appeal went on to hold that there should be no recovery for other reasons. It held that it would be totally impractical to warn every person who could foreseeably suffer economic loss arising from the shutdown of the drilling rig. If there was a duty to warn BVI and HOOL, then there would also be a duty to warn other potential investors in the project, such as Mobil Oil Canada Ltd. and Petro

59

Je reviens à la question de savoir si, suivant l'approche énoncée dans l'arrêt *Hercules*, précité, la réclamation des demanderesses pour perte économique relationnelle découlant d'un contrat donne ouverture à action. La Cour d'appel de Terre-Neuve, avant le prononcé de l'arrêt *Hercules*, a suivi essentiellement la démarche en deux étapes exposée dans cette affaire. Elle a conclu que les défenderesses avaient une obligation de diligence *prima facie* envers BVI et HOOL. Cette obligation a pris naissance en raison du fait qu'il était possible de prévoir que les intérêts financiers de BVI et de HOOL puissent être affectés si BVHB n'était pas mise en garde contre le danger d'incendie découlant de l'utilisation des produits fournis par les défenderesses. La Cour d'appel a poursuivi en statuant qu'il ne devrait pas y avoir d'indemnisation pour d'autres motifs. Elle a jugé qu'il serait totalement impossible en pratique de mettre en garde toutes les personnes dont il était

Canada, as well as a host of other persons who stood to gain from the uninterrupted operation of the drilling rig, including employees and suppliers of the rig. In these circumstances, in the Court of Appeal's view, the only duty on the defendants was to warn the person in control and possession of the rig of the dangers of fire associated with the use of Thermaclad.

possible de prévoir qu'elles subiraient des pertes financières en raison de l'arrêt des activités de la plate-forme de forage. S'il y avait obligation de mettre en garde BVI et HOOL, cette obligation existerait également envers les autres parties ayant investi dans le projet, comme Mobil Oil Canada Ltd. et Petro-Canada, ainsi qu'une foule d'autres personnes qui avaient intérêt à ce que les activités de la plate-forme de forage se poursuivent sans interruption, y compris les employés et les fournisseurs de la plate-forme. Dans ces circonstances, la Cour d'appel a jugé que la seule obligation qui incombait aux défenderesses était de mettre en garde la personne ayant la possession et la responsabilité de la plate-forme contre les dangers d'incendie liés à l'utilisation du Thermaclad.

60 As in *Hercules*, the decision as to whether a *prima facie* duty of care exists requires an investigation into whether the defendant and the plaintiff can be said to be in a relationship of proximity or neighbourhood. Proximity exists on a given set of facts if the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs: *Hercules*, at para. 28. On the facts of this case, I agree with the Court of Appeal that a *prima facie* duty of care arises. Indeed, the duty to warn raised against the defendants is the correlative of the duty to disclose financial facts raised against the auditors in *Hercules*.

Comme dans *Hercules*, pour décider s'il y a obligation de diligence *prima facie*, il faut se demander s'il existe un lien étroit entre le défendeur et le demandeur. Un tel lien existe si, compte tenu d'un ensemble de faits donné, il est possible d'affirmer que le défendeur est tenu de se soucier des intérêts légitimes du demandeur dans le cours de ses propres affaires: *Hercules*, au par. 28. Je suis d'accord avec la Cour d'appel pour dire que, d'après les faits de l'espèce, une obligation de diligence *prima facie* a pris naissance. De fait, l'obligation de mise en garde invoquée contre les défenderesses correspond à l'obligation de divulguer la situation financière qui a été plaidée contre les vérificateurs dans l'affaire *Hercules*.

61 Where a duty to warn is alleged, the issue is not reliance (there being nothing to rely upon), but whether the defendants ought reasonably to have foreseen that the plaintiffs might suffer loss as a result of use of the product about which the warning should have been made. I have already found that the duty to warn extended to BVHB. The question is, however, whether it extended as far as HOOL and BVI. The facts establish that this was the case. The defendants knew of the existence of the plaintiffs and others like them and knew or

Si on plaide l'existence d'une obligation de mise en garde, ce n'est pas la confiance qui est en jeu (il n'y a rien sur quoi s'appuyer), c'est la question de savoir si les défenderesses auraient dû raisonnablement prévoir que les demanderesses pouvaient subir une perte à la suite de l'utilisation du produit au sujet duquel il aurait fallu faire la mise en garde. J'ai déjà conclu que l'obligation de mise en garde s'étendait à BVHB. Il s'agit toutefois de se demander si elle s'étendait aussi à HOOL et BVI. Les faits établissent que tel était le cas. Les défenderesses connaissaient l'existence des demanderesses et d'autres personnes comme elles, et elles savaient ou auraient dû savoir que ces dernières

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ought to have known that they stood to lose money if the drilling rig was shut down.

The next question is whether this *prima facie* duty of care is negatived by policy considerations. In my view, it is. The most serious problem is that seized on by the Court of Appeal — the problem of indeterminate liability. If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged. Other investors in the project are the most obvious persons who would also be owed a duty, although the list could arguably be extended to additional classes of persons. What has been referred to as the ripple effect is present in this case. A number of investment companies which contracted with HOOL are making claims against it, as has BVI.

No sound reason to permit the plaintiffs to recover while denying recovery to these other persons emerges. To hold otherwise would pose problems for defendants, who would face liability in an indeterminate amount for an indeterminate time to an indeterminate class. It also would pose problems for potential plaintiffs. Which of all the potential plaintiffs can expect and anticipate they will succeed? Why should one type of contractual relationship, that of HOOL, be treated as more worthy than another, e.g., that of the employees on the rig? In this state, what contractual and insurance arrangements should potential plaintiffs make against future loss?

The plaintiffs propose a number of solutions to the problem of indeterminacy. None of them succeeds, in my respectful view. The first proposal is to confine liability to persons whose identity was known to the defendants. This is a reversion to the

risquaient de perdre de l'argent si la plate-forme de forage cessait de fonctionner.

62 La question suivante est de savoir si cette obligation de diligence *prima facie* est annihilée par des considérations de principe. Je suis d'avis que oui. Le problème le plus sérieux est celui qui a retenu l'attention de la Cour d'appel — le problème de la responsabilité indéterminée. Si les défenderesses avaient l'obligation de mettre en garde les demanderesses, il est difficile de voir pourquoi elles n'auraient pas la même obligation envers une foule d'autres personnes dont les pertes étaient prévisibles si la plate-forme cessait ses activités en raison des dommages subis. Les autres personnes ayant investi dans le projet seraient, à l'évidence, également créancières d'une telle obligation, même si, on pourrait le soutenir, la liste pourrait inclure d'autres catégories de personnes. On retrouve, en l'espèce, ce qu'on a appelé l'effet d'enchaînement car un certain nombre de sociétés de placement, qui ont passé des contrats avec HOOL, ont exercé des réclamations contre cette dernière, comme l'a fait BVI.

63 Il n'y a aucune raison valable de permettre l'indemnisation des demanderesses et de refuser de l'accorder aux autres. Conclure autrement créerait des problèmes pour les défenderesses, qui feraient face à une responsabilité pour un montant indéterminé, pendant un temps indéterminé à l'égard d'une catégorie indéterminée. Cela créerait également des problèmes aux demandeurs potentiels. Lesquels parmi tous ces demandeurs potentiels pourraient s'attendre à obtenir gain de cause? Pourquoi un certain type de lien contractuel, en l'occurrence celui de HOOL, serait-il considéré plus valable qu'un autre, par ex. celui des employés travaillant sur la plate-forme? Dans cette situation, quels arrangements les demandeurs potentiels devraient-ils prendre en matière de contrats et d'assurances pour se protéger contre des pertes futures?

64 Les demanderesses proposent un certain nombre de solutions au problème de l'indétermination. À mon humble avis, toutefois, aucune n'est efficace. La première proposition vise à limiter la responsabilité aux personnes dont l'identité était connue

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"known plaintiff" test, rejected by a majority of this Court in *Norsk, supra*. As commentators have pointed out, the fact that the defendant knew the identity of the plaintiff should not in logic or justice determine recovery. On such a test, the notorious would recover, the private would lose: *Norsk*. The problem of indeterminate liability cannot be avoided by arbitrary distinctions for which there is no legal or social justification: *Norsk*, at p. 1112. There must be something which, for policy reasons, permits the court to say this category of person can recover and that category cannot, something which justifies the line being drawn at one point rather than another.

des défenderesses. C'est un retour au critère du «demandeur connu», qui a été rejeté par notre Cour à la majorité dans *Norsk*, précité. Comme l'ont indiqué les commentateurs, le fait que le défendeur connaisse le demandeur ne devrait pas, en toute logique ni en toute justice, déterminer l'indemnisation. Selon un tel critère, le demandeur très connu serait dédommagé tandis que le demandeur anonyme subirait une perte: *Norsk*. Le problème de la responsabilité indéterminée ne peut pas être évité par des distinctions arbitraires pour lesquelles il n'existe aucune justification juridique ou sociale: *Norsk*, à la p. 1112. Quelque chose doit permettre au tribunal de conclure pour des raisons de principe que telle catégorie de personnes peut être indemnisée et que telle autre ne peut l'être: quelque chose doit justifier de tracer la ligne de démarcation à un endroit plutôt qu'à un autre.

65 Second, and in a similar vein, the plaintiffs argue that determinacy can be achieved by restricting recovery to the users of the rig, a class which they say is analogous in time and extent to the owners and occupiers of the building in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85. This argument fails for the same reasons as the known plaintiff test. There is no logical reason for drawing the line at users rather than somewhere else.

Deuxièmement, dans la même veine, les demanderesses soutiennent qu'on peut mettre fin à l'indétermination en limitant l'indemnisation aux utilisateurs de la plate-forme qui forment une catégorie analogue pour ce qui est de la durée et de l'étendue à celle des propriétaires et des occupants de l'édifice dans l'arrêt *Winnipeg Condominium Corporation No. 36 c. Bird Construction Co.*, [1995] 1 R.C.S. 85. Cet argument doit être rejeté pour les mêmes raisons que le critère du demandeur connu. Il n'y a aucune raison logique de tracer une ligne de démarcation entre les utilisateurs et les autres.

66 Third, the plaintiffs attempt to distinguish themselves from other potential claimants through the concept of reliance. The defendants correctly answer this argument by pointing out that any person who is contractually dependent on a product or a structure owned by another "relies" on the manufacturer or builder to supply a safe product.

Troisièmement, les demanderesses tentent d'établir une distinction entre elles-mêmes et les autres réclamants potentiels en invoquant la notion de confiance. Les défenderesses répondent correctement à cet argument en soulignant que toute personne qui, en vertu d'un contrat, est tributaire d'un produit ou d'une construction appartenant à autrui «compte» sur le fabricant ou le constructeur pour fournir un produit sûr.

67 Finally, the plaintiffs argue that a finding of a duty to warn negates the spectre of indeterminate liability as the duty to warn does not extend to everyone in any way connected to the manufactured product. This argument begs the question. The duty to warn found to this point is only a *prima facie* duty to warn in accordance with the first

Enfin, les demanderesses font valoir que le fait de conclure à l'existence d'une obligation de mise en garde annihile le spectre de la responsabilité indéterminée, car l'obligation de mise en garde ne s'étend pas à quiconque est relié d'une façon ou d'une autre au produit fabriqué. Cet argument présume la question résolue. L'obligation de mise en

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requirement of *Anns*, *supra*, that there be sufficient proximity or neighbourhood to found a duty of care. It is not circumscribed and imports no limits on liability. Considerations of indeterminate liability arise in the second step of the *Anns* analysis. Hence the *prima facie* duty of care, by itself, cannot resolve the problem of indeterminate liability.

garde constatée ici est seulement une obligation de mise en garde *prima facie*, conformément à la première condition énoncée dans l'arrêt *Anns*, précité, voulant qu'il y ait un lien suffisamment étroit pour servir de fondement à une obligation de diligence. Cette obligation n'est pas restreinte et elle n'impose aucune limite à la responsabilité. Les considérations touchant la responsabilité indéterminée sont prises en compte dans la deuxième étape de l'analyse fondée sur l'arrêt *Anns*. En conséquence, l'obligation de diligence *prima facie* ne permet pas, à elle seule, de résoudre le problème de la responsabilité indéterminée.

The problem of indeterminate liability constitutes a policy consideration tending to negative a duty of care for contractual relational economic loss. However, the courts have recognized positive policy considerations tending to support the imposition of such a duty of care. One of these, discussed by La Forest J. in *Norsk*, is the need to provide additional deterrence against negligence. The potential liability to the owner of the damaged property usually satisfies the goal of encouraging persons to exercise due care not to damage the property. However, situations may arise where this is not the case. In such a case, the additional deterrent of liability to others might be justified. The facts in the case at bar do not support liability to the plaintiffs on this basis. BVHB, the owner of the drilling rig, suffered property damage in excess of five million dollars. This is a significant sum. It is not apparent that increasing the defendants' potential liability would have led to different behaviour and avoidance of the loss.

68 Ce problème constitue une considération de principe qui tend à écarter l'obligation de diligence en cas de perte économique relationnelle découlant d'un contrat. Cependant, les tribunaux ont reconnu l'existence de considérations de principe positives qui tendent à appuyer l'imposition d'une telle obligation de diligence. Une de ces considérations, qui a été examinée par le juge La Forest dans l'arrêt *Norsk*, est la nécessité de fournir un moyen de dissuasion supplémentaire contre la négligence. La responsabilité potentielle envers le propriétaire du bien endommagé suffit habituellement pour inciter les personnes visées à exercer la diligence requise afin de ne pas endommager le bien. Toutefois, il peut se présenter des situations où cela n'est pas suffisant. Dans un tel cas, le moyen de dissuasion supplémentaire que serait l'extension de la responsabilité au profit d'autres personnes pourrait se justifier. Cependant, les faits de l'espèce ne justifient pas d'étendre la responsabilité en faveur des demanderesses sur ce fondement. BVHB, le propriétaire de la plate-forme de forage, a subi des dommages matériels de plus de cinq millions de dollars. Il s'agit d'une somme importante. Il n'est pas évident que le fait d'accroître la responsabilité potentielle des défenderesses aurait amené un comportement différent et permis d'éviter la perte.

Another situation which may support imposition of liability for contractual relational economic loss, recognized by La Forest J. in *Norsk*, is the case where the plaintiff's ability to allocate the risk to the property owner by contract is slight, either because of the type of the transaction or inequality

69 Une autre situation dans laquelle on peut admettre l'imposition de la responsabilité en cas de perte économique relationnelle découlant d'un contrat, et qui a été acceptée par le juge La Forest dans l'arrêt *Norsk*, est le cas où la capacité du demandeur de faire assumer le risque par le propriétaire

of bargaining power. Again, this does not assist the plaintiffs in this case. BVI and HOOL not only had the ability to allocate their risks; they did just that. It cannot be said that BVI and HOOL suffered from inequality of bargaining power with BVHB, the very company they created. Moreover, the record shows they exercised that power. The risk of loss caused by down-time of the rig was specifically allocated under the Drilling Contracts between BVI, HOOL and BVHB. The contracts provided for day rate payments to BVHB and/or termination rights in the event of lost or diminished use of the rig. The parties also set out in the contracts their liability to each other and made provision for third party claims arising out of rig operations. Finally, the contracts contained provisions related to the purchase and maintenance of insurance.

du bien dans un contrat est faible, en raison soit du genre d'opération, soit de l'inégalité du pouvoir de négociation. Encore une fois, cela n'est d'aucun secours aux demanderesses en l'espèce. En effet, non seulement BVI et HOOL avaient-elles la capacité de répartir leurs risques, mais c'est exactement ce qu'elles ont fait. Il est impossible d'affirmer que BVI et HOOL ont souffert d'une inégalité du pouvoir de négociation à l'égard de BVHB, la société même qu'elles ont créée. De plus, il ressort du dossier qu'elles ont exercé ce pouvoir. Le risque de pertes causées par le temps d'inactivité de la plate-forme a été expressément réparti dans les contrats de forage intervenus entre BVI, HOOL et BVHB. Ces contrats prévoyaient qu'en cas de perte d'utilisation ou d'utilisation réduite de la plate-forme, il y aurait soit paiement d'un taux journalier à BVHB, soit droit de résiliation ou les deux. Les parties ont également précisé dans les contrats leur responsabilité mutuelle et elles ont pris des mesures au sujet des réclamations des tiers qui pouvaient découler des opérations de forage. En dernier lieu, les contrats comportaient des clauses relatives à la souscription et au maintien d'assurances.

70 I conclude that the policy considerations relevant to the case at bar negative the *prima facie* duty of care to BVI and HOOL.

Je conclus que les considérations de principe concernant le présent litige annihilent l'obligation de diligence *prima facie* envers BVI et HOOL.

G. *Was BVHB Contributorily Negligent*?

G. *Y a-t-il eu négligence contributive de BVHB*?

71 The Court of Appeal upheld the trial judge's finding that BVHB was contributorily negligent in failing to have an operable GFCB system, that this negligence was the immediate cause of the fire, and that the fire was a reasonably foreseeable consequence of BVHB's negligence. BVHB contends that the entire responsibility for the fire and consequential loss is attributable to the defendants' breach of their duty to warn of the dangers of using Thermaclad on the rig.

La Cour d'appel a confirmé la conclusion du juge de première instance selon laquelle il y a eu négligence contributive de BVHB qui n'a pas installé de système DFT efficace, que cette négligence a été la cause immédiate de l'incendie et que cet incendie était une conséquence raisonnablement prévisible de la négligence de BVHB. BVHB prétend que les défenderesses sont entièrement responsables de l'incendie et de la perte indirecte parce qu'elles ont manqué à leur obligation de mise en garde relativement aux dangers que présentait l'utilisation du Thermaclad sur la plate-forme.

72 BVHB argues that generally courts decline to ascribe contributory negligence in duty to warn cases for policy reasons related to assumption of

BVHB prétend que, pour des raisons de principe liées à l'acceptation des risques, les tribunaux refusent habituellement de conclure à la négligence

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risk. BVHB urges that in failure to warn cases, a finding of contributory negligence cannot be made unless the defendant shows that the plaintiff voluntarily assumed the risk of injury. This, it says, is not such a case.

contributive dans les affaires d'obligation de mise en garde. BVHB soutient avec insistance que, dans les affaires où il y a violation de l'obligation de mise en garde, les tribunaux ne peuvent conclure à l'existence de négligence contributive que si le défendeur prouve que le demandeur a accepté volontairement le risque de préjudice. Elle affirme que ce n'est pas le cas en l'espèce.

I cannot accept this argument. A finding of contributory negligence is not the same as a finding that the injured party voluntarily accepted the risk of injury. The latter is a complete defence (in the limited circumstances in which it applies), whereas the result of the former is that the injured party generally recovers less than full compensation for its injuries. As Viscount Simon said in *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.), at p. 611:

73 Je ne puis accepter cet argument. Conclure à la négligence contributive n'équivaut pas à conclure que la partie lésée a accepté volontairement le risque de préjudice. Dans ce dernier cas, il s'agit d'un moyen de défense complet (dans les circonstances limitées où il s'applique), tandis que, dans le premier, la partie lésée n'est généralement pas indemnisée complètement de son préjudice. Comme l'a déclaré le vicomte Simon dans l'arrêt *Nance c. British Columbia Electric Railway Co.*, [1951] A.C. 601 (P.C.), à la p. 611:

But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

[TRADUCTION] Mais lorsque la négligence contributive est invoquée comme moyen de défense, son existence ne dépend d'aucune obligation que la partie lésée a envers la partie poursuivie, et tout ce qu'il faut pour établir le bien-fondé d'un tel moyen de défense, c'est de convaincre le jury que la partie lésée n'a pas, dans son propre intérêt, fait montre de diligence raisonnable envers elle-même et a contribué, par son absence de diligence, au préjudice qu'elle a subi. Car, lorsque la négligence contributive est invoquée pour combattre l'obligation d'indemniser complètement le demandeur de sa réclamation, le principe en cause est que, quand une personne est en partie responsable du préjudice qu'elle a subi, elle ne peut pas demander à l'autre partie de l'indemniser complètement de celui-ci.

BVHB next submits that the burden on the tortfeasor of proving contributory negligence in duty to warn cases should be more onerous because the injured party lacks the knowledge necessary to make an informed assessment of the risks of using the product. Here, BVHB's failure to use the GFCB system is a foreseeable consequence of the failure to warn of the fire propagation propensity of Thermaclad. In the absence of a warning of the dangers of using Thermaclad on the rig, BVHB viewed the GFCB system only as a protective measure against gas explosions. BVHB contends that had it been warned of the dangers posed by the use

74 BVHB soutient ensuite que, dans les affaires d'obligation de mise en garde, il devrait être plus difficile pour l'auteur du délit de se décharger du fardeau de prouver l'existence de la négligence contributive parce que la partie lésée n'a pas la connaissance nécessaire pour évaluer de façon éclairée les risques que présente l'utilisation du produit. En l'espèce, le défaut de BVHB d'utiliser le système DFT est une conséquence prévisible de la violation de l'obligation de mise en garde au sujet de l'inflammabilité du Thermaclad. En l'absence de mise en garde relativement aux dangers que présentait l'utilisation du Thermaclad sur la

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of Thermaclad in this marine installation, it would never have permitted the rig to operate in the absence of an effective grounding system. For these reasons, BVHB submits that the defendants bear total responsibility for the fire and its consequences.

plate-forme, BVHB a considéré le système DFT seulement comme une mesure de protection contre les explosions dues au gaz. BVHB prétend que, si elle avait été prévenue des dangers que présentait l'utilisation du Thermaclad dans son installation en mer, elle n'aurait jamais permis l'exploitation de la plate-forme en l'absence d'un système efficace de fuite à la terre. Pour ces raisons, BVHB affirme que les défenderesses doivent assumer l'entière responsabilité de l'incendie et de ses conséquences.

75 The defendants respond that the burden of showing contributory negligence is the same in duty to warn cases as in other cases. The evidence, they submit, establishes contributory negligence. The damage sustained by BVHB was a foreseeable result of BVHB's negligent failure to operate with a functioning GFCB system. BVHB did not need to foresee the specific role that Thermaclad would play in a fire. It is enough that BVHB foresaw the possibility of a gas explosion.

Les défenderesses répondent que le fardeau de la preuve en ce qui concerne la négligence contributive est le même dans les affaires où il y a obligation de mise en garde que dans les autres affaires. Elles prétendent que la preuve établit la négligence contributive. Les dommages subis par BVHB étaient une conséquence prévisible du défaut négligent de BVHB d'utiliser un système DFT efficace. BVHB n'avait pas besoin de prévoir le rôle précis que le Thermaclad jouerait dans un incendie. Il est suffisant que BVHB ait prévu la possibilité d'une explosion due au gaz.

76 I accept the defendants' submissions. The test for contributory negligence was summarized by Denning L.J. in *Jones v. Livox Quarries Ld.*, [1952] 2 Q.B. 608 (C.A.), at p. 615:

> Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

J'accepte les arguments des défenderesses. Le critère applicable en matière de négligence contributive a été résumé par lord Denning dans l'arrêt *Jones c. Livox Quarries Ld.*, [1952] 2 Q.B. 608 (C.A.), à la p. 615:

> [TRADUCTION] Bien que la négligence contributive ne dépende pas d'une obligation de diligence, elle dépend bel et bien de la prévisibilité. Tout comme la négligence donnant ouverture à une poursuite exige la prévisibilité d'un préjudice à autrui, la négligence contributive exige la prévisibilité d'un préjudice à soi-même. Une personne est coupable de négligence contributive si elle aurait dû raisonnablement prévoir que, si elle n'agissait pas de façon raisonnable et prudente, elle pourrait se causer préjudice; et dans ses estimations, elle doit prendre en considération la possibilité que d'autres personnes manquent de diligence.

The trial judge found that the fire started because the rig was being operated without a GFCB system. The fire would not have occurred "but for" the negligence of BVHB: *Snell v. Farrell*, [1990] 2 S.C.R. 311. The conduct of BVHB viewed independently was negligent. The fire was a foresee-

Le juge de première instance a conclu que l'incendie s'était déclaré parce que la plate-forme était exploitée sans système DFT. L'incendie ne se serait pas produit [TRADUCTION] «n'eût été» la négligence de BVHB: *Snell c. Farrell*, [1990] 2 R.C.S. 311. Examinée isolément, la conduite de

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able result of BVHB's failure to operate with a functioning GFCB system. It was not necessary for BVHB to foresee the precise type of damage or sequence of events that would result from its negligence: *Hughes v. Lord Advocate*, [1963] A.C. 837 (H.L.), and *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] 1 A.C. 617 (P.C.) (*Wagon Mound No. 2*). The fact that it was aware of the risk of explosion was enough. It follows that the negligence of BVHB was a proximate cause of the fire.

BVHB a été négligente. L'incendie qui s'est produit était une conséquence prévisible du fait que BVHB n'a pas utilisé un système DFT efficace. Il n'était pas nécessaire que BVHB prévoie de façon précise les dommages ou la suite d'événements qui résulteraient de sa négligence: *Hughes c. Lord Advocate*, [1963] A.C. 837 (H.L.) et *Overseas Tankship (U.K.) Ltd. c. Miller Steamship Co. Pty.*, [1967] 1 A.C. 617 (P.C.) (*Wagon Mound No. 2*). Le fait qu'elle connaissait le risque d'explosion était suffisant. Il s'ensuit que la négligence de BVHB a constitué une cause immédiate de l'incendie.

BVHB also argues that there should be a distinction between responsibility for "fire initiation" damages and "fire propagation" damages. The trial judge did not determine the precise role played by Thermaclad in the damage, particularly with respect to the damage to the cables. Although he found that the fire was initially spread from the Thermaclad to the cables, he also found that once the cables caught fire they fuelled themselves and caused additional Thermaclad to catch fire. These findings preclude distinguishing between the damage caused by initiation and propagation in this case.

77 BVHB soutient également qu'il faut faire une distinction entre la responsabilité pour les dommages résultant du «déclenchement de l'incendie» et la responsabilité pour les dommages résultant de la «propagation de l'incendie». Le juge de première instance n'a pas déterminé le rôle précis du Thermaclad dans les dommages, notamment en ce qui concerne les dommages aux câbles. Même s'il a conclu que l'incendie s'est propagé initialement du Thermaclad aux câbles, il a également conclu qu'une fois les câbles enflammés, ceux-ci ont suffi à alimenter l'incendie et ont même amené une autre partie du Thermaclad à prendre feu. Ces conclusions empêchent de distinguer entre les dommages causés par le déclenchement de l'incendie et ceux causés par la propagation de l'incendie en l'espèce.

I agree with the courts below that BVHB was contributorily negligent. The remaining question is the extent of BVHB's responsibility. Apportionment of liability is primarily a matter within the province of the trial judge, and appellate courts should not interfere with the trial judge's apportionment unless there is demonstrable error in the trial judge's appreciation of the facts or applicable legal principles: *Sparks v. Thompson*, [1975] 1 S.C.R. 618; see also the judgment of Dickson J. (as he then was) in *Taylor v. Asody*, [1975] 2 S.C.R. 414 (dissenting in result).

78 Je suis d'accord avec les juridictions inférieures pour conclure à la négligence contributive de BVHB. La question qui reste est celle de l'étendue de la responsabilité de BVHB. La répartition de la responsabilité est une question qui relève au premier chef du juge de première instance, et les tribunaux d'appel ne devraient pas modifier la répartition faite par ce dernier sauf s'il a commis une erreur démontrable dans l'appréciation des faits ou des principes juridiques applicables: *Sparks c. Thompson*, [1975] 1 R.C.S. 618; voir également les motifs du juge Dickson (plus tard juge en chef) dans l'arrêt *Taylor c. Asody*, [1975] 2 R.C.S. 414 (dissidents quant au résultat).

BVHB submits that the Court of Appeal should have reassessed the apportionment of responsibil-

79 BVHB prétend que la Cour d'appel aurait dû réexaminer la répartition de la responsabilité étant

ity because it reversed the trial judge's finding that it was negligent in allowing the cables to accumulate residue. The trial judge apportioned the majority of the fault to BVHB on the ground that BVHB's negligence in continuing to operate the heat trace system, even when unnecessary, outweighed the defendants' negligence. The accumulation of residue on the cables was not determinative. It follows that reversal on that issue does not invalidate the trial judge's conclusion that the plaintiff should bear the greatest portion of responsibility for the loss.

donné qu'elle a infirmé la conclusion du juge de première instance selon laquelle BVHB avait été négligente en permettant l'accumulation de résidus d'huile sur les câbles. Le juge de première instance a attribué la plus grande partie de la faute à BVHB pour le motif que la négligence dont celle-ci a fait montre en continuant de faire fonctionner le système de réchauffage des conduites, même lorsque ce n'était pas nécessaire, l'emportait sur la négligence des défenderesses. L'accumulation de résidus sur les câbles n'a pas été déterminante. Il s'ensuit que l'annulation du jugement sur ce point n'invalide pas la conclusion du juge de première instance que la demanderesse devrait assumer la plus grande partie de la responsabilité de la perte.

80 More generally, the trial judge made no error of fact or law in apportioning liability for the loss. There was ample evidence to support his finding that BVHB's negligence outweighed that of the defendants. Although it may not have been aware of the detailed characteristics of Thermaclad, BVHB was aware that it could burn. It was aware of the risk of arcing as there had been previous arcing incidents, and it was aware of the risk of explosion from arcing. Nor did the trial judge misapprehend the applicable legal principles. I would not disturb the trial judge's finding that the liability should be apportioned 60 percent to BVHB and 40 percent to the defendants Raychem and SJSL.

De façon plus générale, le juge de première instance n'a pas commis d'erreur de fait ni de droit en répartissant la responsabilité de la perte. Il y avait amplement d'éléments de preuve étayant sa conclusion que la négligence de BVHB l'emportait sur celle des défenderesses. Même si BVHB ne connaissait peut-être pas le détail des caractéristiques du Thermaclad, elle savait qu'il pouvait brûler. Elle était au courant du risque de formation d'arcs électriques, car il y en avait déjà eus, et elle était au courant du risque d'explosion due à des arcs électriques. De plus, le juge de première instance n'a pas mal compris les principes juridiques applicables. Je suis d'avis de ne pas modifier sa conclusion que la responsabilité devrait être attribuée dans une proportion de 60 pour 100 à BVHB et dans une proportion de 40 pour 100 aux défenderesses Raychem et SJSL.

H. *Does BVHB's Contributory Negligence Bar Its Claims*?

H. *La négligence contributive de BVHB constitue-t-elle une fin de non-recevoir à ses réclamations*?

81 The defendants assert that the plaintiffs' claims are barred because at common law, contributory negligence is a bar to recovery. The plaintiffs respond that their contributory negligence is not a bar because: (a) the law of the vessel's flag, Bermuda, applies; (b) alternatively, the Newfoundland *Contributory Negligence Act* applies; (c) in the further alternative, the common law applicable in maritime cases does not make contributory negligence a bar. I accept the plaintiffs' contention on

Les défenderesses prétendent que les réclamations des demanderesses sont irrecevables parce que, en common law, la négligence contributive constitue une fin de non-recevoir à l'indemnisation. Les demanderesses répliquent que leur négligence contributive ne constitue pas une fin de non-recevoir pour les raisons suivantes: a) le droit applicable est celui du pays dont le bâtiment bat pavillon, en l'occurrence les Bermudes; b) subsidiairement, c'est la *Contributory Negligence Act*

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the last ground and conclude that BVHB's right to recover is not barred by its contributory negligence.

de Terre-Neuve qui s'applique; c) subsidiairement encore, la common law applicable aux affaires maritimes ne fait pas de la négligence contributive une fin de non-recevoir. J'accepte la prétention des demanderesses pour le dernier motif invoqué, et je conclus que la négligence contributive de BVHB ne fait pas obstacle à l'exercice de son droit d'être indemnisée.

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The first question is whether the law of the vessel applies. The plaintiffs argue that the fire occurred on the high seas, making applicable the law of the flag of the vessel, Bermuda. They then assert that since Bermuda law was not proven, the law of Newfoundland should be applied. This argument rests on a series of tenuous propositions, the first of which is that the fire occurred on the high seas. It must fail, if only because the fact was not proved.

82 La première question est de savoir si le droit du pays dont le navire bat pavillon s'applique. Les demanderesses soutiennent que comme l'incendie est survenu en haute mer, c'est en l'occurrence le droit des Bermudes qui s'applique. Elles poursuivent en affirmant que, puisque le droit des Bermudes n'a pas été prouvé, c'est celui de Terre-Neuve qui devrait être appliqué. Cette thèse s'appuie sur une série d'arguments plutôt faibles, le premier étant que l'incendie est survenu en haute mer. Cette thèse ne saurait être retenue, ne serait-ce que parce que ce fait n'a pas été prouvé.

Alternatively, the plaintiffs submit that the law of Newfoundland should be applied. The defendants reply that this is a maritime matter and that the applicable law is maritime law, not the law of Newfoundland. This raises the question of which law applies — Newfoundland law or federal maritime law?

83 Subsidiairement, les demanderesses avancent que le droit de Terre-Neuve devrait s'appliquer. Les défenderesses répondent qu'il s'agit d'une affaire maritime et que le droit applicable est le droit maritime et non le droit de Terre-Neuve. Cela soulève la question de savoir quel droit s'applique — le droit de Terre-Neuve ou le droit maritime fédéral?

The plaintiffs submit that maritime law should not apply because the Thermaclad had no relationship to the rig's navigational equipment and because the claims are advanced in tort and contract, rather than navigation and shipping. However, the legal nature of a claim is not the decisive factor in the determination of whether the principles of maritime law apply. What is required is "that the subject-matter under consideration in any case [be] so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence": *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 774, *per* McIntyre J. It follows that "tortious liability which arises in a maritime context is governed by a body of maritime law within the exclusive legislative

84 Les demanderesses prétendent que le droit maritime ne devrait pas s'appliquer parce que le Thermaclad n'a aucun rapport avec le matériel de navigation de la plate-forme et parce que les réclamations sont fondées sur la responsabilité délictuelle et contractuelle et ne concernent pas la navigation et ni les expéditions par eau. Cependant, la nature juridique d'une réclamation n'est pas le facteur décisif pour déterminer si les principes du droit maritime s'appliquent. Il faut «que la question examinée dans chaque cas [soit] entièrement liée aux affaires maritimes au point de constituer légitimement du droit maritime canadien qui relève de la compétence législative fédérale»: *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752, à la p. 774, le juge McIntyre. Il s'ensuit que «la respon-

jurisdiction of Parliament": *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1289, *per* La Forest J.

85 This case involves tortious liability arising in a maritime context. The Court of Appeal, *per* Cameron J.A., held that "[t]he activities of the Bow Drill 3 are essentially maritime in nature, albeit a modern view of maritime activity" (p. 134). The rig was not only a drifting platform, but a navigable vessel. As Cameron J.A. put it at pp. 133-34, the rig "is capable of self-propulsion; even when drilling, is vulnerable to the perils of the sea; is not attached permanently to the ocean floor and, can travel world wide to drill for oil". Alternatively, even if the rig is not a navigable vessel, the tort claim arising from the fire would still be a maritime matter since the main purpose of the Bow Drill III was activity in navigable waters. The operation of the rig's heat trace system was hazardous because the GFCB system that was installed was not appropriate in the ungrounded marine context. The claims against the defendants for failure to warn included allegations that the defendants knew about the special marine material requirements such as non-combustibility or flame retardancy. The products liability issues in this case are clearly dominated by marine considerations.

86 This is not a case that "is in 'pith and substance' a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867*": *ITO, supra*, at p. 774, *per* McIntyre J. I conclude that the issues

sabilité délictuelle dont il est question dans un contexte maritime est régie par un ensemble de règles de droit maritime relevant de la compétence exclusive du Parlement»: *Whitbread c. Walley*, [1990] 3 R.C.S. 1273, à la p. 1289, le juge La Forest.

Il s'agit en l'espèce de responsabilité délictuelle dans un contexte maritime. La Cour d'appel, sous la plume du juge Cameron, a statué que [TRADUCTION] «[l]es activités de la plate-forme Bow Drill 3 sont essentiellement de nature maritime, quoiqu'il s'agisse d'une activité maritime d'un type moderne» (p. 134). La plate-forme n'était pas seulement une plate-forme flottante, mais un bâtiment navigable. Comme l'a dit le juge Cameron, aux pp. 133 et 134, la plate-forme [TRADUCTION] «peut se propulser par ses propres moyens; même lorsqu'elle fait du forage, elle est vulnérable aux dangers de la mer; elle n'est pas attachée en permanence au fond de l'océan et elle peut voyager à travers le monde afin de forer à la recherche du pétrole». Subsidiairement, même si la plate-forme n'est pas un bâtiment navigable, la réclamation fondée sur la responsabilité délictuelle qui a été exercée à la suite de l'incendie n'en serait pas moins une question maritime puisque l'objet principal de la plate-forme Bow Drill III était une activité se déroulant dans des eaux navigables. Le fonctionnement du système de réchauffage des conduites de la plate-forme était dangereux parce que le système DFT qui avait été installé ne convenait pas dans un contexte maritime sans mise à la terre. Les réclamations exercées contre les défenderesses pour défaut de mise en garde comportaient des allégations selon lesquelles les défenderesses connaissaient les exigences spéciales concernant le matériel maritime comme l'incombustibilité ou l'ininflammabilité. Dans la présente affaire, les questions relatives à la responsabilité du fait des produits sont clairement dominées par des considérations d'ordre maritime.

Il ne s'agit pas d'une affaire qui «constitue, de par son caractère véritable, une matière d'une nature locale mettant en cause la propriété et les droits civils ou toute autre question qui relève essentiellement de la compétence exclusive de la province en vertu de l'art. 92 de la *Loi constitu-*

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for resolution in this case are integrally connected with maritime matters, and fall to be resolved under Canadian maritime law.

The plaintiffs next submit that even if the claims are maritime matters, the law of Newfoundland applies because treaties and related laws make Newfoundland the proper legal forum and provide for the operation of Newfoundland law on the continental shelf. The difficulty with this submission is that assuming Newfoundland law to apply, Newfoundland law includes federal law and the principle that Canadian maritime law applies to maritime matters:

> Once it has been determined that a matter is governed by constitutionally valid federal law, as in this case, then the relevant legal unit is Canada and not a particular province. Federal law is not foreign law *vis-à-vis* the law of a province since it is an integral part of the law of each province and territory. [Emphasis added.]

(*ITO*, *supra*, at p. 777, *per* McIntyre J.)

Since the claims advanced relate to maritime matters, the law of Newfoundland mandates the application of Canadian maritime law, not the Newfoundland *Contributory Negligence Act*.

Policy considerations support the conclusion that marine law governs the plaintiffs' tort claim. Application of provincial laws to maritime torts would undercut the uniformity of maritime law. The plaintiff BVHB argues that uniformity is only necessary with respect to matters of navigation and shipping, such as navigational rules or items that are the subject of international conventions. I do not agree. There is nothing in the jurisprudence of this Court to suggest that the concept of uniformity should be so limited. This Court has stated that "Canadian maritime law", not merely "Canadian maritime law related to navigation and shipping", must be uniform. BVHB argues that uniformity can be achieved through the application of provincial contributory negligence legislation as all prov-

tionnelle de 1867»: *ITO*, précité, à la p. 774, le juge McIntyre. Je conclus que les questions qui se posent en l'espèce relèvent intégralement du domaine maritime et doivent être tranchées en vertu du droit maritime canadien.

87 Les demanderesses soutiennent ensuite que, même si les réclamations sont des questions d'ordre maritime, le droit de Terre-Neuve s'applique parce que des traités et des lois connexes font de Terre-Neuve le ressort compétent et prévoient l'application du droit de cette province au plateau continental. La difficulté que présente cet argument est que, en supposant que le droit de Terre-Neuve s'applique, celui-ci comprend le droit fédéral et donc le principe que le droit maritime canadien s'applique aux affaires maritimes:

> Dès qu'il est établi qu'une question est régie par une loi fédérale valide sur le plan constitutionnel, comme c'est le cas en l'espèce, l'entité juridique importante est alors le Canada et non une province en particulier. Le droit fédéral ne constitue pas du droit étranger par rapport à celui d'une province, puisqu'il fait partie intégrante du droit de chaque province et de chaque territoire. [Je souligne.]

(*ITO*, précité, à la p. 777, le juge McIntyre.)

Comme les réclamations présentées concernent le domaine maritime, le droit de Terre-Neuve commande l'application du droit maritime canadien et non celle de la *Contributory Negligence Act* de cette province.

88 Des considérations de principe viennent étayer la conclusion selon laquelle le droit maritime régit la réclamation fondée sur la responsabilité délictuelle exercée par les demanderesses. L'application des lois provinciales aux délits maritimes nuirait à l'uniformité du droit maritime. La demanderesse BVHB soutient que l'uniformité est nécessaire seulement en ce qui concerne les affaires de navigation et d'expéditions par eau, comme les règles de la navigation ou les questions qui font l'objet de conventions internationales. Je ne suis pas d'accord. Rien dans la jurisprudence de notre Cour ne donne à penser que la notion d'uniformité devrait être ainsi limitée. Notre Cour a déclaré que «le droit maritime canadien», et non pas seulement «le droit maritime canadien relatif à la navigation et

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inces have apportionment provisions in the statutes. However, there are important differences between the various provincial statutes. These differences might lead over time to non-uniformity and uncertainty. Difficulty might also arise as to what province's law applies in some situations.

aux expéditions par eau», doit être uniforme. BVHB plaide que cette uniformité peut être réalisée par l'application des lois provinciales en matière de négligence contributive, puisque toutes les provinces ont édicté, dans ces lois, des dispositions concernant la répartition de la responsabilité. Cependant, il existe des différences importantes entre les diverses lois provinciales. Ces différences pourraient, avec le temps, créer de l'incertitude et entraîner une absence d'uniformité. Des difficultés pourraient également surgir lorsqu'il s'agira de déterminer le droit de quelle province s'applique dans certaines situations.

89 The plaintiffs argue that this Court's decision in *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, provides that provincial laws can apply to maritime matters in the absence of federal law. Assuming this is so, it does not advance the plaintiffs' case. On the view I take, there is no "gap" that would allow for the application of provincial law. While the federal government has not passed contributory negligence legislation for maritime torts, the common law principles embodied in Canadian maritime law remain applicable in the absence of federal legislation. The question is not whether there is federal maritime law on the issue, but what that law decrees.

Les demanderesses prétendent qu'il ressort de l'arrêt de notre Cour *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802, que des lois provinciales peuvent s'appliquer à des affaires maritimes en l'absence de règles de droit fédéral. À supposer que ce soit le cas, cela n'aide pas la cause des demanderesses. Suivant le point de vue que j'adopte, il n'existe pas de «vide» qui justifierait l'application du droit provincial. Bien que le gouvernement fédéral n'ait pas adopté de loi concernant la négligence contributive en matière de délits maritimes, les principes de common law incorporés dans le droit maritime canadien restent applicables en l'absence de législation fédérale. La question n'est pas de savoir s'il existe des règles de droit maritime fédérales sur la question en litige, mais plutôt de savoir ce que dicte ce droit.

90 The common law inherited from Britain barred a contributorily-negligent plaintiff from recovery. Canadian maritime law embraces the common law principles of tort: *ITO*, *supra*, at p. 779. The basis of the old common law "defence" of contributory negligence, thought to have originated in *Butterfield v. Forrester* (1809), 11 East. 60, 103 E.R. 926 (K.B.), was that the damages suffered by a contributorily negligent party were not totally the fault of a tortfeasor. Courts were reluctant to allow the injured party to recover where the tortfeasor was not fully responsible for the damage. In essence, this was a "causation" rationale. The Court took the view that the injured party had failed to prove that the tortfeasor caused the damage: *Toronto Transportation Commission v. The King*, [1949]

La common law héritée de l'Angleterre faisait obstacle à l'indemnisation des demandeurs dont la négligence contributive avait été retenue. Le droit maritime canadien englobe les principes de la common law en matière de responsabilité délictuelle: *ITO*, précité, à la p. 779. Le vieux [TRADUCTION] «moyen de défense» fondé sur la négligence contributive en common law, dont l'origine serait l'arrêt *Butterfield c. Forrester* (1809), 11 East. 60, 103 E.R. 926 (K.B.), reposait sur l'idée que les dommages subis par une partie coupable de négligence contributive n'étaient pas entièrement imputables à la faute de l'auteur du délit. Les tribunaux étaient réticents à permettre l'indemnisation de la partie lésée alors que l'auteur du délit n'était pas totalement responsable des dommages. Essentielle-

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S.C.R. 510, at p. 515. In England, prior to statutory revision, this bar for recovery by contributorily negligent plaintiffs was acknowledged to apply in maritime cases: see e.g. *The "Sobieski"* (1949), 82 Ll.L.R. 370 (C.A.). In Canada, the rule has been applied or referred to in the context of both non-maritime and maritime matters in cases including: *Toronto Transportation Commission*, *supra*, *Gartland Steamship Co. v. The Queen*, [1960] S.C.R. 315, *Algoma Central & Hudson Bay Railway Co. v. Manitoba Pool Elevators Ltd.*, [1964] Ex. C.R. 505, and *Fraser River Harbour Commission v. The "Hiro Maru"*, [1974] 1 F.C. 490 (T.D.).

ment, il s'agissait d'un raisonnement fondé sur la [TRADUCTION] «causalité». La Cour a estimé que la partie lésée n'avait pas prouvé que l'auteur du délit avait causé les dommages: *Toronto Transportation Commission c. The King*, [1949] R.C.S. 510, à la p. 515. En Angleterre, avant la réforme législative, il était admis que cet obstacle à l'indemnisation des demandeurs coupables de négligence contributive s'appliquait aux affaires maritimes: voir, par ex., l'arrêt *The «Sobieski»* (1949), 82 Ll.L.R. 370 (C.A.). Au Canada, la règle a été appliquée ou mentionnée dans le contexte d'affaires maritimes et d'affaires non maritimes, notamment dans les arrêts suivants: *Toronto Transportation Commission*, précité, *Gartland Steamship Co. c. The Queen*, [1960] R.C.S. 315, *Algoma Central & Hudson Bay Railway Co. c. Manitoba Pool Elevators Ltd.*, [1964] Ex. C.R. 505, et *Commission de port du Fraser c. Le «Hiro Maru»*, [1974] 1 C.F. 490 (1re inst.).

The common law rule has been abrogated for certain collisions between vessels by s. 565 of the *Canada Shipping Act*, R.S.C., 1985, c. S-9, but remains in effect for situations not covered by the *Canada Shipping Act* provisions: see e.g. *Algoma Central*, *supra*, and *The "Hiro Maru"*, *supra*. Parliament recently tabled Bill C-73, which would (amongst other matters) reform the *Canada Shipping Act* in relation to collision cases involving wrongful death by stating that in such cases contributory negligence is not a bar to recovery and establishing an apportionment regime. The Department of Justice is considering wider reforms, including the abrogation of the contributory negligence bar through the enactment of federal legislation: see Department of Justice, Admiralty and Maritime Law Section, Discussion Paper, *Eliminating Outmoded Common Law Defences in Maritime Torts.*

91 La règle de common law a été abrogée à l'égard de certaines collisions entre des bâtiments par l'art. 565 de la *Loi sur la marine marchande du Canada*, L.R.C. (1985), ch. S-9, mais elle continue de s'appliquer aux situations non visées par les dispositions de cette loi: voir, par ex., *Algoma Central*, précité, et *Le «Hiro Maru»*, précité. Récemment, le législateur fédéral a déposé le projet de loi C-73, qui vise à modifier (entre autres choses) la *Loi sur la marine marchande du Canada* en ce qui concerne les affaires de collision entraînant un décès causé par une faute, en précisant que, dans de tels cas, la négligence contributive de la victime n'entraîne pas l'irrecevabilité de la demande d'indemnisation et en établissant un régime de partage de la responsabilité. Le ministère de la Justice envisage des réformes plus vastes, notamment l'abolition de la fin de non-recevoir tirée de la négligence contributive par l'édiction de dispositions législatives fédérales: voir ministère de la Justice, Section de l'amirauté et du droit maritime, Document de travail, *Éliminer les moyens de défense démodés de la common law en matière de responsabilité délictuelle maritime*.

The plaintiffs argue that this Court should follow the approach taken by the Newfoundland

92 Les demanderesses soutiennent que notre Cour devrait suivre l'approche adoptée par la Cour d'ap-

Court of Appeal and remove the maritime contributory negligence bar. They contend that the bar is out of date, and that it is time for Canada to adopt a regime of apportionment in maritime claims, as other jurisdictions have done. The defendants, in response, submit that the common law rule barring recovery for contributory negligence in maritime cases is long established. They point out that parties involved in maritime activity arrange their affairs on the basis of the existing law, which bars recovery by contributorily negligent plaintiffs in maritime collision cases. If the bar is to be lifted, this should be done by Parliament, they argue.

pel de Terre-Neuve et abolir la fin de non-recevoir tirée de la négligence contributive en matière maritime. Elles prétendent que cette fin de non-recevoir est dépassée et que le temps est venu pour le Canada de faire comme ont fait d'autres pays et d'adopter un régime de partage de la responsabilité dans les réclamations en matière maritime. Les défenderesses répliquent que la règle de common law faisant obstacle à l'indemnisation en cas de négligence contributive dans les affaires maritimes est établie depuis longtemps. Elles soulignent que les parties qui exercent des activités dans le domaine maritime organisent leurs affaires en fonction du droit existant, qui interdit l'indemnisation des demandeurs coupables de négligence contributive dans les affaires de collision en mer. Si cette interdiction doit être levée, c'est par le législateur fédéral qu'elle devrait l'être, affirment-elles.

93 The question is whether the proposed change falls within the test for judicial reform of the law which has been developed by this Court. Courts may change the law by extending existing principles to new areas of the law where the change is clearly necessary to keep the law in step with the "dynamic and evolving fabric of our society" and the ramifications of the change are not incapable of assessment. Conversely, courts will not intervene where the proposed changes will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately gauged: *Watkins v. Olafson*, [1989] 2 S.C.R. 750, and *R. v. Salituro*, [1991] 3 S.C.R. 654. As Iacobucci J. put it in *Salituro* (at p. 670):

La question qui se pose est de savoir si le changement proposé satisfait au critère élaboré par notre Cour en ce qui concerne la réforme du droit par les tribunaux. Les tribunaux peuvent changer le droit en étendant les principes existants à de nouveaux domaines du droit lorsque le changement est clairement nécessaire pour que le droit suive «l'évolution et le dynamisme de la société» et lorsqu'il n'est pas impossible d'évaluer les conséquences du changement. À l'inverse, les tribunaux n'interviendront pas lorsque les changements proposés auront des effets complexes et d'une grande portée, plaçant le droit sur une trajectoire inconnue et dont les conséquences ne peuvent pas être mesurées avec précision: *Watkins c. Olafson*, [1989] 2 R.C.S. 750, et *R. c. Salituro*, [1991] 3 R.C.S. 654. Comme l'a dit le juge Iacobucci dans *Salituro* (à la p. 670):

> These cases reflect the flexible approach that this Court has taken to the development of the common law. Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex

> Ces arrêts témoignent de l'attitude souple que notre Cour a adoptée envers l'évolution de la common law. Les juges peuvent et doivent adapter la common law aux changements qui se produisent dans le tissu social, moral et économique du pays. Ils ne doivent pas s'empresser de perpétuer des règles dont le fondement social a depuis longtemps disparu. D'importantes contraintes pèsent cependant sur le pouvoir des tribunaux de changer le droit. Comme le juge McLachlin l'a souligné dans l'arrêt *Watkins*, précité, en régime de démocratie constitutionnelle comme le nôtre, c'est le législateur et non les tribunaux qui assume, quant à la réforme du droit, la

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ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

responsabilité principale; et tout changement qui risquerait d'entraîner des conséquences complexes devrait, aussi nécessaire ou souhaitable soit-il, être laissé au législateur. Le pouvoir judiciaire doit limiter son intervention aux changements progressifs nécessaires pour que la common law suive l'évolution et le dynamisme de la société.

In my view, recognition of shared liability for fault and elimination of the contributory negligence bar in maritime torts falls within these principles.

À mon avis, la reconnaissance du partage de la responsabilité en cas de faute et la suppression de la fin de non-recevoir tirée de la négligence contributive en matière de délits maritimes sont visées par ces principes.

First, the change is required to keep the maritime common law "in step with the dynamic and evolving fabric of our society". The considerations on which the contributory negligence bar was based no longer comport with the modern view of fairness and justice. Tort law no longer accepts the traditional theory underpinning the contributory negligence bar — that the injured party cannot prove that the tortfeasor "caused" the damage. The contributory negligence bar results in manifest unfairness, particularly where the negligence of the injured party is slight in comparison with the negligence of others. Nor does the contributory negligence bar further the goal of modern tort law of encouraging care and vigilance. So long as an injured party can be shown to be marginally at fault, a tortfeasor's conduct, no matter how egregious, goes unpunished.

94 Premièrement, le changement est requis pour que la common law en matière maritime «suive l'évolution et le dynamisme de la société». Les considérations servant de fondement à la fin de non-recevoir tirée de la négligence contributive ne sont plus compatibles avec la conception moderne de l'équité et de la justice. Le droit de la responsabilité délictuelle n'accepte plus la doctrine traditionnelle qui sous-tend cette fin de non-recevoir — savoir que la partie lésée est incapable de prouver que l'auteur du délit «a causé» le dommage. La fin de non-recevoir tirée de la négligence contributive est source d'injustice manifeste, particulièrement lorsque la négligence de la partie lésée est légère en comparaison de celle d'autrui. Cette fin de non-recevoir ne sert pas non plus l'objectif du droit moderne de la responsabilité délictuelle qui consiste à favoriser la diligence et la vigilance. Tant qu'il est possible d'établir que la partie lésée est marginalement fautive, la conduite de l'auteur d'un délit, si odieuse soit-elle, reste impunie.

Judges and commentators are united in condemning the bar. The continuing existence of a maritime contributory negligence bar has been termed "archaic" (see W. Tetley, "A Definition of Canadian Maritime Law" (1996), 30 *U.B.C. L. Rev.* 137, at p. 138). In a maritime personal injury case, Mackenzie J. described the bar much less charitably as "a harsh anachronism out of tune with contemporary standards of fairness": *Peters v. A.B.C. Boat Charters Ltd.* (1992), 73 B.C.L.R. (2d) 389 (S.C.), at p. 397.

95 Les juges et les commentateurs s'unissent pour condamner cette fin de non-recevoir. Son maintien en matière maritime a été qualifié d'[TRADUCTION] «archaïque» (voir W. Tetley, «A Definition of Canadian Maritime Law» (1996), 30 *U.B.C. L. Rev.* 137, à la p. 138). Dans une affaire de lésions corporelles en matière maritime, le juge Mackenzie a décrit cette fin de non-recevoir en termes beaucoup moins charitables, la qualifiant d'[TRADUCTION] «anachronisme criant, complètement déphasé par rapport aux normes contemporaines de l'équité»: *Peters c. A.B.C. Boat Charters Ltd.* (1992), 73 B.C.L.R. (2d) 389 (C.S.), à la p. 397.

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96 Although admiralty law in the United States is a combination of legislation and judicially created rules, much of the reform in the area of contributory negligence and apportionment based on liability originated with the judiciary. The United States Supreme Court removed the contributory negligence bar over one hundred years ago in *The Max Morris*, 137 U.S. 1 (1890). The plaintiff longshoreman sued for injuries sustained when he fell from the defendant ship's bridge. The accident was found to have been caused both by the negligence of the plaintiff and the negligent removal of a ladder by the defendant ship operators. Blatchford J., after reviewing the case law, concluded that the contributory negligence bar had been gradually relaxed and applied the divided damages rule which then prevailed in maritime collision cases. He stated (at pp.14-15):

All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libellant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, in a case like the present, where their fault is clear, provided the libellant's fault, though evident, is neither wilful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly

Bien que le droit de l'amirauté aux États-Unis soit un amalgame de règles législatives et prétoriennes, les tribunaux sont à l'origine d'une grande partie des améliorations apportées dans le domaine de la négligence contributive et de la répartition fondée sur la responsabilité. La Cour suprême des États-Unis a aboli la fin de non-recevoir tirée de la négligence contributive il y a plus de cent ans dans l'arrêt *The Max Morris*, 137 U.S. 1 (1890). Le débardeur demandeur avait intenté une action par suite des blessures qu'il avait subies en tombant du pont du navire défendeur. Le tribunal a conclu que l'accident avait été causé à la fois par la négligence du demandeur lui-même et par le retrait négligent d'une échelle par les exploitants du navire défendeur. Après examen de la jurisprudence, le juge Blatchford a conclu que la fin de non-recevoir tirée de la négligence contributive avait été graduellement assouplie et il a suivi la règle du partage de la charge des dommages, qui était alors appliquée dans les affaires de collisions maritimes. Il a déclaré ceci (aux pp. 14 et 15):

[TRADUCTION] Il s'agissait exclusivement d'affaires d'amirauté et non pas d'affaires de collision entre deux bâtiments. Elles attestent une amélioration de la règle de common law ainsi qu'une extension de la règle d'amirauté dans une direction que nous croyons manifestement juste et correcte. Dans une affaire comme la présente, la négligence contributive ne devrait pas empêcher totalement l'indemnisation. Le demandeur n'aurait pas subi de préjudice n'eût été la faute du bâtiment; et même si, d'une part, la cour ne doit pas lui accorder pleine compensation pour son préjudice, dès lors qu'il a lui-même été en partie fautif, elle ne doit pas, d'autre part, être empêchée de dire que sa négligence ne devrait pas le priver de toute indemnisation de ses dommages. Comme l'a déclaré le juge de district dans ses motifs en l'espèce, on favorisera davantage l'égalité de la justice, les préceptes de l'humanité, la sécurité de la vie et l'intégrité physique ainsi que le bien public en mettant à la charge des bâtiments une partie de la perte financière réelle subie par le demandeur, dans une affaire comme celle qui nous occupe, lorsque la faute du bâtiment est manifeste, pourvu que celle du demandeur, bien qu'évidente, ne soit ni volontaire, ni lourde, ni inexcusable, et lorsque les autres circonstances militent fortement en faveur de l'octroi d'une réparation à son endroit. Nous estimons que cette règle est applicable à toutes les affaires analogues de délit sur-

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through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

venu en mer fondées sur la négligence et poursuivies en amirauté, car elle est en accord avec la règle du partage des dommages dans les affaires d'abordage. Le simple fait que la négligence du demandeur est partiellement à l'origine de ses blessures, alors qu'elles résultent également en partie de la négligence des officiers du bâtiment, ne l'empêche pas totalement d'être indemnisé.

Legislation providing for apportionment based on fault in personal injury cases was later enacted. More recently, the principle of contribution between tortfeasors was recognized in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). Finally, in relation to collision cases, the United States Supreme Court reformed the common law divided damages rule and apportioned damages proportionately to the comparative degrees of fault: *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

Le texte de loi qui prévoit la répartition en fonction de la faute dans les affaires de lésions corporelles a été adopté plus tard. Plus récemment, le principe de la contribution appliqué aux auteurs d'un délit a été reconnu dans l'arrêt *Cooper Stevedoring Co. c. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). En dernier lieu, en ce qui concerne les affaires de collision, la Cour suprême des États-Unis a réformé la règle du partage de la charge des dommages en common law, et elle a réparti les dommages selon le degré comparatif des fautes commises: *United States c. Reliable Transfer Co.*, 421 U.S. 397 (1975).

I turn next to the question of whether removal of the contributory negligence bar will have unforeseeable or complex ramifications beyond the cognizance of the judiciary. In my view, it will not. The principle of apportionment for non-maritime torts is universally accepted in every part of Canada and indeed, around the world. Statutes have eliminated the bar and substituted a rule of apportionment in England, Australia and the common law provinces of Canada. The same holds under the *Civil Code of Québec*, S.Q. 1991, c. 64 (art. 1478): see J.-L. Baudouin, *La responsabilité civile* (4th ed. 1994), at paras. 490-91. In England, Australia and the United States, the bar has been removed, and apportionment made the rule, for maritime torts. In all these jurisdictions, the rule of apportionment operates without apparent problem. In brief, the proposed change has been tried and tested. This experience tells us what will happen if the contributory negligence bar is lifted and apportionment allowed. We can confidently predict that lifting the bar will not produce unforeseen or problematic consequences. Rather, the effect will be positive: to bring the law in step not only with "the changing social, moral and economic fabric of the country" (*Salituro*, *supra*, at p. 670), but with the

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J'aborde maintenant la question de savoir si l'abolition de la fin de non-recevoir tirée de la négligence contributive aura des conséquences imprévisibles ou complexes qui échappent aux tribunaux. À mon avis, elle n'en aura pas. Le principe de la répartition en matière de délits non maritimes est accepté universellement, partout au Canada et, de fait, à travers le monde. Des lois ont aboli cette fin de non-recevoir et l'ont remplacée par une règle prescrivant la répartition en Angleterre, en Australie et dans les provinces canadiennes de common law. La même règle existe en vertu du *Code civil du Québec*, L.Q. 1991, ch. 64 (art. 1478): voir J.-L. Baudouin, *La responsabilité civile* (4e éd. 1994), aux par. 490 et 491. En Angleterre, en Australie et aux États-Unis, cette fin de non-recevoir a été abolie et la répartition est devenue la règle en matière de délits maritimes. Dans tous ces ressorts, la règle de la répartition s'applique sans problème apparent. En résumé, le changement proposé a été mis à l'épreuve. Cette expérience nous renseigne sur ce qui se passera si la négligence contributive n'est plus considérée comme une fin de non-recevoir et si la répartition est permise. Nous pouvons prédire avec confiance que l'abolition de cette fin de non-recevoir n'entraînera pas de conséquences imprévues ni problématiques. Au contraire, cette décision aura un effet

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law of other jurisdictions like the United States, Australia and England.

98 The defendants submit that this Court should not change the law to eliminate the contributory negligence bar because it is not in a position to determine what type of regime to put in its place. Here again, however, the experience of other jurisdictions assists us.

99 The first question is whether a defendant should be responsible for only its share of the damages (several liability), or for all of the plaintiff's damages less the percentage of damage attributable to the plaintiff (joint and several liability). The defendants submit that the first approach (several liability) should be adopted as it is more consistent with the collision provisions in s. 565 of the *Canada Shipping Act*, which provides:

565. (1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault.

This may be contrasted with s. 566, which provides that the liability of vessel owners for personal injury is "joint and several". Without definitively determining the effect of s. 565, which was not argued, the difference between the two sections falls short of demonstrating that Parliament intended liability under s. 565 to be several only. The precursors to ss. 565 and 566 were originally enacted in the *Maritime Conventions Act, 1914*, S.C. 1914, c. 13, in order to give effect to the articles of the 1910 Brussels Convention. Section 565 originated as a response to the common law admiralty divided damages rule which provided that when two ships collided, each bore 50 percent of the loss. As collisions between more than two

positif: celui d'harmoniser le droit applicable non seulement avec les «changements qui se produisent dans le tissu social, moral et économique du pays» (*Salituro*, précité, à la p. 670), mais également avec le droit d'autres pays comme les États-Unis, l'Australie et l'Angleterre.

Les défenderesses soutiennent que notre Cour ne devrait pas changer le droit pour supprimer la fin de non-recevoir tirée de la négligence contributive car elle n'est pas en mesure de déterminer par quel type de régime il faudrait la remplacer. Encore une fois, cependant, l'expérience d'autres ressorts nous est utile.

La première question est de savoir si le défendeur devrait être responsable seulement de sa part des dommages (responsabilité individuelle) ou de tous les dommages du demandeur, déduction faite du pourcentage des dommages attribuable au demandeur (responsabilité solidaire). Les défenderesses prétendent qu'il faudrait retenir la première méthode (responsabilité individuelle), parce qu'elle est plus compatible avec les dispositions relatives aux collisions de l'art. 565 de la *Loi sur la marine marchande du Canada*, qui est ainsi rédigé:

565. (1) Lorsque, par la faute de deux ou plusieurs bâtiments, il y a avarie ou perte d'un ou plusieurs de ces bâtiments, de leurs cargaisons ou de leur fret, ou des biens à bord, la responsabilité en matière d'avarie ou de perte est proportionnée au degré de faute de chaque bâtiment.

Cette disposition peut être comparée avec l'art. 566, qui prévoit que les propriétaires des bâtiments sont «solidairement» responsables des lésions corporelles. Sans statuer de façon définitive sur la portée de l'art. 565, cette question n'ayant pas été débattue, j'estime que la différence entre les deux articles ne prouve pas que le législateur fédéral entendait que la responsabilité prévue à l'art. 565 soit individuelle seulement. Les dispositions qui ont précédé les art. 565 et 566 ont été édictées à l'origine dans la *Loi des conventions maritimes, 1914*, S.C. 1914, ch. 13, pour donner effet aux articles de la Convention de Bruxelles de 1910. L'article 565 répondait à l'origine à la règle d'amirauté en common law concernant le partage

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vessels are rare (no reported cases of such collisions have been cited to us), it may not have been considered necessary to address the issue of contribution between two or more vessels. By contrast, personal injury actions are more likely to involve more than one defendant, which may explain the reference to joint and several liability in s. 566.

des dommages qui prévoyait qu'en cas d'abordage entre deux bâtiments, chacun assumait 50 pour 100 de la perte. Comme les abordages entre plus de deux bâtiments sont chose rare (aucun cas de ce genre ne nous a été signalé), il est possible qu'on n'ait pas jugé nécessaire de traiter la question de la contribution de deux bâtiments ou plus. Par contraste, les actions pour lésions corporelles sont plus susceptibles de mettre en cause plus d'un défendeur, ce qui peut expliquer la mention de la responsabilité solidaire à l'art. 566.

In the United States, joint and several liability is the rule: *Edmonds v. Compagnie Générale Transatlantique*, 443 U.S. 256 (1979); see also W. B. Daly and G. H. Falter, "Contribution and Indemnity in Maritime Actions", in *Benedict on Admiralty* (7th ed. 1995 (loose-leaf)), vol. 2, at p. 1-6. Any tortfeasor paying the plaintiff a greater amount than its portion of liability can obtain contribution from the other tortfeasor(s): *Cooper Stevedoring*, *supra*, and Daly and Falter. This appears to be essentially consistent with the contributory negligence legislation of most provinces and England: see e.g. L. Klar, "Contributory Negligence and Contribution Between Tortfeasors" in *Studies in Canadian Tort Law* (1977), at pp. 163-64, and R. F. V. Heuston and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (21st ed. 1996), at p. 491. The situation appears to be similar under the *Civil Code of Québec* (arts. 1523 and 1526): J.-L. Baudouin, *Les obligations* (4th ed. 1993), at para. 870.

100 Aux États-Unis, la solidarité est la règle: *Edmonds c. Compagnie Générale Transatlantique*, 443 U.S. 256 (1979); voir également W. B. Daly et G. H. Falter, «Contribution and Indemnity in Maritime Actions», dans *Benedict on Admiralty* (7e éd. 1995 (feuilles mobiles)), vol. 2, à la p. 1-6. L'auteur d'un délit qui verse au demandeur un montant supérieur à sa part de l'indemnité due peut obtenir une contribution des autres auteurs du délit: *Cooper Stevedoring*, précité, et Daly et Falter. Cela semble être essentiellement en accord avec la législation de la plupart des provinces et de l'Angleterre en matière de négligence contributive: voir, par ex., L. Klar, «Contributory Negligence and Contribution Between Tortfeasors» dans *Studies in Canadian Tort Law* (1977), aux pp. 163 et 164, et R. F. V. Heuston et R. A. Buckley, *Salmond and Heuston on the Law of Torts* (21e éd. 1996), à la p. 491. La situation semble la même en vertu du *Code civil du Québec* (art. 1523 et 1526): J.-L. Baudouin, *Les obligations* (4e éd. 1993), au par. 870.

A final question concerns the availability of contribution — that is, the right of a tortfeasor who pays more than its share of the plaintiff's damages to recover the excess amount paid from other tortfeasors. It is often stated that at common law there was no contribution between tortfeasors, citing *Merryweather v. Nixan* (1799), 8 T.R. 186, 101 E.R. 1337. It may also be noted that in *Sparrows Point v. Greater Vancouver Water District*, [1951] S.C.R. 396, Rand J. (at p. 412), in concurring reasons, after holding that provincial contributory negligence legislation could not apply, stated that as a result of the application of common law admi-

101 La dernière question concerne la possibilité d'une contribution — c'est-à-dire le droit pour l'auteur d'un délit qui verse plus que sa part de l'indemnité accordée au demandeur de recouvrer auprès des coauteurs la somme excédentaire qu'il a versée. On a affirmé souvent que, en common law, il n'y avait pas de contribution entre les coauteurs d'un délit, en citant alors *Merryweather c. Nixan* (1799), 8 T.R. 186, 101 E.R. 1337. On peut également noter que, dans l'arrêt *Sparrows Point c. Greater Vancouver Water District*, [1951] R.C.S. 396, le juge Rand (à la p. 412), dans des motifs concordants, après avoir conclu que la législation

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ralty principles, there could be no contribution. However, the arguments in favour of and against contribution between tortfeasors appear not to have been considered. Commentators have questioned whether the common law rule against contribution was absolute, particularly in cases where the tort committed was not intentional, and there was no malicious motivation: see e.g. G. Williams, *Joint Torts and Contributory Negligence* (1951), at pp. 83-84, and see also *Eliminating Outmoded Common Law Defences in Maritime Torts*, *supra*, at pp. 5-6. Again, under the Quebec *Civil Code*, contribution is available to a tortfeasor who has paid more than its share of the liability (art. 1536): Baudouin, *Les obligations*, *supra*, at para. 881. Like the contributory negligence bar, the idea that there can be no contribution between tortfeasors is anachronistic and not in keeping with modern notions of fairness.

provinciale en matière de négligence contributive ne pouvait pas s'appliquer, a déclaré que, par suite de l'application de principes de common law en matière d'amirauté, il ne pouvait y avoir contribution. Cependant, on ne semble avoir examiné ni les arguments favorables ni les arguments défavorables à la thèse de la contribution entre coauteurs d'un délit. Les commentateurs se sont demandé si la règle de common law interdisant la contribution était absolue, particulièrement dans les cas où le délit commis n'était pas intentionnel et où il n'y avait pas de motivation malveillante: voir, par ex., G. Williams, *Joint Torts and Contributory Negligence* (1951), aux pp. 83 et 84, et voir également *Éliminer les moyens de défense démodés de la common law en matière de responsabilité délictuelle maritime*, *op. cit.*, aux pp. 5 et 6. Encore une fois, selon le *Code civil du Québec*, la contribution est ouverte à l'auteur d'un délit qui a versé une somme supérieure à celle correspondant à sa part de responsabilité (art. 1536): Baudouin, *Les obligations*, *op. cit.*, au par. 881. Comme la fin de non-recevoir tirée de la négligence contributive, l'idée qu'il ne puisse pas y avoir de contribution entre les coauteurs d'un délit est anachronique et ne concorde pas avec les notions modernes d'équité.

102 I conclude that this is an appropriate case for this Court to make an incremental change to the common law in compliance with the requirements of justice and fairness. Contributory negligence may reduce recovery but does not bar the plaintiff's claim. The defendants SJSL and Raychem are jointly and severally liable to the plaintiff BVHB for 40 percent of its loss, subject to a right of contribution between defendants.

Je conclus qu'il s'agit d'un cas où il convient que notre Cour apporte un changement progressif à la common law conformément aux exigences de la justice et de l'équité. La négligence contributive peut réduire l'indemnité, mais elle ne constitue pas une fin de non-recevoir à la réclamation présentée par la demanderesse. Les défenderesses SJSL et Raychem sont solidairement responsables envers la demanderesse BVHB de 40 pour 100 de la perte subie par cette dernière, sous réserve du droit de chacune des défenderesses de demander une contribution à l'autre.

I. *Summary of Findings on Tort Issues*

I. *Résumé des conclusions sur les questions de responsabilité délictuelle*

103 The defendants SJSL and Raychem owed the plaintiff BVHB a duty to warn of the dangers of using Thermaclad on the rig. The contract did not exclude SJSL's tort liability to BVHB. SJSL and

Les défenderesses SJSL et Raychem avaient l'obligation de mettre en garde la demanderesse BVHB contre les dangers que présentait l'utilisation du Thermaclad sur la plate-forme. Le contrat n'excluait pas que la responsabilité délictuelle de SJSL soit engagée à l'égard de BVHB. SJSL et

Raychem did not discharge their duty to warn and are equally responsible for failing to do so.

The plaintiff BVHB was contributorily negligent, and responsible for 60 percent of its loss. Its contributory negligence does not bar recovery of the balance of its losses.

VI. Is SJSL Liable to BVHB in Contract?

The Court of Appeal found that the parties settled the contract issues out of court and that there was accord and satisfaction. BVHB appeals this finding.

In BVHB's submission, the purpose of the settlement concluded by the countersigned letter dated November 12, 1985 was not to discharge all contractual liabilities but to determine the final cost of construction so that the day rates could be established. The parties could not, it argues, have intended to abandon other rights in the contract, such as BVHB's intellectual property claims, SJSL's intellectual property reservations, or rights arising from breaches that they were unaware of at the time. It argues that the general release language of the letter should be restrained by the limiting language in an earlier letter outlining construction costs and warranty matters. BVHB also argues that the Court of Appeal's conclusion of accord and satisfaction contravenes the express provisions of clause 1903 of the construction contract:

1903. Any failure by Owner at any time or from time to time to enforce or require the strict keeping and performance of any of the terms or conditions of this Agreement shall not constitute a waiver of such terms or conditions and shall not affect or impair such terms or conditions in any way, or the right of Owner at any time to avail itself of such remedies as it may have for any breaches of such terms or conditions.

Raychem ne se sont pas acquittées de leur obligation de mise en garde et elles sont également responsables de ce manquement.

104 La demanderesse BVHB s'est rendue coupable de négligence contributive et elle est responsable de sa perte dans une proportion de 60 pour 100. Sa négligence contributive ne l'empêche pas d'être indemnisée du reste de ses pertes.

VI. SJSL est-elle responsable envers BVHB en matière contractuelle?

105 La Cour d'appel a conclu que les parties ont réglé à l'amiable les questions d'ordre contractuel et qu'il y a eu accord et satisfaction sur ce point. BVHB se pourvoit contre cette conclusion.

106 Selon BVHB, le règlement intervenu au moyen de la lettre contresignée en date du 12 novembre 1985 ne visait pas à acquitter toutes les obligations contractuelles mais à déterminer le coût final de la construction pour que les taux quotidiens puissent être fixés. Il n'est pas possible, affirme BVHB, que les parties aient eu l'intention de renoncer aux autres droits prévus au contrat, comme les réclamations de BVHB en matière de propriété intellectuelle, les réserves de SJSL à cet égard ou les droits découlant des manquements dont elles n'étaient pas au courant à l'époque. BVHB soutient que la libération générale formulée dans la lettre devrait être restreinte par le libellé limitatif d'une lettre antérieure exposant les coûts de construction et les clauses relatives à la garantie. BVHB affirme également que la conclusion de la Cour d'appel selon laquelle il y aurait eu entente va à l'encontre des dispositions expresses de la clause 1903 du contrat de construction:

[TRADUCTION]

1903. L'omission par le propriétaire de faire observer toute condition de l'accord ou d'en exiger le respect strict ne constitue pas une renonciation à ces conditions et n'a aucune incidence sur celles-ci ni sur le droit du propriétaire d'exercer en tout temps les recours dont il dispose en cas de manquement à ces conditions.

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Thus, BVHB submits that SJSL's breaches of contract — its failure to provide letters of certification for Thermaclad and its failure to ensure that Thermaclad met the non-combustibility requirements incorporated into the construction contract — remain actionable.

Ainsi, BVHB soutient que les manquements de SJSL au contrat — son omission de fournir des lettres de certification pour le Thermaclad et son omission de vérifier si le Thermaclad satisfaisait aux exigences d'incombustibilité stipulées dans le contrat de construction — donnent encore ouverture à action.

107 SJSL responds by pointing out that the stated purpose of the exchange of cheques was to fully and finally settle all of the claims arising out of the contract, except in relation to the thruster problem (not at issue). The letter did not state that the exchange was for the limited purpose of settling the capital cost of the rig for the determination of the day rates. SJSL says that there is no evidence that SJSL knew or would have cared about BVHB's need to settle contractual issues in order to determine the day rates. Finally, in SJSL's submission, clause 1903 does not apply. A settlement agreement is not a "failure . . . to enforce or require the strict keeping and performance of any of the terms or conditions" of the contract. The purpose of a provision such as clause 1903 is to prevent an argument based on waiver or promissory estoppel, not to prevent the reaching of a settlement agreement entered into for good consideration.

SJSL répond en soulignant que l'objectif déclaré de l'échange des chèques était de régler totalement et définitivement toutes les réclamations découlant du contrat, sauf en ce qui concerne le problème du propulseur (qui n'était pas en litige). La lettre ne mentionnait pas que l'échange avait uniquement pour but de déterminer le coût en capital de la plate-forme en vue de la fixation des taux quotidiens. SJSL dit qu'aucune preuve n'établit qu'elle savait que BVHB devait régler des questions d'ordre contractuel pour déterminer les tarifs quotidiens, ni qu'elle s'y serait intéressée. Enfin, selon SJSL, la clause 1903 ne s'applique pas. Un règlement amiable n'est pas une «omission [. . .] de faire observer toute condition [du contrat] ou d'en exiger le respect strict». Une disposition telle que la clause 1903 a pour objet d'empêcher que soit invoqué tout argument fondé sur une renonciation ou une préclusion promissoire, non pas à empêcher la conclusion d'un règlement pour une contrepartie valable.

108 I agree with the Court of Appeal that the countersigned letter of November 12, 1985 and the exchange of cheques settled the claims for breach of contract. Cameron J.A. correctly stated the requirements of accord and satisfaction as outlined by Scrutton L.J. in *British Russian Gazette and Trade Outlook, Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616 (C.A.), at pp. 643-44:

Je suis d'accord avec la Cour d'appel pour dire que la lettre contresignée en date du 12 novembre 1985 et l'échange des chèques ont réglé les réclamations pour rupture de contrat. Le juge Cameron a bien exposé les exigences requises pour qu'il y ait accord et satisfaction, qui ont été formulées par le lord juge Scrutton dans l'arrêt *British Russian Gazette and Trade Outlook, Ltd. c. Associated Newspapers, Ltd.*, [1933] 2 K.B. 616 (C.A.), aux pp. 643 et 644:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

> [TRADUCTION] L'entente dite d'accord et satisfaction consiste à obtenir la libération d'une obligation découlant d'un contrat ou d'un délit en versant une contrepartie valable autre que l'exécution elle-même de l'obligation elle-même. L'accord est l'échange des consentements en vue d'éteindre l'obligation. La satisfaction est la contrepartie qui donne effet à l'accord.

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The knowledge that BVHB may or may not have had of other potential contractual claims is irrelevant in light of its intention that there be a "full and final settlement". BVHB made no reservations in the letter except for the thrusters. I accept SJSL's argument that BVHB's motivation for entering into the agreement is also irrelevant. The court need not go beyond the purpose of the exchange of cheques unambiguously stated in the countersigned letter: to "constitute full and final settlement of the subject contract and the guarantee provision thereof, with the exception of the thruster problem". The accord and satisfaction was supported by consideration, discharging SJSL from any contractual liability to BVHB in relation to the alleged breaches raised in this case.

Le fait de savoir que BVHB peut avoir eu ou non d'autres réclamations contractuelles potentielles n'est pas pertinent à la lumière de son intention d'arriver à un «règlement complet et définitif». BVHB n'a fait aucune réserve dans la lettre sauf en ce qui concerne les propulseurs. J'accepte l'argument de SJSL que le motif pour lequel BVHB a conclu l'entente n'est pas pertinent non plus. La cour n'a pas à aller au-delà de l'objet de l'échange des chèques, qui est énoncé de manière non ambiguë dans la lettre contresignée: [TRADUCTION] «en règlement complet et définitif du contrat visé et de sa clause de garantie, à l'exception du problème du propulseur». L'entente d'accord et satisfaction était appuyée par une contrepartie et avait pour effet de libérer SJSL de toute responsabilité contractuelle envers BVHB à l'égard des manquements allégués en l'espèce. 109

In view of my conclusion that the contractual issues have been settled and are no longer litigable I make no findings on whether there was a breach of contract or whether if there was, damages would be reduced on account of BVHB's contributory negligence.

Vu ma conclusion selon laquelle les questions d'ordre contractuel ont été réglées et ne sont plus litigieuses, je ne tire aucune conclusion quant à savoir s'il y a eu rupture de contrat ou si, en cas de réponse affirmative à la première question, les dommages-intérêts devraient être réduits pour tenir compte de la négligence contributive de BVHB. 110

VII. Disposition

I would dismiss the main appeal and all cross-appeals, with costs in this Court. As to costs below, the order of the Newfoundland Court of Appeal remains.

VII. Dispositif

Je suis d'avis de rejeter le pourvoi principal et les pourvois incidents, avec dépens devant notre Cour. Pour ce qui est des dépens devant les juridictions inférieures, l'ordonnance de la Cour d'appel de Terre-Neuve reste valide. 111

The judgment of Gonthier, Cory, Iacobucci and Major JJ. was delivered by

Version française du jugement des juges Gonthier, Cory, Iacobucci et Major rendu par

IACOBUCCI J. — I have had the advantage of reading the lucid reasons of my colleague, Justice McLachlin. At the outset, I wish to commend my colleague for her treatment of the approaches taken by her and La Forest J. in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021. In that respect, I simply wish to add one comment regarding the issue of contractual relational economic loss.

LE JUGE IACOBUCCI — J'ai eu l'avantage de prendre connaissance des motifs lumineux de ma collègue, le juge McLachlin. Je désire d'abord la complimenter pour sa façon d'aborder les méthodes qu'elle-même et le juge La Forest ont retenues dans l'arrêt *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021. À cet égard, je voudrais simplement ajouter un commentaire relativement à la question de la perte économique relationnelle découlant d'un contrat. 112

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113 I understand my colleague's discussion of this matter to mean that she has adopted the general exclusionary rule and categorical exceptions approach set forth by La Forest J. in *Norsk*. My colleague has found that the circumstances of the present case do not fall within any of the three exceptions identified in that case. She points out that both her reasons and those of La Forest J. in *Norsk* recognize that the categories of recoverable contractual relational economic loss are not closed and that whether or not a new category ought to be created is determined on a case-by-case basis. In that connection, I approve of her analysis of the facts of this case and applaud the approach she has taken to meld her reasoning in *Norsk* with that of La Forest J. in this very difficult area of the law.

Si je comprends bien l'examen que ma collègue a fait de cette question, elle a adopté la méthode proposée par le juge La Forest dans l'arrêt *Norsk* qui consiste à poser une règle générale d'exclusion et à l'assortir d'exceptions fondées sur des catégories. Ma collègue a conclu que les circonstances de l'espèce ne sont visées par aucune des trois exceptions mentionnées dans cet arrêt. Elle souligne qu'il ressort tant de ses motifs que de ceux du juge La Forest dans l'arrêt *Norsk* que les catégories de pertes économiques relationnelles découlant d'un contrat susceptibles d'indemnisation ne sont pas limitatives et que la question de savoir s'il convient de créer une nouvelle catégorie est réglée dans chaque cas. À ce propos, je suis d'accord avec son analyse des faits en l'espèce et j'approuve la façon dont elle a combiné son raisonnement dans l'arrêt *Norsk* avec celui du juge La Forest dans ce domaine très difficile du droit.

114 While I agree with most of her analysis in this case, I cannot, with respect, concur with her interpretation of clauses 702, 905 and 907 of the contract between SJSL and BVHB. I agree with my colleague when she points out that limitation and exclusion clauses are to be strictly construed against the party seeking to invoke the clause. I also agree that, where the planned contractual obligations of two parties negate tort liability, contract will "trump" tort. But, I disagree with her conclusion that the clauses in question do not negate SJSL's duty to warn.

Tout en étant d'accord avec la plus grande partie de son analyse en l'espèce, je ne puis, en toute déférence, souscrire à son interprétation des clauses 702, 905 et 907 du contrat intervenu entre SJSL et BVHB. Je suis d'accord avec ma collègue pour dire que les clauses de limitation ou d'exclusion doivent être interprétées de façon stricte à l'encontre de la partie qui cherche à les invoquer. Je conviens également que, lorsque les obligations contractuelles prévues par les deux parties écartent la responsabilité délictuelle, le contrat «l'emportera» sur le délit. Mais je suis en désaccord avec sa conclusion selon laquelle les clauses en question ne font pas disparaître l'obligation de mise en garde qui incombait à SJSL.

115 Clause 907 states in part that, "Builder's liability with respect to the Owner Directed Supply shall extend only to installation thereof . . ." (emphasis added). As I read this clause, the parties have chosen to specify the only ground of builder liability related to the use of Thermaclad, namely, negligence in the installation thereof. By expressly limiting liability to only these circumstances, the parties have, in my view, by necessary implication

La clause 907 stipule notamment que: [TRADUCTION] «[l]a responsabilité du constructeur à l'égard du matériel imposé par le propriétaire s'étend seulement à son installation . . .» (je souligne). Selon mon interprétation de cette clause, les parties ont choisi de préciser le seul fondement permettant d'établir la responsabilité du constructeur relativement à l'utilisation du Thermaclad, à savoir la négligence commise dans son installation. À mon avis, en limitant expressément la responsabilité à ces seules circonstances, les parties ont écarté, par déduction nécessaire, tous les autres fondements

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excluded all other grounds of builder liability, including the duty to warn.

The fact that Thermaclad is "owner directed supply" reinforces my reading of the provisions in question. In the instant case, Thermaclad was chosen by the owner, BVHB, and the builder, SJSL, was obliged to use that product. Indeed, SJSL would have breached the contract if it had refused to use this material. It seems to me that where the owner specifies a particular product to be used, it is generally the owner and not the builder who, unless otherwise specified in the contract, should bear the losses that flow from the risk associated with that product's use.

Additional reinforcement for my conclusion that the contract provisions create exclusive liability limited to installation is found in the concluding language of clause 907, which reads: "In all other instances, the sole risk and responsibility for Owner Directed Supply shall, as between Builder and Owner, be borne by Owner" (emphasis added). I also draw support from clause 905 which states in part that, the "remedies provided in this Article are exclusive" (emphasis added). In addition, clause 702 states that "the Builder's sole obligation with respect to the Vessel shall be as specified in Article IX" (emphasis added). That article contains both clauses 905 and 907.

In concluding that the present contract does not exclude liability for negligence, my colleague puts much emphasis on the placement of the relevant provisions within the contract. Clauses 905 and 907, both found in the "warranty" section of the contract, are said to function as a "'warranty' of workmanship and materials" (para. 29). My colleague notes that warranties generally do not relate to the duty to warn about the risks associated with the use of the products they cover. However, in my opinion, the placement of clauses within a contract, while a factor to be considered, is not determinative. Rather, in my view, one should examine the contract as a whole with a view to searching for the intention of the parties by recognizing the

de responsabilité en ce qui concerne le constructeur, dont l'obligation de mise en garde.

116 Le fait que le Thermaclad soit du «matériel imposé par le propriétaire» renforce mon interprétation des dispositions en question. Dans le cas présent, le Thermaclad a été choisi par le propriétaire, BVHB, et le constructeur, SJSL, était tenu d'utiliser ce produit. En effet, SJSL aurait manqué à son engagement contractuel si elle avait refusé d'utiliser ce matériel. Lorsque le propriétaire spécifie le produit qu'il faut utiliser, il me semble qu'à moins de stipulations contraires du contrat, c'est habituellement lui et non le constructeur qui devrait supporter les pertes découlant du risque lié à l'utilisation de ce produit.

117 Un autre élément qui vient renforcer ma conclusion selon laquelle les dispositions du contrat créent une responsabilité exclusive, limitée à l'installation, c'est la dernière phrase de la clause 907: [TRADUCTION] «Dans tous les autres cas, c'est le propriétaire qui supporte seul les risques et la responsabilité — entre le constructeur et le propriétaire — relativement au matériel imposé par le propriétaire» (je souligne). Je m'appuie également sur la clause 905, qui précise notamment que [TRADUCTION] «[l]es recours prévus au présent article sont exclusifs» (je souligne). De plus, la clause 702 stipule que [TRADUCTION] «la seule obligation du constructeur en ce qui concerne le bâtiment est celle précisée à l'article IX» (je souligne). Cet article comprend les clauses 905 et 907.

118 En concluant que le présent contrat n'exclut pas la responsabilité en cas de négligence, ma collègue insiste beaucoup sur l'endroit où sont placées les dispositions pertinentes dans le contrat. Les clauses 905 et 907, qui se trouvent dans la partie du contrat consacrée à la garantie, sont considérées comme jouant le rôle d'une «"garantie" quant à la fabrication et aux matériaux» (par. 29). Ma collègue note que les garanties ne portent pas en général sur les obligations de mise en garde au sujet des risques liés à l'utilisation des produits qu'elles couvrent. Toutefois, à mon avis, l'endroit où figurent les clauses dans un contrat, tout en constituant un facteur à prendre en considération, n'est pas décisif. Il me semble qu'on devrait plutôt

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natural meaning that flows from the language chosen.

examiner le contrat dans son ensemble afin de découvrir l'intention des parties en donnant aux termes qu'elles ont employés le sens qui s'en dégage naturellement.

119 When examined in the context of cases which have held parties responsible for negligence without any express contractual reference to that head of liability, it is clear that the clauses in the instant contract are of a very different nature. For example, in *Falcon Lumber Ltd. v. Canada Wood Specialty Co.* (1978), 95 D.L.R. (3d) 503 (Ont. H.C.), the court found the defendant liable for negligence despite the following at paragraph 13 of the defendant's price list: "The Canada Wood Specialty Company Limited is not responsible for damages or theft that may occur whilst customer lumber and/or property is on The Canada Wood Specialty Co. Ltd. premises." Whereas clauses such as this provide for general exclusion from liability, the language of the clauses at issue in the case at bar expressly provides for the assumption of liability limited to a specific circumstance, namely, negligent installation of owner-directed supply. I do not accept that contract clauses which are so fundamentally different should necessarily be interpreted in the same manner.

Lorsqu'on les examine dans le contexte d'affaires où les parties ont été tenues responsables de négligence sans que cette source de responsabilité ne soit mentionnée de façon expresse dans le contrat, il est clair que les clauses figurant dans le présent contrat sont de nature très différente. Par exemple, dans l'arrêt *Falcon Lumber Ltd. c. Canada Wood Specialty Co.* (1978), 95 D.L.R. (3d) 503 (H.C. Ont.), la cour a jugé la défenderesse responsable de négligence malgré le passage suivant du paragraphe 13 de la liste de prix de la défenderesse: [TRADUCTION] «La Canada Wood Specialty Company Limited n'est pas responsable des dommages ni des vols qui peuvent survenir pendant que le bois d'œuvre ou les biens du client se trouvent dans les locaux de la Canada Wood Specialty Co. Ltd.» Alors que les clauses comme celle-ci prévoient une exclusion générale de responsabilité, le libellé des clauses visées en l'espèce prévoit expressément l'acceptation d'une responsabilité limitée à un cas particulier, à savoir l'installation négligente du matériel imposé. Je n'accepte pas que des clauses contractuelles si fondamentalement différentes doivent nécessairement être interprétées de la même manière.

120 An alternative analysis set forth by this Court in *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, leads me to the same conclusion. In *Miida Electronics*, a marine carrier (Mitsui) agreed in a contract evidenced by a bill of lading to carry goods from Japan to Montreal where the respondent Miida, the other party to the contract and the owner of the goods, could take delivery. The goods arrived in Montreal and were picked up by the appellant, ITO, a cargo-handling company and terminal operator. ITO had agreed with Mitsui to store the goods until delivery was made to Miida. Before the goods could be delivered to Miida, thieves broke into the storage facility operated by ITO and a large number of Miida's goods were stolen. Miida

Une autre analyse effectuée par notre Cour dans l'arrêt *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752, m'amène à la même conclusion. Dans l'arrêt *Miida Electronics*, un transporteur maritime (Mitsui) a convenu dans un contrat constaté par un connaissement de transporter des marchandises du Japon à Montréal où l'intimée Miida, l'autre partie au contrat et propriétaire des marchandises, pourrait en prendre livraison. Les marchandises sont arrivées à Montréal où elles ont été prises en charge par l'appelante, ITO, une compagnie de manutention et d'acconage. ITO avait convenu avec Mitsui d'entreposer les marchandises jusqu'à leur livraison à Miida. Avant que les marchandises aient pu être livrées à Miida, des voleurs ont pénétré par effrac-

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alleged that the theft would not have occurred but for the negligence of ITO.

One of the key issues in *Miida Electronics* was whether a "Himalaya" clause in Mitsui's bill of lading extended limitation of liability to those it employed in the performance of the contract of carriage. However, having decided that the Himalaya clause could be effective, the Court went on to consider whether the exemption clause in the bill of lading, which imposed limits on liability but did not expressly refer to negligence, could relieve ITO of liability for its own negligence. McIntyre J., writing for the majority, relied heavily upon *Lamport & Holt Lines Ltd. v. Coubro & Scrutton (M. & I.) Ltd. (The "Raphael")*, [1982] 2 Lloyd's Rep. 42 (C.A.), where May L.J. canvassed the jurisprudence in the area and stated (at pp. 49-50):

. . . if an exemption clause of the kind we are considering excludes liability for negligence expressly, then the Courts will give effect to the exemption. If it does not do so expressly, but its wording is clear and wide enough to do so by implication, then the question becomes whether the contracting parties so intended. If the only head of liability upon which the clause can bite in the circumstances of a given case is negligence, and the parties did or must be deemed to have applied their minds to this eventuality, then clearly it is not difficult for a Court to hold that this was what the parties intended — that this is its proper construction. Indeed, to hold otherwise would be contrary to commonsense. On the other hand if there is a head of liability upon which the clause could bite in addition to negligence then, because it is more unlikely than not that a party will be ready to excuse his other contracting party from the consequences of the latter's negligence, the clause will generally be construed as not covering negligence. If the parties did or must be deemed to have applied their minds to the potential alternative head of liability at the time the contract was made then, in the absence of any express reference to negligence, the Courts can sensibly only conclude that the relevant clause was not

tion dans l'entrepôt exploité par ITO et se sont emparés d'une grande partie des marchandises de Miida. Cette dernière a soutenu que le vol n'aurait pas eu lieu n'eût été la négligence de la société ITO.

Dans l'arrêt *Miida Electronics*, l'une des questions cruciales était de savoir si la clause «Himalaya» du connaissement de Mitsui étendait la limitation de responsabilité à ceux qu'elle employait pour exécuter le contrat de transport. Cependant, après avoir décidé que la clause Himalaya pouvait jouer, la Cour s'est demandé si la clause d'exemption du connaissement, qui limitait la responsabilité mais ne mentionnait pas expressément la négligence, pouvait dégager ITO de toute responsabilité due à sa propre négligence. S'exprimant au nom de la majorité, le juge McIntyre s'est appuyé largement sur l'arrêt *Lamport & Holt Lines Ltd. c. Coubro & Scrutton (M. & I.) Ltd. (The «Raphael»)*, [1982] 2 Lloyd's Rep. 42 (C.A.), où le lord juge May a examiné minutieusement la jurisprudence en la matière et a dit (aux pp. 49 et 50):

[TRADUCTION] . . . si une clause de non-responsabilité du genre de celle dont nous sommes saisis exclut expressément la responsabilité pour négligence, les tribunaux donneront alors effet à cette exclusion. Si elle ne le fait pas expressément, mais que son texte est clair et suffisamment général pour le faire tacitement, il s'agit alors de déterminer si c'était bien là l'intention des parties contractantes. Si la seule catégorie de responsabilité que la clause peut frapper dans les circonstances d'une espèce donnée est celle due à la négligence, et que les parties ont eu cette éventualité à l'esprit ou doivent être réputées l'avoir eue, alors, manifestement, il ne sera pas difficile pour le tribunal de juger que c'était bien là la volonté des parties — que c'est là l'interprétation qu'il faut lui donner. D'ailleurs, juger autrement serait contraire au bon sens. D'autre part, s'il y a une catégorie de responsabilité que la clause pourrait viser outre celle due à la négligence, alors, parce qu'il est plus improbable que probable que l'une des parties sera prête à soustraire son cocontractant aux conséquences de sa négligence, la clause sera généralement interprétée comme non applicable à la négligence. Si les parties ont eu à l'esprit, ou doivent être réputées avoir eu à l'esprit, une autre catégorie possible de responsabilité au moment de la conclusion du contrat, alors, en l'absence de mention expresse de la négligence, les tribunaux ne peuvent que conclure que la clause pertinente n'est pas destinée à

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intended to cover negligence and will refuse so to construe it.

The Ontario Court of Appeal recently relied upon this same line of reasoning in *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.* (1992), 89 D.L.R. (4th) 722.

122 In *Miida Electronics*, *supra*, McIntyre J. found that, as the goods were in short-term storage awaiting delivery, the only liability that could be imposed on ITO would be based on negligence. Therefore, the exemption clause in the bill of lading, despite the absence of an express reference to negligence, was found to relieve ITO of liability for negligence. In my opinion, the contract provisions in the instant case warrant the same treatment. By the wording of clause 905, SJSL is relieved of any liability arising from defects. Clause 907 states that SJSL's liability shall extend only to installation of owner-directed supply and that in all other instances, BVHB bears the risk and responsibility for these products. Therefore, it seems to me that the natural meaning of these clauses indicates that the only head of liability upon which these clauses can bite is negligence in installation. As such, based upon the authority of *Miida Electronics*, SJSL ought to be relieved of any liability for failing to warn BVHB of the dangers associated with the use of Thermaclad.

123 Accordingly, I must respectfully disagree with McLachlin J.'s conclusion that BVHB was entitled to claim against SJSL based on the tort duty to warn. I note that it is not open to Raychem to seek contribution from SJSL, as a contractor which has protected itself against liability cannot be said to have contributed to any actionable loss suffered by the plaintiff: *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346. Consequently, Raychem is liable for the entire 40 percent quantum found by the trial judge.

s'appliquer à la négligence et ils refuseront de l'interpréter ainsi.

La Cour d'appel de l'Ontario s'est fondée récemment sur le même raisonnement dans l'arrêt *Upper Lakes Shipping Ltd. c. St. Lawrence Cement Inc.* (1992), 89 D.L.R. (4th) 722.

Dans l'arrêt *Miida Electronics*, précité, le juge McIntyre a conclu que, comme les marchandises étaient entreposées pour une courte période en attendant la livraison, la seule responsabilité qui pouvait être attribuée à la société ITO serait fondée sur la négligence. Par conséquent, il a été décidé que la clause d'exemption figurant dans le connaissement dégageait ITO de toute responsabilité due à la négligence, malgré l'absence d'une mention expresse de la négligence. À mon avis, les dispositions du contrat en l'espèce justifient le même traitement. En vertu du libellé de la clause 905, SJSL est dégagée de toute responsabilité à l'égard des vices. La clause 907 stipule que la responsabilité de SJSL s'étend seulement à l'installation du matériel imposé par le propriétaire et que, dans tous les autres cas, BVHB assume les risques et la responsabilité pour ces produits. Par conséquent, il me semble que selon le sens naturel de ces clauses, elles ne peuvent viser que la responsabilité due à une négligence dans l'installation. Ainsi, compte tenu du poids de l'arrêt *Miida Electronics*, SJSL devrait être dégagée de toute responsabilité pour avoir omis d'informer BVHB des dangers liés à l'utilisation du Thermaclad.

En conséquence, je suis dans l'obligation de me dissocier de la conclusion du juge McLachlin selon laquelle BVHB avait le droit de poursuivre SJSL en invoquant l'obligation de mise en garde en matière délictuelle. Je fais remarquer que Raychem ne peut pas réclamer une contribution de SJSL car on ne peut pas dire que l'entrepreneur qui s'est protégé de toute responsabilité a contribué à une perte l'exposant aux poursuites du demandeur: *Giffels Associates Ltd. c. Eastern Construction Co.*, [1978] 2 R.C.S. 1346. Par conséquent, Raychem est seule responsable de la part de 40 pour 100 fixée par le juge de première instance.

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I would therefore dismiss the appeal brought by HOOL and BVI. Further, I would dismiss all of the cross-appeals save for that of SJSL with regard to the duty to warn, which I would allow with costs throughout. As to costs on the main appeal and all other cross-appeals, I would assess these in the same manner as McLachlin J.

Je suis donc d'avis de rejeter le pourvoi formé par HOOL et BVI. De plus, je suis d'avis de rejeter tous les pourvois incidents, sauf celui de SJSL relativement à l'obligation de mise en garde que je suis d'avis d'accueillir avec dépens dans toutes les cours. Quant aux dépens du pourvoi principal et de tous les autres pourvois incidents, je suis d'avis de les fixer de la même manière que le juge McLachlin. 124

Appeal and cross-appeals other than that of SJSL dismissed with costs. Cross-appeal of SJSL allowed with costs, LA FOREST *and* MCLACHLIN JJ. *dissenting.*

Pourvoi et pourvois incidents autres que celui de SJSL rejetés avec dépens. Pourvoi incident de SJSL accueilli, les juges LA FOREST *et* MCLACHLIN *sont dissidents.*

Solicitors for Husky Oil Operations Ltd.: Code Hunter Wittmann, Calgary.

Procureurs de Husky Oil Operations Ltd.: Code Hunter Wittmann, Calgary.

Solicitors for Bow Valley Industries Ltd.: McCarthy Tétrault, Toronto.

Procureurs de Bow Valley Industries Ltd.: McCarthy Tétrault, Toronto.

Solicitors for Bow Valley Husky (Bermuda) Ltd.: Stewart McKelvey Stirling Scales, St. John's.

Procureurs de Bow Valley Husky (Bermuda) Ltd.: Stewart McKelvey Stirling Scales, St. John's.

Solicitors for St. John Shipbuilding Limited: Osler, Hoskin & Harcourt, Toronto.

Procureurs de St. John Shipbuilding Limited: Osler, Hoskin & Harcourt, Toronto.

Solicitors for Raychem Canada Limited and Raychem Corporation: McInnes Cooper & Robertson, St. John's.

Procureurs de Raychem Canada Limited et Raychem Corporation: McInnes Cooper & Robertson, St. John's.

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TAB 23

Bruno Appliance and Furniture, Inc. *Appellant*

v.

Robert Hryniak *Respondent*

and

Attorney General of Ontario, Ontario Trial Lawyers Association, Advocates' Society and Canadian Bar Association *Interveners*

Indexed as: Bruno Appliance and Furniture, Inc. *v.* Hryniak

2014 SCC 8

File No.: 34645.

2013: March 26; 2014: January 23.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Summary judgment — Investor bringing action in civil fraud and subsequently bringing a motion for summary judgment — Motion judge granting summary judgment but being overruled by Court of Appeal — Elements of civil fraud — Whether motion judge erred in granting summary judgment — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

Bruno Appliance and Furniture, Inc. is an American corporation. Its principal met with the principal of Frontline Investments, Inc. and as a result of these meetings, executed a number of investment documents in favour of Frontline. Bruno Appliance subsequently wired US$1 million to Cassels Brock, who assigned the funds to an account associated with Tropos Capital Inc., a company of which H was the principal. Bruno Appliance's funds were then bundled with other funds and paid to Tropos in a bank draft. Bruno Appliance's money was not invested and disappeared.

Bruno Appliance and Furniture, Inc. *Appelante*

c.

Robert Hryniak *Intimé*

et

Procureur général de l'Ontario, Ontario Trial Lawyers Association, Advocates' Society et Association du Barreau canadien *Intervenants*

Répertorié : Bruno Appliance and Furniture, Inc. *c.* Hryniak

2014 CSC 8

N° du greffe : 34645.

2013 : 26 mars; 2014 : 23 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Procédure civile — Jugement sommaire — Investisseur intentant une action pour fraude civile et présentant ensuite une requête en jugement sommaire — Jugement accueillant la requête en jugement sommaire infirmé par la Cour d'appel — Éléments de la fraude civile — Le juge saisi de la requête a-t-il commis une erreur en accueillant la requête en jugement sommaire? — Règles de procédure civile, R.R.O. 1990, Règl. 194, règle 20.

Bruno Appliance and Furniture, Inc. est une société américaine. Son dirigeant a rencontré le dirigeant de Frontline Investments, Inc. et comme suite à ces rencontres, il a signé un certain nombre de documents de placement en faveur de Frontline. Bruno Appliance a par la suite transféré un million de dollars américains à Cassels Brock, qui a placé l'argent dans un compte associé à Tropos Capital Inc., une entreprise dont H était le dirigeant. Les fonds de Bruno Appliance ont ensuite été regroupés avec d'autres fonds et versés à Tropos par traite bancaire. L'argent de Bruno Appliance n'a pas été investi et est disparu.

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Bruno Appliance launched a civil fraud action against H and others, and brought a motion for summary judgment. The motion judge found that Bruno Appliance had established its claim and that there was no issue requiring a trial. The Court of Appeal disagreed and ordered that the Bruno Appliance action proceed to trial.

Held: The appeal should be dismissed.

The scope and interpretation of the amended Rule 20 summary judgment motion are addressed in the companion appeal, *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. The motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. 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. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

The Court of Appeal did not err in its determination that Bruno Appliance should not receive summary judgment against H. The following four elements constitute 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.

Civil fraud requires a finding that H made a misrepresentation which induced Bruno Appliance to invest. The motion judge neither identified the need for a misrepresentation, nor found that H made one. H was not present at the meeting that led to Bruno's investment and the motion judge's findings are insufficient to establish that any false statements made at the meeting can be attributed to him.

Bruno Appliance a intenté contre H et d'autres personnes une action pour fraude civile et a présenté une requête en jugement sommaire. Le juge saisi de la requête a conclu que Bruno Appliance avait établi le bien-fondé de sa poursuite et qu'aucune question ne nécessitait la tenue d'un procès. La Cour d'appel s'est dite d'avis contraire et a ordonné l'instruction de l'action intentée par Bruno Appliance.

Arrêt : Le pourvoi est rejeté.

La portée et l'interprétation de la règle 20 relative à la requête en jugement sommaire sont examinées dans le pourvoi connexe *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87. Un jugement sommaire ne peut pas être rendu en vertu de la règle 20 en présence d'une véritable question nécessitant la tenue d'un procès. Le juge saisi de la requête doit se demander si l'affaire peut être réglée de manière juste et équitable par voie de requête en jugement sommaire. Ce sera le cas lorsque la procédure (1) lui permet de tirer les conclusions de fait qui s'imposent, (2) lui permet d'appliquer le droit aux faits et (3) constitue un moyen proportionné, plus expéditif et moins coûteux d'atteindre un résultat juste. Si, compte tenu uniquement du dossier dont dispose le juge, il semble y avoir une véritable question nécessitant la tenue d'un procès, ce dernier doit alors se demander si l'exercice des nouveaux pouvoirs que confèrent les par. 20.04(2.1) et (2.2) des Règles permet d'écarter le besoin d'un procès. Il peut, à son gré, exercer ces pouvoirs pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice.

La Cour d'appel n'a pas commis d'erreur en décidant que Bruno Appliance ne doit pas obtenir un jugement sommaire contre H. Les quatre éléments suivants constituent le délit de fraude civile : (1) le défendeur a fait une fausse déclaration; (2) le défendeur savait, jusqu'à un certain point, que sa déclaration était fausse (sciemment ou par insouciance); (3) la fausse déclaration a incité le demandeur à agir; (4) les actes du demandeur ont entraîné une perte.

La fraude civile exige que H ait fait une fausse déclaration ayant incité Bruno Appliance à investir. Le juge saisi de la requête n'a ni souligné la nécessité qu'il y ait eu fausse déclaration, ni conclu que H avait fait une telle déclaration. H n'était pas présent à la rencontre qui a amené Bruno à investir et les conclusions du juge saisi de la requête ne suffisent pas à prouver que des déclarations fausses faites lors de la rencontre peuvent être attribuées à H.

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While the evidence clearly demonstrates that H was aware of the fraud, and may in fact have benefited from the fraud, whether H perpetrated the fraud by inducing Bruno Appliance to contribute US$1 million to a non-existent investment scheme is a genuine issue requiring a trial.

Cases Cited

Applied: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; **referred to:** *Derry v. Peek* (1889), 14 App. Cas. 337; *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330.

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Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* and *Jonathan A. Odumeru*, for the appellant.

Sarit E. Batner, *Brandon Kain* and *Moya J. Graham*, for the respondent.

Malliha Wilson and *Christopher P. Thompson*, for the intervener the Attorney General of Ontario.

Allan Rouben and *Ronald P. Bohm*, for the intervener the Ontario Trial Lawyers Association.

Bien que la preuve démontre clairement que H était au courant de la fraude, et qu'il en a peut-être effectivement bénéficié, la question de savoir si H a commis la fraude en incitant Bruno Appliance à verser un million de dollars américains à un projet d'investissement inexistant constitue une véritable question nécessitant la tenue d'un procès.

Jurisprudence

Arrêt appliqué : *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87; **arrêts mentionnés :** *Derry c. Peek* (1889), 14 App. Cas. 337; *Parna c. G. & S. Properties Ltd.*, [1971] R.C.S. 306; *Snell c. Farrell*, [1990] 2 R.C.S. 311; *Angers c. Mutual Reserve Fund Life Assn.* (1904), 35 R.C.S. 330.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (le juge en chef Winkler et les juges Laskin, Sharpe, Armstrong et Rouleau), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515, qui a infirmé une décision du juge Grace, 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Pourvoi rejeté.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* et *Jonathan A. Odumeru*, pour l'appelante.

Sarit E. Batner, *Brandon Kain* et *Moya J. Graham*, pour l'intimé.

Malliha Wilson et *Christopher P. Thompson*, pour l'intervenant le procureur général de l'Ontario.

Allan Rouben et *Ronald P. Bohm*, pour l'intervenante Ontario Trial Lawyers Association.

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David W. Scott, *Q.C.*, *Patricia D. S. Jackson* and *Crawford Smith*, for the intervener the Advocates' Society.

Paul R. Sweeny and *David Sterns*, for the intervener the Canadian Bar Association.

The judgment of the Court was delivered by

[1] KARAKATSANIS J. — Like its companion, *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (*Mauldin*), this appeal concerns the interpretation and application of Ontario's new summary judgment rules. In this action, the Ontario Court of Appeal overturned the motion judge's decision to grant summary judgment in favour of the plaintiff and made various trial management orders under Rule 20.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] In light of the principles articulated in the *Mauldin* appeal and for the reasons that follow, I would dismiss the appeal.

I. Facts

[3] Bruno Appliance and Furniture, Inc. is an American corporation, whose principal is Albert Bruno. In late 2001, Bruno met with Robert Cranston, the principal of a Panamanian company, Frontline Investments, Inc. As a result of these meetings, Bruno executed a number of investment documents in favour of Frontline.

[4] In February 2002, Bruno met with Cranston and Gregory Peebles, a corporate-commercial lawyer at the Toronto offices of Cassels Brock and Blackwell. No notes were kept of this meeting, and the recollection of the participants varies. While Robert Hryniak did not attend this meeting, Tropos Capital Inc. (Tropos), a company of which Hryniak was the principal, received and paid a bill for Peebles' attendance.

David W. Scott, *c.r.*, *Patricia D. S. Jackson* et *Crawford Smith*, pour l'intervenante Advocates' Society.

Paul R. Sweeny et *David Sterns*, pour l'intervenante l'Association du Barreau canadien.

Version française du jugement de la Cour rendu par

[1] LA JUGE KARAKATSANIS — Le présent pourvoi, comme le pourvoi connexe *Hryniak c. Mauldin*, 2014 CSC 7, [2014] 1 R.C.S. 87 (*Mauldin*), porte sur l'interprétation et l'application des nouvelles règles régissant les jugements sommaires en Ontario. Dans la présente affaire, la Cour d'appel de l'Ontario a infirmé la décision du juge saisi de la requête de rendre un jugement sommaire favorable à la demanderesse. Elle a aussi rendu plusieurs ordonnances relatives à la gestion du procès en vertu de la règle 20.05 des *Règles de procédure civile*, R.R.O. 1990, Règl. 194.

[2] À la lumière des principes énoncés dans le pourvoi *Mauldin* et pour les motifs qui suivent, je suis d'avis de rejeter le pourvoi.

I. Faits

[3] Bruno Appliance and Furniture, Inc. est une société américaine dirigée par Albert Bruno. Vers la fin de 2001, M. Bruno a rencontré Robert Cranston, le dirigeant d'une entreprise panaméenne, Frontline Investments, Inc. Comme suite à ces rencontres, M. Bruno a signé un certain nombre de documents de placement en faveur de Frontline.

[4] En février 2002, M. Bruno a rencontré M. Cranston et Gregory Peebles, un avocat spécialisé en droit des sociétés et en droit commercial du cabinet Cassels Brock and Blackwell à Toronto. Aucune note sur cette rencontre n'a été conservée et les participants en ont gardé un souvenir différent. Robert Hryniak n'a pas assisté à cette rencontre, mais Tropos Capital Inc. (Tropos), une entreprise dont M. Hryniak était le dirigeant, a reçu et payé une facture pour la présence de M. Peebles.

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[5] In early March 2002, Bruno Appliance wired US$1 million to Cassels Brock, who assigned the funds to an account associated with Tropos. Bruno Appliance's funds were then bundled with other funds (totalling US$3.5 million) and paid to Tropos in a bank draft. At the end of April 2002, Tropos paid US$2.5 million to a company called Southern Equity Investors Inc., and in late June 2002 transferred approximately US$550,000 to an individual named Reinhard. By the end of September 2003, Tropos' balance with Cassels Brock had declined to US$19,000.

[6] In short, Bruno Appliance's money was not invested and it never received a return on its investment.

II. Judicial History

A. *Ontario Superior Court of Justice, 2010 ONSC 5490 (CanLII)*

[7] Bruno Appliance joined with the plaintiffs from the companion *Mauldin* appeal in a civil fraud action against Hryniak, Peebles and Cassels Brock. Both sets of plaintiffs brought motions for summary judgment, which were heard together.

[8] The motion judge found that Bruno Appliance had established its claim against Hryniak and that there was no issue requiring a trial. He was satisfied that, in spite of Hryniak's absence from an early meeting between Peebles, Cranston and Bruno, Hryniak knew that the meeting was occurring and his company, Tropos, paid for Peebles' attendance. The motion judge further found that Hryniak was aware that US$1 million was placed in Tropos' account on Bruno Appliance's behalf, and that Hryniak gave instructions regarding those funds.

[9] The motion judge found that none of Bruno Appliance's funds were invested. In part, they were

[5] Au début de mars 2002, Bruno Appliance a transféré un million de dollars américains à Cassels Brock, qui a placé l'argent dans un compte associé à Tropos. Les fonds de Bruno Appliance ont ensuite été regroupés avec d'autres fonds (totalisant 3,5 millions de dollars américains) et versés à Tropos par traite bancaire. À la fin d'avril 2002, Tropos a versé 2,5 millions de dollars américains à une entreprise appelée Southern Equity Investors Inc. et, à la fin de juin 2002, a transféré environ 550 000 $US à une personne du nom de Reinhard. À la fin de septembre 2003, le solde de Tropos détenu par Cassels Brock avait chuté à 19 000 $US.

[6] En résumé, l'argent de Bruno Appliance n'a pas été investi et la société n'a jamais touché quelque revenu de son placement.

II. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2010 ONSC 5490 (CanLII)*

[7] Bruno Appliance s'est jointe aux demandeurs du pourvoi connexe *Mauldin* dans une action pour fraude civile intentée contre M. Hryniak, M. Peebles et Cassels Brock. Dans les deux dossiers, les demandeurs ont présenté des requêtes en jugement sommaire qui ont été instruites ensemble.

[8] Le juge saisi de la requête a conclu que Bruno Appliance avait établi le bien-fondé de sa poursuite contre M. Hryniak et qu'aucune question ne nécessitait la tenue d'un procès. Il était convaincu que, même si M. Hryniak n'avait pas assisté à une rencontre antérieure entre MM. Peebles, Cranston et Bruno, il savait que cette rencontre avait eu lieu et que son entreprise, Tropos, avait payé pour la présence de M. Peebles. Le juge saisi de la requête a aussi conclu que M. Hryniak savait qu'un million de dollars américains avaient été déposés dans le compte de Tropos au nom de Bruno Appliance et que M. Hryniak avait donné des directives à propos de ces fonds.

[9] Le juge saisi de la requête a déclaré qu'aucune partie des fonds de Bruno Appliance n'avait été

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used to fund disbursements to another individual, Reinhard, and the remainder was slowly drained.

[10] The motion judge held that the tort of civil fraud was made out and there was no genuine issue requiring a trial.

[11] As in the companion *Mauldin* appeal, the motion judge dismissed the motion for summary judgment against Peebles, as he found that the claim involved factual issues that could not be resolved on the record. Consequently, the motion for summary judgment against Cassels Brock was dismissed, as it was premised on the theory that the firm was vicariously liable for Peebles' acts and omissions.

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

[12] Hryniak's appeal of this motion was heard together with the companion *Mauldin* appeal, as well as three other matters, which are not before this Court. The Court of Appeal found that Bruno Appliance's action should not be addressed through summary judgment due to its voluminous record, conflicting testimony, credibility issues, conflicting theories of liability advanced against multiple defendants, and the absence of reliable documentary evidence.

[13] Despite this conclusion, as in *Mauldin*, the Court of Appeal was prepared to review whether the motion judge was nonetheless entitled to grant judgment but, in this case, it concluded that the evidence against Hryniak was not nearly as overwhelming. Two genuine issues required a trial: first, whether Hryniak induced Bruno Appliance to invest, and second, whether some of the funds were misappropriated by Cranston, instead of Hryniak.

investie. Ces fonds ont notamment été utilisés pour financer des versements à une personne du nom de Reinhard. Le reste a lentement été épuisé.

[10] Le juge saisi de la requête a conclu que le délit de fraude civile avait été établi et qu'aucune véritable question ne nécessitait la tenue d'un procès.

[11] Comme dans le pourvoi connexe *Mauldin*, le juge a rejeté la requête visant à obtenir un jugement sommaire contre M. Peebles puisqu'il a conclu que la poursuite mettait en jeu des questions de fait qui ne pouvaient pas être résolues au vu du dossier. La requête en jugement sommaire contre Cassels Brock a donc été rejetée puisqu'elle était fondée sur la thèse selon laquelle le cabinet était responsable du fait d'autrui pour les actes et omissions de M. Peebles.

B. *Cour d'appel de l'Ontario, 2011 ONCA 764, 108 O.R. (3d) 1*

[12] L'appel interjeté par M. Hryniak à l'encontre de cette décision a été entendu avec l'appel connexe *Mauldin*, ainsi qu'avec trois autres affaires dont notre Cour n'est pas saisie. La Cour d'appel a conclu que l'action intentée par Bruno Appliance ne devrait pas être tranchée par jugement sommaire compte tenu de son volumineux dossier, des témoignages contradictoires, des questions de crédibilité, des thèses opposées en matière de responsabilité qui ont été avancées contre plusieurs défendeurs et de l'absence d'une preuve documentaire fiable.

[13] Malgré cette conclusion, la Cour d'appel était disposée, tout comme dans *Mauldin*, à réexaminer la question de savoir si le juge saisi de la requête était néanmoins habilité à rendre un jugement, mais en l'espèce, elle a conclu que la preuve présentée contre M. Hryniak n'était pas aussi accablante. Deux véritables questions nécessitaient la tenue d'un procès : premièrement, celle de savoir si M. Hryniak avait incité Bruno Appliance à investir, et deuxièmement, celle de savoir si une partie des fonds avait été détournée par M. Cranston plutôt que M. Hryniak.

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[14] The Court of Appeal found that the motion judge failed to address the issue of whether Hryniak knowingly made any misrepresentation that induced Bruno Appliance to invest, a necessary element of fraud. The Court of Appeal concluded that there was no compelling evidence that Peebles acted as Hryniak's agent when the relevant representations were made. With respect to the second issue, the Court of Appeal found that it could not decide, based on the record, whether Bruno Appliance's investment was misappropriated entirely by Hryniak or by both Hryniak and Cranston in some proportion.

[15] As a result, the Court of Appeal ordered that the Bruno Appliance action proceed to trial, subject to certain trial management orders under Rule 20.05(2).

III. Analysis

[16] The scope and interpretation of the amended Rule 20 are addressed in the companion *Mauldin* appeal. Therefore, the issue that remains to be determined in this appeal is whether the Court of Appeal erred in its determination that Bruno Appliance should not receive summary judgment against Hryniak.

A. *The Tort of Civil Fraud*

[17] The parties disagree as to the elements of the tort of civil fraud, in particular whether proof is required that Hryniak induced Bruno Appliance to part with its funds.

[18] The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Derry v. Peek* (1889), 14 App. Cas. 337, where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:

[14] La Cour d'appel a conclu que le juge saisi de la requête n'avait pas traité de la question de savoir si M. Hryniak avait sciemment fait une fausse déclaration ayant incité Bruno Appliance à investir, un élément nécessaire de la fraude. La Cour d'appel est arrivée à la conclusion qu'il n'existait aucune preuve convaincante selon laquelle M. Peebles avait agi à titre de mandataire de M. Hryniak au moment où les déclarations pertinentes ont été faites. Au sujet de la deuxième question, la Cour d'appel a conclu qu'elle ne pouvait pas décider, au vu du dossier, si le placement de Bruno Appliance avait été détourné entièrement par M. Hryniak ou par MM. Hryniak et Cranston selon certaines proportions.

[15] Par conséquent, la Cour d'appel a ordonné l'instruction de l'action intentée par Bruno Appliance, sous réserve de certaines ordonnances relatives à la gestion de l'instance rendues conformément au par. 20.05(2) des Règles.

III. Analyse

[16] Le pourvoi connexe *Mauldin* traite de la portée et de l'interprétation de la règle 20 modifiée. Par conséquent, il reste à décider en l'espèce si la Cour d'appel a commis une erreur en décidant que Bruno Appliance ne doit pas obtenir un jugement sommaire contre M. Hryniak.

A. *Le délit de fraude civile*

[17] Les parties ne s'entendent pas sur les éléments constitutifs du délit de fraude civile, plus particulièrement sur la question de savoir s'il faut prouver que M. Hryniak a incité Bruno Appliance à se départir de ses fonds.

[18] L'énoncé classique des éléments de la fraude civile tire son origine dans un arrêt rendu en 1889 par la Chambre des lords, *Derry c. Peek* (1889), 14 App. Cas. 337, dans lequel lord Herschell a procédé à un examen approfondi de l'historique du délit de tromperie et a énoncé les trois propositions suivantes, à la p. 374 :

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First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. . . . Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[19] This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 319-20, that tort law requires proof that "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".

[20] Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330, "fraud without damage gives . . . no cause of action" (p. 340).

[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.

B. *Did the Motion Judge Err in Granting Summary Judgment?*

[22] Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal,

[TRADUCTION] Premièrement, afin de fonder une action pour tromperie, il faut prouver qu'il y a eu fraude, et rien de moins que cela ne saurait suffire. Deuxièmement, la fraude est établie par la preuve qu'une fausse déclaration a été faite (1) sciemment, ou (2) sans la croire vraie, ou encore (3) avec insouciance, sans se soucier qu'elle soit vraie ou fausse. [. . .] Troisièmement, si la fraude est établie, le mobile de l'auteur de la fraude n'a aucune importance. Il importe peu que l'auteur de la déclaration n'eût pas l'intention de tromper son interlocuteur ou de lui faire du tort.

[19] Notre Cour a fait siens ces propos de lord Herschell dans *Parna c. G. & S. Properties Ltd.*, [1971] R.C.S. 306, ajoutant que la fausse déclaration doit « porte[r] effectivement [le demandeur] à y donner suite » (p. 316, citant *Anson on Contract*). Obliger le demandeur à prouver qu'il y a eu incitation s'accorde avec le fait que la Cour ait ultérieurement reconnu dans *Snell c. Farrell*, [1990] 2 R.C.S. 311, p. 319-320, qu'en droit, en matière de responsabilité civile délictuelle, il faut démontrer que « n'eût été la conduite délictueuse du défendeur, le demandeur n'aurait pas subi le préjudice reproché ».

[20] Enfin, la Cour a reconnu qu'il faut aussi faire la preuve d'une perte. Comme l'a dit le juge en chef Taschereau dans *Angers c. Mutual Reserve Fund Life Assn.* (1904), 35 R.C.S. 330, [TRADUCTION] « une fraude ne causant aucun préjudice ne [. . .] donne aucune cause d'action » (p. 340).

[21] Sur la base de cet historique jurisprudentiel, je résume ainsi les quatre éléments du délit de fraude civile : (1) le défendeur a fait une fausse déclaration; (2) le défendeur savait, jusqu'à un certain point, que sa déclaration était fausse (sciemment ou par insouciance); (3) la fausse déclaration a incité le demandeur à agir; (4) les actes du demandeur ont entraîné une perte.

B. *Le juge saisi de la requête a-t-il commis une erreur en rendant un jugement sommaire?*

[22] Un jugement sommaire ne peut pas être rendu en vertu de la règle 20 en présence d'une véritable question nécessitant la tenue d'un procès. Comme

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the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. 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. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

il est souligné dans le pourvoi connexe *Mauldin*, le juge saisi de la requête doit se demander si l'affaire peut être réglée de manière juste et équitable par voie de requête en jugement sommaire. Ce sera le cas lorsque la procédure (1) lui permet de tirer les conclusions de fait qui s'imposent, (2) lui permet d'appliquer le droit aux faits et (3) constitue un moyen proportionné, plus expéditif et moins coûteux d'atteindre un résultat juste. Si, compte tenu uniquement du dossier dont dispose le juge, il semble y avoir une véritable question nécessitant la tenue d'un procès, ce dernier doit alors se demander si l'exercice des nouveaux pouvoirs que confèrent les par. 20.04(2.1) et (2.2) des Règles permet d'écarter le besoin d'un procès. Il peut, à son gré, exercer ces pouvoirs pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice.

[23] For the reasons that follow, I am of the view that there is a genuine issue requiring a trial.

[23] Pour les motifs qui suivent, je suis d'avis qu'il existe une véritable question nécessitant la tenue d'un procès.

[24] As noted by the Court of Appeal, and following the analysis above, civil fraud requires a finding that Hryniak made a misrepresentation which induced Bruno Appliance to invest. The motion judge neither identified the need for a misrepresentation, nor found that Hryniak made one.

[24] Comme l'a indiqué la Cour d'appel et suivant l'analyse qui précède, la fraude civile exige que M. Hryniak ait fait une fausse déclaration ayant incité Bruno Appliance à investir. Le juge saisi de la requête n'a ni souligné la nécessité qu'il y ait eu fausse déclaration, ni conclu que M. Hryniak avait fait une telle déclaration.

[25] The motion judge found that Tropos did not invest Bruno Appliance's funds and that a misrepresentation had therefore been made to the investors. The point at which a misrepresentation occurred was a meeting between Peebles, Cranston and Bruno Appliance's principal in February 2002. He found: that Hryniak was supposed to be in attendance at this meeting, that Hryniak knew of the purpose of the meeting and that Hryniak's company paid for Peebles' attendance.

[25] Le juge saisi de la requête a conclu que Tropos n'avait pas investi les fonds de Bruno Appliance et qu'une fausse déclaration avait donc été faite aux investisseurs. C'est à l'occasion d'une rencontre entre M. Peebles, M. Cranston et le dirigeant de Bruno Appliance en février 2002 que cette fausse représentation a été faite. Il a conclu que M. Hryniak était censé assister à cette rencontre, que ce dernier connaissait l'objet de la rencontre et que l'entreprise de ce dernier avait payé pour la présence de M. Peebles.

[26] However, Hryniak was not present, and he can only be liable for any misrepresentation made by Peebles or Cranston if their statements can be attributed to him. For example, the Court of Appeal considered, and ultimately rejected, the possibility

[26] Cependant, M. Hryniak n'était pas présent à cette rencontre et il ne peut être tenu responsable de fausses déclarations faites par M. Peebles ou M. Cranston que si les déclarations de ces derniers peuvent lui être attribuées. Par exemple, la Cour

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that Peebles or Cranston was acting as Hryniak's agent.

[27] In my view, the motion judge's findings are insufficient to establish that any false statements made at the meeting can be attributed to Hryniak. There was no evidence that Peebles or Cranston were acting on instructions from Hryniak when they met with Bruno. While a principal will generally be vicariously liable "for the torts of her agent committed within the scope of her actual or apparent authority" (P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 369), the motion judge did not find Peebles or Cranston to be Hryniak's agent, and there is no indication that the evidence established that Peebles or Cranston was authorized to make representations on behalf of Hryniak and did not do so on their own account. Similarly, there was insufficient evidence to establish that either Peebles or Cranston was acting as Hryniak's unwitting dupe and, as the motion judge concluded, that issue required a trial.

[28] While the motion judge found that Hryniak was aware of the falseness of the representations[1] and exercised "full dominion and control" over Bruno Appliance's funds (para. 169), as noted by the Court of Appeal, this finding would support liability in conversion, but is not sufficient to establish fraud.

[29] While I agree with the motion judge that the evidence clearly demonstrates that Hryniak was *aware* of the fraud, and may in fact have *benefited* from the fraud, whether Hryniak *perpetrated* the fraud by inducing Bruno Appliance to contribute US$1 million to a non-existent investment scheme is a genuine issue requiring a trial.

1 This follows from his finding in a footnote to para. 178 of his reasons that he accepted Peebles' evidence that he regularly reviewed trust activity with Hryniak (A.R., vol. V, at pp. 154-59).

d'appel a envisagé, puis a rejeté en fin de compte, la possibilité que M. Peebles ou M. Cranston ait agi comme mandataire de M. Hryniak.

[27] À mon avis, les conclusions du juge saisi de la requête ne suffisent pas à prouver que des déclarations fausses faites lors de la rencontre peuvent être attribuées à M. Hryniak. Rien ne prouve que M. Peebles ou M. Cranston suivaient des directives de M. Hryniak quand ils ont rencontré M. Bruno. Un dirigeant est généralement responsable du fait d'autrui [TRADUCTION] « pour les délits commis par son mandataire dans le cadre de son pouvoir réel ou apparent » (P. H. Osborne, *The Law of Torts* (4e éd. 2011), p. 369), mais le juge saisi de la requête n'a pas conclu que M. Peebles ou M. Cranston étaient les mandataires de M. Hryniak et rien n'indique que, selon la preuve, ils étaient autorisés à faire des déclarations au nom de M. Hryniak et qu'ils n'ont rien fait de tel de leur propre initiative. De même, la preuve était insuffisante pour établir que M. Peebles ou M. Cranston était la dupe de M. Hryniak et, comme l'a conclu le juge saisi de la requête, cette question nécessitait la tenue d'un procès.

[28] Bien que le juge saisi de la requête ait conclu que M. Hryniak était au courant de la fausseté des déclarations[1] et qu'il exerçait [TRADUCTION] « un plein contrôle » sur les fonds de Bruno Appliance (par. 169), comme l'a indiqué la Cour d'appel, cette conclusion justifierait l'imputation de responsabilité pour détournement, mais elle ne suffit pas pour établir la fraude.

[29] Je conviens avec le juge saisi de la requête que la preuve démontre clairement que M. Hryniak était *au courant* de la fraude, et qu'il en a peut-être effectivement *bénéficié*, mais la question de savoir si M. Hryniak a *commis* la fraude en incitant Bruno Appliance à verser un million de dollars américains à un projet d'investissement inexistant constitue une véritable question nécessitant la tenue d'un procès.

1 C'est ce qui ressort de sa conclusion dans une note en bas de page rattachée au par. 178 de ses motifs selon laquelle il acceptait le témoignage de M. Peebles, qui a dit avoir examiné régulièrement les activités de la fiducie avec M. Hryniak (d.a., vol. V, p. 154-159).

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[30] The Court of Appeal also found the extent of Hryniak's misappropriation of Bruno Appliance's funds to be a second issue requiring a trial. The Court of Appeal found that Hryniak had appropriated US$450,000, but that the fate of the remaining US$550,000 required a trial. Given the principles of joint and several liability, I am satisfied that this issue would not normally preclude a finding that there is no genuine issue requiring a trial against Hryniak.

[31] The motion judge failed to find a necessary element of civil fraud, an error of law, and did not draw sufficient factual conclusions for either him, or an appellate court, to make such a finding. Since the action was proceeding to trial against the other defendants in any event, the order of the Court of Appeal that all the remaining actions be heard together is the most proportionate, timely and cost effective approach. In light of this conclusion, it is unnecessary for me to determine whether it was against the interest of justice for the motion judge to make use of his expanded fact-finding powers.

IV. Conclusion

[32] Accordingly, I would dismiss the appeal, with costs to the respondent. I would not interfere with the case management orders made by the Court of Appeal.

Appeal dismissed with costs.

Solicitors for the appellant: Heydary Hamilton, Toronto.

Solicitors for the respondent: McCarthy Tétrault, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

[30] La Cour d'appel a aussi conclu que le montant du détournement des fonds de Bruno Appliance par M. Hryniak constituait une deuxième question nécessitant la tenue d'un procès. Elle est parvenue à la conclusion que M. Hryniak avait détourné 450 000 $US, mais que le sort des 550 000 $US qui restaient nécessitait la tenue d'un procès. Compte tenu des principes de responsabilité solidaire, je suis convaincue que cette question n'empêcherait pas normalement de conclure à l'absence d'une véritable question nécessitant la tenue d'un procès contre M. Hryniak.

[31] Le juge saisi de la requête n'a pu conclure à l'existence d'un élément nécessaire de la fraude civile, ce qui constitue une erreur de droit, et n'a pas tiré de conclusions factuelles suffisantes pour lui permettre ou permettre à une cour d'appel de conclure à l'existence d'un tel élément. Puisque l'action donnait lieu à un procès contre les autres défendeurs en tout état de cause, l'ordonnance de la Cour d'appel portant que toutes les autres actions soient instruites ensemble constitue la marche à suivre la plus proportionnée, opportune et économique. À la lumière de cette conclusion, je n'ai pas à déterminer s'il était contraire à l'intérêt de la justice que le juge saisi de la requête exerce ses pouvoirs élargis en matière d'appréciation des faits.

IV. Conclusion

[32] Par conséquent, je suis d'avis de rejeter le pourvoi avec dépens en faveur de l'intimé. Je ne modifierais pas les ordonnances relatives à la gestion de l'instance rendues par la Cour d'appel.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante : Heydary Hamilton, Toronto.

Procureurs de l'intimé : McCarthy Tétrault, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

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Solicitors for the intervener the Ontario Trial Lawyers Association: Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Solicitors for the intervener the Advocates' Society: Borden Ladner Gervais, Ottawa; Torys, Toronto.

Solicitors for the intervener the Canadian Bar Association: Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

Procureurs de l'intervenante Ontario Trial Lawyers Association : Allan Rouben, Toronto; SBMB Law, Richmond Hill, Ontario.

Procureurs de l'intervenante Advocates' Society : Borden Ladner Gervais, Ottawa; Torys, Toronto.

Procureurs de l'intervenante l'Association du Barreau canadien : Evans Sweeny Bordin, Hamilton; Sotos, Toronto.

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THE LORD CHANCELLOR:—Certainly not.

The *Attorney-General*:—I only wished to know your Lordship's pleasure upon that.

Mr. *Bacon*:—The costs of all parties come out of the estate.

The *Attorney-General*:—That includes the costs of the appeal also?

THE LORD CHANCELLOR:—Yes.

Judgment given for Appellants.

Lords' Journals, 14th May, 1867.

Solicitors for the Appellants: *White, Broughton, & White.*
Solicitors for the Respondents: *Nash, Field, & Layton.*

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March 26, 28, 29; *April* 1: *May* 14.

THE DIRECTORS, &c., OF THE CENTRAL RAILWAY COMPANY OF VENEZUELA } APPELLANTS;

AND

JOSEPH KISCH . . . . . RESPONDENT.

Company—Prospectus—Misrepresentation—Shareholder—Practice—Appeal.

Where a person believes that he has been misled, by representations which are false or deceptive, into taking shares in a proposed company, it is his duty to raise the objection at an early period, and to be guilty of no needless delay.

The same rules as to false or deceptive representations which are applicable to contracts between individuals are also applicable to contracts between an individual and a company. No misstatement or concealment of any material facts or circumstances ought to be permitted in a prospectus issued to invite persons to become shareholders in a projected company.

The public are, in such a case, entitled to have the same opportunity of judging of everything material to a knowledge of the true character of the undertaking as the promoters themselves possess.

Where there has been fraudulent misrepresentation, or wilful concealment of facts, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, that he might have known the truth by proper inquiry.

The phrase "available capital of the company" is not a true, but is a de-

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ceptive, description of capital which may be raised under the borrowing powers conferred upon directors.

Where a prospectus described a contract for the construction of a line of railway as entered into at "a price considerably within the available capital of the company," and the facts were, that from the nominal capital of £500,000 were to be deducted £50,000 as the price of purchasing the concession to make the railway, and the contract price for making it was £420,000, the representation was held to be untrue and deceptive.

A prospectus of a railway company stated that "the engineer's report, maps, plans, &c., may be inspected, and farther information obtained at the offices of the company." An applicant for shares signed the printed form of application, in which, as usual, it was stated that he agreed to be bound by the conditions and regulations contained in the memorandum and articles of association. An examination of all of these papers would have afforded him the information, the want of which he alleged as a ground for rescinding his contract. Trusting to the representations, he did not examine all:—

Held, that his neglect to do so was no answer to his demand to be relieved from the contract.

A bill was filed to rescind a contract on the ground of there having been misrepresentations of facts. Relief was given in the Court below on only some of the alleged grounds. An appeal was brought against the decree:—

Held, that it was open to the Respondent to sustain the decree on any or all of the grounds stated in his bill.

THIS was an appeal against a decision of the Lords Justices, by which an order of Vice-Chancellor Sir *John Stuart* had been reversed.

In the year 1856 the legislature of *Venezuela*, with a view to establish railways there by the aid of foreign adventurers, passed a law authorizing the executive government to conclude contracts for the construction of certain lines of railway to be called "*The Central Railroad of Venezuela*," giving, of course, certain advantages to those who should enter into such contracts. On the 18th of January, 1857, a contract was entered into between the Secretaries for the Interior, for Justice, for the Treasury, and for Foreign Relations, of the one part, and certain persons forming a financial company, and called "concessionaries," on the other, by which the latter bound themselves to construct certain railways on the terms mentioned in the contract. The construction of the railways was at first prevented by the existence of a war, which having come to an end, the period for commencing the works was fixed for the 31st of July, 1864. One of the terms of the contract required the deposit of £20,000 as "caution money" for the commencement of

the works within twelve months after that date. The original concessionaries ultimately sold the concession, such of the works as had been commenced, and the plant thereof, to the Appellants, the promoters of the present company, the *Central Railway Company of Venezuela, Limited,* for the sum of £50,000. The company formed by the Appellants was, in July, 1864, registered under the *Companies Act,* 1862, and the memorandum of association stated that the objects of the company were the constructing, maintaining, managing, and working railways in *Venezuela,* the first section of which was to be from *Puerto Cabello* to *San Felipe,* a distance of fifty-four miles, the supplying the plant, acquiring concessions from the government, &c., and the capital was stated to be £500,000 in 10,000 shares of £50 each. The prospectus issued by the Appellants set forth that, among other advantages enjoyed by the company, there was a government guarantie to the shareholders of 9 per cent. per annum, for twenty years, on the capital employed, amply secured by a mortgage of 10 per cent. on the import duties of *La Guayra* and *Puerto Cabello,* together with 2½ per cent. guaranteed by the contractor during the construction of the line, and that the interest would run from the commencement of the works. The prospectus represented that *Venezuela* possessed, perhaps, the most prolific soil in the world; that tens of thousands of acres awaited occupation; that the railway would pass through a district most productive in coffee, cocoa, cotton, hides, indigo, &c., and richly agricultural; so that "a large and permanent traffic will be at once secured to the company," and that the government of the Republic had bound itself not to grant, for a period of twenty-five years, any other concession for the construction of a railway in the direction of the *Central Railway.* The prospectus went on thus to describe the privileges secured to the company:

1. "A guarantie of 9 per cent. interest on all calls paid on account of the subscribed capital for a period of twenty years, amply secured by a cession of the import duties of *La Guayra* and *Puerto Cabello.*"

4. "A free grant of all lands required for the construction of the railways, and for the stations and other buildings required to be executed."

5. "A free grant of 30,000 acres of land, in addition to the above,

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in the provinces through which the railway will pass, and for which land warrants will be issued to the company on the completion of the line."

As to the contractor, the prospectus set forth: "A contract has been entered into by the company with a responsible contractor, based upon surveys, plans, and sections approved by the government, for the completion of the line from *Puerto Cabello* to *San Felipe*, including stations and rolling stock, at a price considerably within the available capital, and the works will be commenced forthwith. Security has been taken for the due fulfilment of the contract. The contractor, also, in consideration of receiving a large quantity of timber along the line for his use, guarantees $2\frac{1}{2}$ per cent. on the paid up capital during the construction of the works."

The Respondent received a copy of the prospectus in the ordinary way by post. Attached to it was the common form of application for shares, containing the usual words, "I agree to be bound by all the conditions and regulations contained in the memorandum and articles of association." He paid, on the 13th of July, the sum of £100 into the bankers of the Appellants, and then signed the form of application for 100 shares, and forwarded it. The shares were allotted to him at once. With this letter of allotment, dated 14th of July, came a demand on him to pay the farther sum of £2 per share. On the 20th of July he paid that call, but before doing so called at the office of the company, had an interview with the secretary, and asked that the number of shares allotted him might be reduced to twenty. On the 25th of July the secretary wrote to say that the directors could not comply with his request, adding, "but there will be no difficulty in your disposing of them on the *Stock Exchange*." In September a farther call of £2 per share was made on the Respondent, which, however, he did not answer, and the solicitors for the Appellants applied to him on the subject by letter on the 11th of November. On the following day the Respondent's solicitor applied for permission to inspect the concessions and contracts referred to in the prospectus. This application was granted, and he and the Respondent examined these documents on the 22nd of November. The call was not paid, and on the 15th of December, 1864, the Respondent owed for

unpaid calls, and for interest thereon, the sum of £707 18*s.* 2*d.*, and an action was brought against him in the Court of Common Pleas to recover the amount. The declaration was delivered on the 26th of January, 1865, and on the 28th of January the Respondent filed his bill in Chancery, in which he set forth the circumstances of his becoming a shareholder in the company, alleged untruthfulness in the representations made in the prospectus, the discovery of certain facts of which he was ignorant when he applied for shares, and that he would not have taken the shares if he had known these facts, and he prayed, therefore, that he might be released from the contract on account of the fraudulent misrepresentations of the directors, that they might be ordered to repay to him the deposit and the calls paid by him, with interest and expenses, and he offered to return them the said shares; and he farther prayed that they might be restrained from proceeding in the action.

The representations of which he especially complained were the statements as to the capital of the company, from which all mention of the £50,000 for the purchase of the concession was omitted, while the contract for the construction of the line was made for £420,000, thus leaving no more than a possible balance of £30,000 for all contingencies; the statements as to the grants of land, as to the guarantie of 9 per cent., and as to the way in which that amount of interest was secured on the imports of *Puerto Cabello* and *La Guayra*. He also insisted that there had been great and material misrepresentations as to the contractor, his duties and liabilities.

Evidence was taken on both sides, and the various documents were produced (1). The authority given by the legislature to the government of *Venezuela*, of April, 1856, was thus set forth:— "The executive power is authorized, in order that, in the name of the nation, and as far as ten years, it guarantees the interest up to 7 per cent. on the capital which, during this time, may be employed in railroads; but, in case that the roads shall not be producing any interest on account of any causes imputable to the company, the nation shall not be obliged to pay the said interest."

(1) The documents are quoted as given in the printed papers laid before the House. The originals were not printed. The translations are very unsatisfactory, and, in some instances, hardly intelligible.

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Article 17 of the contract (made in January, 1857) was in these terms:—"The executive power, in the name of the nation, guarantees, for ten years, as a minimum, the interest of 7 per cent. annually, in favour of the capital which during this time may be employed in the railroads, while these do not produce it from a cause not imputable to the company; and, it being understood that, from the time when they may produce any, the nation shall not be bound to pay in this time, except what may be wanting to complete the 7 per cent. guaranteed."

By an authoritative article of October, 1858, called "An Explanation of the last-mentioned Contract," it was declared (Article 7), "That the interest of which Article 17 speaks shall not be paid except upon the sums really and actually laid out upon the railroads . . . and, whatever may be the amount of the sum employed in them, the assistance of the government for the payment of the 7 per cent. aforesaid, shall not exceed the 10 per cent. of the import and export duties which may be collected by the Custom House of *Puerto Cabello;* that as soon as the proceeds of the *Central Railroad* exceed 7 per cent. of the sums expended upon it, the excess shall be applied to the reimbursement of that which the government may have paid in virtue of this article, unless the company decides to make the reimbursement with shares of the said undertaking." The article went on to declare the appointment, by the government, of a director, who was, even though he might have no shares in the company, to be a controller of the company, and who was to have a salary paid by the company, "and that the payment of the 7 per cent. offered by this article shall not commence but when the company has a capital of 200,000 dollars at least, beyond the privileged shares mentioned in the Article 13."

In September, 1863, the government passed some resolutions, one of which (Article 3) was as follows:—"The government agrees to guarantee, as a minimum, for the term of 20 years, interest at 9 per cent. per annum, in favour of the capitals which may enter into the coffers of the company, from the day on which the government receives the official intimation that the works of the railway have been commenced, and the amount of the sum which this interest is to gain will be verified by the representative of the

government, who, for this and other purposes, will have a seat in the direction of the company at *London*. This interest is guaranteed so long as the said capital does not produce 9 per cent. for a reason not imputable to the company, and this being understood in the same terms which Article 17 of the contract of January, 1857, and its only paragraph, express. For the payment of this interest there is set apart, specially and signally, during the first year, the 5 per cent., and in the rest, the 10 per cent. of the import duties of the Custom Houses of *La Guayra* and *Puerto Cabello*."

A decree of the 28th of January, 1864, contained the following article:—"The government will guarantee as dividend on the capital employed as far as 9 per cent. per annum, while, for causes not imputable to the company, what the line may produce do not reach so much; but this guarantie shall never be for more than 20 years."

With regard to the granting of lands to the company, the Articles 3 and 7 of the decree of April, 1856, were these:—"Art. 3. For fixing in the contract the rules necessary for obtaining private property when it may be necessary for the railway line or its dependencies, there being previously the just indemnification on the part of the undertaking: the work being considered as one of public convenience. The waste lands (1), which, according to the present decree, it is agreed to give to the company, shall only be able to be taken from the provinces benefited by the railroad, and in case there be not such in these, the concession remains without effect, which cannot be a subject for claim. In the grounds ceded by the present decree, those are not included which, with any title, the Venezuelans possess at the time of the publication of this decree."

In the contract of the 18th of January, 1857, Article 4 provided that—"The executive power, making use of the authorization which the legislative decree already mentioned gives to it, grants to the Senor *Lorenzo Jose* and his associates, and their heirs and successors, the ownership of 500 fanegadas of waste lands

(1) There was much discussion about the meaning of this expression—the Respondent insisted that it meant waste lands, the Appellants that it meant unoccupied or unappropriated lands.

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for each mile of railway which they may construct, in addition to 30 varas of width for the line of road, throughout all its extent, and to those which may be necessary for forming the depôts or offices which the service of the railway may require: provided that the said lands are in the provinces benefited without being owned by Venezuelans at the date of this contract." "In case the lands necessary for the line of the road, its depôts and offices, are private property, the executive power shall intervene (if the company and the owner do not arrange between themselves) to cause them to be ceded to the company, the just indemnification having previously been made by the latter for their actual value, determined by skilled persons to be named by the company and the proprietor, one by each party, and an umpire whom the government shall name, without their entering into the estimate the greater value which the railway itself will give them."

Art. 5. "Each time the company presents constructed a part of the railway which can be made use of by the public, there shall be given to it the titles of the waste land corresponding to the extension of that part."

As to the Contractor,—the real arrangement with him was as follows:—"That the contractor shall pay to the company interest at the rate of 2½ per cent. per annum on all capital which should from time to time be paid up in the company, during the time of the construction of the railway and works, and until such railway and works are delivered up to the company entirely completed, and fit for traffic in accordance with the plan, section, and specification: Provided that the liability of the contractor to pay such interest should cease when and so soon as he should have paid the company for such interest sums of money amounting in the aggregate to £20,000. That in order to provide a fund for the payment of such interest, it should be lawful for the company to deduct and retain £5 per cent. interest out of every payment to be made to the contractor until the sums so deducted and retained shall amount to £20,000, when the sums so deducted and retained should be passed to the credit of the contractor in interest account with the company, and such account should be debited at the end of every six months at the rate of 2½ per cent. per annum on the paid up capital of the company for the

time being, until such debt should amount to the sum of £20,000, and until the completion and delivery up to traffic of the entire line." It was also alleged that he had been in pecuniary embarrassment, and so was not what the prospectus described him.

The cause was heard before Vice-Chancellor *Stuart*, upon interlocutory motion for an injunction; and on the 21st of March, 1865, the Respondent's bill was ordered to be dismissed with costs. On appeal to the Lords Justices, an injunction was granted, and the order of the Vice-Chancellor, dismissing the bill, was reversed (1).

This was an appeal against their Lordships' decree.

Sir *R. Palmer*, Q.C., and Mr. *W. Morris*, for the Appellants:—

This decree of the Lords Justices cannot be supported unless bad faith can be shewn on the part of the Appellants. There is no pretence for such a charge against them. In *Ex parte Briggs* (2), though the circumstances were somewhat different, the principle was laid down which ought to govern this case. There the shareholder had, as here, full means of knowledge; he had paid his deposit, and but for a difficulty arising from the rules of the *Stock Exchange*, would have sold his shares. The Master of the Rolls refused to relieve him from his liability. Here the Respondent applied for more shares than he really wanted; the number he applied for was allotted to him; he sought to have that number reduced; that was refused, and after that he paid the £2 deposit. He was not entitled, under such circumstances, to ask to be put in a better situation than other shareholders: *Nicol's Case* (3). There was no fraud here; yet fraud was suggested by the Respondent. When it was so suggested, it was most essential that it should be accurately set forth in the bill, and that the Court should be informed how it had arisen: *The New Brunswick, &c., Railway Company* v. *Conybeare* (4). So in *Jennings* v. *Broughton* (5), Lord Justice *Knight Bruce* said, that in such a case, "the title to relief depended on three questions: First, whether in the statements or representations made there was anything untrue, material in its nature,

(1) 3 De G. J. & S. 122.
(2) Law Rep. 1 Eq. 483.
(3) 3 De G. & J. 387.
(4) 9 H. L. C. 711, 724.
(5) 5 De G. M. & G. 126, 130.

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that is to say, which, taken as true, added substantially to the value of the mine, and was not conjectural merely. Secondly, if so, was any such untrue assertion published or made without a belief in its truth by the person or persons publishing or making it. And thirdly, if not, was the belief entertained without fair or reasonable ground?" It was impossible for the Respondent here to sustain his claim to relief on any of these grounds. And as to such cases in general, the true rule was laid down by Lord Justice *Turner*, when, in the same case, he said (1), "Finally, I think that, although it is the undoubted duty of the Court to relieve persons who have been deceived by false representations, it is equally the duty of this Court to be careful that, in its anxiety to correct frauds, it does not enable persons who have joined with others in speculations, to convert their speculations into certainties at the expense of those with whom they have joined. This, in my opinion, would be the effect of giving the Plaintiff the relief which he asks, and, I think, therefore, that this bill ought to be dismissed." That ought to be the case here.

The facts here [which were observed upon very fully] do not justify the charge of misrepresentation. In every substantial respect they were true. If they were expressed in rather too sanguine terms, that is no ground for setting aside the contract. Every prudent man is on his guard against high-flown language in a prospectus. As the prospectus referred to the articles of contract with the government and with the contractor, he had full means of knowing all the circumstances connected with the company, and forming his judgment upon them. There is no ground here to rescind the contract, nor any to grant the injunction to stay the action for calls. *Smith* v. *The Reese River Company* (2) will be relied on by the other side. There an injunction was granted to protect a shareholder against an action for calls, but that was where the directors themselves had rescinded the contract; and when that case afterwards came before the Master of the Rolls, on a motion to take the Plaintiff's name off the list of contributories, he refused the application. The Respondent here sought to obtain the benefit which was refused in that case, and his application could not be supported. Neither with regard to the

(1) 5 De G. M. & G. 140. (2) Law Rep. 2 Eq. 264.

directors, nor to the creditors of the company, had he a right to be relieved from the liability which he had voluntarily, and with full means of knowledge, incurred.

The Respondent knew all the facts in November, and ought then to have sought relief; his delay precluded him from afterwards asking for it.

The Respondent obtained the judgment of the Lords Justices on two matters only. He cannot now be heard to sustain it upon others.

Mr. *Dickinson*, Q.C., and Mr. *Swanston*, for the Respondent:—

There has been no unnecessary delay here. [The LORD CHANCELLOR:—We think that you need not enter on that point.] There may be allowance made for large expressions in anticipation of what a company will do and will gain; but if things are stated as facts, they must be truly stated. The party misled has a right to be removed from the list of shareholders: *Ship's Case* (1). Misrepresentation as to facts avoids the contract founded upon them. In *Nicol's Case* (2) the applicant had not only received a dividend, but he had sold his shares, and he was therefore held to be liable to be treated as a shareholder up to the time of the transfer. That case has no application to the present. So in *Jennings* v. *Broughton* (3), it was quite within the power of the purchaser of the shares to avoid being misled, for from the first he had ample means of knowing the facts, and had not relied on the advertisements; but even there it was declared that misrepresentations of a material kind would be sufficient to avoid the contract. In *Rawlins* v. *Wickham* (4) the delivery of a false account, to induce a person to become a partner in a banking business, was held sufficient to entitle him to have the contract rescinded, and that, too, although he had continued in the partnership for four years; and in *The New Brunswick and Canada Railway and Land Company* v. *Muggeridge* (5) it was held that a person contracting to take shares on the statements contained in a prospectus had a right, not only not to be misled by statements actually false, but was

(1) 2 De G. J. & S. 544.
(2) 3 De G. & J. 387.
(3) 17 Beav. 234; 5 De G. M. & G. 126.
(4) 3 De G. & J. 304.
(5) 1 Dr. & Sm. 363.

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entitled to be informed of all the facts the knowledge of which might reasonably influence his judgment in making the contract. The observations of Vice-Chancellor *Kindersley* were in that case very strong on this point. In *Price* v. *Macaulay* a misrepresentation as to the yearly value of some premises, occasioned by the suppression of the fact that that value arose from circumstances of a temporary nature only, was held sufficient to justify the rescinding of the contract. And the same result followed where houses were sold under the description of being "well supplied with water," when, in fact, though other houses near them were supplied with water from their own grounds, these houses were only supplied from the waterworks of the town: *Leyland* v. *Illingworth* (1). "A fraud may consist as well of the suppression of what is true as the representation of what is false," was said by Mr. Justice *Chambre*, in *Tapp* v. *Lee* (2); and that principle was acted on in *Foster* v. *Charles* (3), where a person who had recommended an agent by a statement which he knew to be false, was held liable in damages for the misconduct of that agent. *Dobell* v. *Stevens* (4), *Attwood* v. *Small* (5), *Reynell* v. *Sprye* (6), and *Burnes* v. *Pennell* (7), all proceed on the same principles. The last-named case contained some very strong observations by Lord *Campbell*, to which he adhered when Lord Chief Justice, in *The Deposit Company* v. *Ayscough* (8). And in *Wilkinson's Case, In re the Madrid Bank* (9) Lord Justice *Cairns* expressed his approval of the decision in the present case, although he held *Wilkinson* there to be liable, on the ground that he believed *Wilkinson* to have been fully informed of the facts. In *Oakes's Case, In re Overend* (10), Vice-Chancellor *Malins* recognised the principle that, in a case where fraud was practised by the promoters of a company, a person deceived by it would be released from his contract with the promoters, though as to creditors he might still continue liable. Where a party has been drawn into a contract by misrepresentation, he may compel the party making the misrepresentation to make it good, or, if that is impossible, he may

(1) 2 De G. F. & J. 248.
(2) 3 B. & P. 371.
(3) 6 Bing. 396.
(4) 3 B. & C. 623.
(5) 6 Cl. & F. 395.
(6) 8 Hare, 269; 1 De G. M. & G. 660.
(7) 2 H. L. C. 497.
(8) 6 E. & B. 761.
(9) 15 Weekly Rep. 499.
(10) Law Rep. 3 Eq. 576.

avoid the contract: *Pulsford* v. *Richards* (1). Here there are many misrepresentations sufficient to avoid the contract; and the only parties in contest being the directors who made those misrepresentations and the party who was misled by them, he is entitled to relief.

The Respondent is entitled to sustain the decree, not only on the grounds on which it was rested by the Lords Justices, but on all those stated in his bill.

Sir *R. Palmer*, in reply:—

It is not contended that any principle of law is in doubt in this case, but only the application of the principle. For that purpose alone the case of *The New Brunswick Company* v. *Conybeare* was cited. That case shews that, if fraud and deception are relied on, they must be clearly alleged and distinctly proved. *Burnes* v. *Pennell* is to the same effect, and shews too the difference which exists, applying the rule to set aside an executed contract, or to give effect to one which is purely executory. *Price* v. *Macauley* and *Leyland* v. *Illingworth* were cases of specific performance. In *Rawlins* v. *Wyckham* there had been a direct misrepresentation of a positive fact. There was none here. In *Ship's Case* (2) there was no answer given to the applicant's positive statement on oath that he was not informed of the facts, and on that ground he was held entitled to relief. In *Jennings* v. *Broughton* the Master of the Rolls declared (3), that "it is always to be borne in mind, in suits of this nature, that the burden of proof is on the Plaintiff." He had said the same thing in *Pulsford* v. *Richards* (4). The Respondent here has not fulfilled that condition, on the performance of which he is alone entitled to ask for relief.

May 14. THE LORD CHANCELLOR (Lord *Chelmsford*), having stated the facts of the case, said:—

The Respondent alleges that the prospectus which induced him to purchase the shares contains fraudulent representations, which

(1) 17 Beav. 87.
(2) 2 De G. J. & S. 544.
(3) 17 Beav. 239.
(4) Ibid. 87.

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entitle him to have the purchase declared void. The Appellants, denying that there are any false representations in the prospectus, contend that the Respondent's delay in instituting his suit as soon as he had knowledge, or means of knowledge, of all the facts, is fatal to his claim to relief.

"There is some little uncertainty as to the exact time when the Respondent made the discovery that the representations in the prospectus were not *bonâ fide*. He at first said that it was within three days after receiving his letter of allotment, which would be as early as the 16th of July; then, that it was after he had paid the £1 and the £2, the latter being the call on his 100 shares, which was paid on the 25th of July.

In his bill the Respondent states, that "it was in or about September, 1864, he heard rumours that the statements in the prospectus were, to a great degree, false; that on the 22nd of November he went to the office of the company, when certain documents were produced, and from them he, for the first time, learnt with certainty that the statements contained in the prospectus issued by the company were false in many particulars."

The fair result of these statements appears to me to be, that although the Respondent might have heard unfavourable rumours, and conceived suspicions of the company, at an early period after he obtained his shares, yet that he received no certain information upon which he could act until the month of November, and he did nothing between that day and the 28th of January, 1865 (when he filed his bill), which amounted to acquiescence. This case differs in this respect from that of *Ex parte Briggs* (1), which was mainly relied upon in support of the objection of delay, for there, Mr. *Briggs*, after he discovered that the representations in a prospectus, on the faith of which he was induced to take shares, were false, dealt with the shares as owner by instructing his broker to sell them. The Respondent, therefore, has not precluded himself by laches from his right to have the contract for the purchase of shares in the company rescinded, provided he has clearly and distinctly alleged in his bill the fraudulent representations (or any of them) upon which he relies, and has established them by satisfactory evidence.

(1) Law Rep. 1 Eq. 483.

The alleged representations are contained in a prospectus, the object of which was to invite the public generally to join the proposed undertaking. In an advertisement of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure, and no prudent man will accept the prospects which are always held out by the originators of every new scheme, without considerable abatement.

But although, in its introduction to the public, some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking, may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted. In my opinion, the public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character, as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements. As was said by Vice-Chancellor *Kindersley*, in the case of the *New Brunswick and Canada Railway Company* v. *Muggeridge* (1), "those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."

Applying these principles to the prospectus in question, I proceed to consider the grounds upon which it is impeached by the bill of the Respondent. Although the Lords Justices decided in favour of the Respondent upon two only of the alleged misrepresentations, or, rather, concealments of facts, in the prospectus, and

(1) 1 Dr. & Sm. 381.

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expressed an opinion against him upon the others, it is quite open to him to maintain the decree upon any of the grounds laid in his bill, and accordingly the argument on his behalf has been extended to every misstatement in the prospectus, which he has attributed to the company.

I will pass lightly over those misstatements in, or omissions from, the prospectus, which, in my opinion, do not establish a case against the Appellants; agreeing, however, with the remark made in the course of the argument for the Respondent, that the suppression of a fact will often amount to a misrepresentation.

I do not think that there is anything in the omission from the prospectus of all mention of the deposit of £20,000 which the company was to make, and which was to be forfeited if the construction of the railway was not commenced by a certain day. The Respondent alleges, in his bill, that the Appellants, by undertaking only one line of the railway, and neglecting to commence or undertake another, are liable to forfeit the £20,000. It appears to me that the omission to mention this required deposit would be no evidence of wilful suppression of the truth, even if the liability to its being forfeited existed. The effect of the deposit would be to quicken the diligence of the company to commence the works, in order to obtain its return. And if the fact of the deposit being in jeopardy by anything which occurred after the issuing of the prospectus can have any bearing upon the statements it contains (which I think it cannot), the evidence shews that the railway has been commenced within the time limited, so as to entitle the company to have the deposit restored.

The next allegation of fraudulent concealment which I will deal with relates to certain shares which, under the contract with the Venezuelan government, the original concessionaries were to have a right to reserve to themselves, as privileged shares, to indemnify them for costs incurred by them up to the date on which they should open the subscriptions to the public. By a document, called "Explanations of the Contract," these shares were not to exceed 2075; 575 to be considered as paid by anticipation for the preliminary expenses, and 1500 as a compensation to the promoters of the undertaking. The Plaintiff alleges, that if these privileged shares had been mentioned in the prospectus

he would not have purchased his shares. The truth of this assertion cannot, of course, be ascertained. But the answer to this charge is, that although the benefit of these privileged shares passed to the company under the purchase of the concession, there never has been any intention to act upon this clause in the contract, nor any provision in reference to it stated by the Appellants, and, therefore, there was no occasion to mention the privilege in the prospectus.

The next charge to be considered is one of alleged misstatement: —that, amongst other privileges secured to the company, is one of "a free grant of 30,000 acres in the provinces through which the railway is to pass." This the Respondent asserts in his bill to be untrue, for that it was expressly provided that the land to be granted should be 30,000 acres only, which were to be nowhere but in the provinces to be benefited by the railway, and that, too, with this condition annexed, that no land should be granted which was owned by Venezuelans. Another ground of misrepresentation was urged in argument, viz., that the prospectus states that the country through which the railway is to pass is a most productive one for produce of various kinds, besides being a rich agricultural district, leading (as it was said) to the belief that the 30,000 acres were to be of land of this quality, instead of which it was expressly stipulated in the decree which authorizes the executive power of *Venezuela* to arrange the contract for the *Central Railroad*, that the lands were to be "waste lands."

It seems to me, however, to be clear, that this description refers, not to the quality of the soil, but to the lands being unoccupied; a view which is confirmed by the qualification annexed to the proposed grant, that in the grounds ceded those "are not included which, with any title, the Venezuelans" (extended afterwards to foreigners) possess at the time of the publication of the decree. The Appellants were, in my opinion, warranted in stating that the grant was a free grant of 30,000 acres, without mentioning the qualification of its not extending to private property (which would of course be implied), or that the 30,000 acres were to be granted only out of the provinces to be benefited by the railway, and in case there should be none such, the concession was to remain without effect. There is no reason to suspect that the Appellants had

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any doubt that the quantity of land conceded could be found within the limited district, and the Venezuelan government bound itself to apply to the convention, or constitutional congresses, "in order that it might prevent the alienation of waste lands in the provinces through which the railroad was to pass, until the plans of the latter being presented, and its extension determined, they might designate those which, according to the contract, were to belong to the company."

I now proceed to consider an alleged misrepresentation upon which the Lords Justices thought that the Respondent had established a case against the Appellants. This relates to the statement in the prospectus, that there was secured to the company the privilege of a guarantie of 9 per cent. interest on all calls paid on account of the subscribed capital for a period of twenty years, amply secured by a cession of the import duties of *La Guayra* and *Puerto Cabello*.

The Respondent charges in his bill that this statement is entirely untrue, and that the import duties are already mortgaged for their full value to other persons. The proof of the mortgage of the duties to their full value fails, as it appears that they were previously mortgaged only to the extent of 55 per cent.

But it is said by the Respondent that the statement of the prospectus is untrue, because the government of *Venezuela* was not to pay the 9 per cent. in case the railroads were not producing any interest on account of any cause imputable to the company. I doubt whether the allegation in the bill places the untruth of the statement upon this ground. But admitting that it does, I do not see how the omission of the qualification can be regarded as a fraudulent suppression of the truth. Even if no mention of it had been made in the agreement for the guarantie, I should suppose it would necessarily be implied; for no party can claim the benefit of a contract the right to the performance of which arises from his own default; and no one could possibly suppose that such an absolute and unqualified guarantie would ever be given. At all events the omission to notice such a qualification does not appear to me (with great respect to the Lords Justices) to be a ground for attributing to the Appellants a fraudulent intention to conceal the truth.

Thus far I have examined the various allegations of fraudulent misrepresentations and concealment in the prospectus of the Appellants, and have been unable to discover anything upon which, if they had stood alone, the Respondent could claim to have his purchase of shares set aside; but I proceed to a part of the case which not only leads to a different conclusion, but also reflects upon the general fairness of the prospectus, even in the particulars which I have been considering.

The portions of the prospectus to which I am about to refer appear to me to be more or less connected with each other, and all of them bear upon the important question of the ability of the Appellants to perform the contract into which they have entered, with the means at their disposal, and by the contractor with whom they had engaged.

The misrepresentations and concealment alleged in the bill under these heads relate—

1. To the omission from the prospectus of all mention of the purchase of the concession by the Appellants for £50,000.

2. To the statement that the contract was entered into with a responsible contractor.

3. To the contract being considerably within the available capital.

4. To the liability of the contractor upon his guarantie of 2½ per cent. being limited to £20,000.

The Respondent alleges in his bill that the purchase of the concession by the company for £50,000 was fraudulently concealed. It is difficult to understand how such an important fact can have been honestly omitted from the prospectus. It cannot be said that the amount of the capital of a company is an insignificant matter for the judgment of those who are invited to become shareholders. The prospectus states the capital to be £500,000, whilst it was well known to those who prepared it that the company was established upon the footing of a payment of £50,000, which necessarily reduced the capital by that amount.

It was said by the counsel for the Appellants that when the prospectus stated that the railway was to be constructed and worked under a concession and important guaranties from the government of *Venezuela* every one would understand that such a

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valuable privilege was not likely to be granted gratuitously. But I see no reason why it is to be assumed that persons reading the prospectus would take for granted that the Venezuelan government would not make a gratuitous concession for the construction of a railway which might prove highly beneficial to the country. At all events, the terms of the prospectus import a direct concession and guaranties from the Venezuelan government, which might or might not be gratuitous, instead of stating the fact, that the Appellants had acquired the concession by purchase from the original concessionaries.

The Appellants also rely upon the fact that the Respondent was expressly referred by the form of the letter of application for shares to the memorandum or articles of association, the latter of which documents expressly mentioned the agreement for the purchase of the concession. But the Respondent applied for shares upon the faith of the prospectus, a copy of which was sent to him, and when the allotment of the 100 shares was made to him he was, in the opinion of the Appellants, fixed as a shareholder, as appears from a letter from their secretary in answer to an application from the Respondent to have the number of shares allotted to him reduced. In that letter he was told that this was not in the power of the Appellants, "as it would make the allotment illegal." It appears to me that there was an intentional and improper suppression as to the extent of the capital of the company by the description in the prospectus.

The next statement in the prospectus to be considered is that which represents that a contract had been entered into with a responsible contractor for the completion of the line from *Puerto Cabello* to *San Felipe*. A responsible contractor of course must be one who has the means at least of commencing the performance of his contract, though he may rely upon the money to be received in the progress of the works to enable him to complete it.

Now it appears to me that *Croskey* was a person who ought to have been known by the directors not to be a responsible contractor in this sense. I do not rely upon the fact of his insolvency in four months after the date of the contract, as that does not necessarily prove that he might not have been in a

position to carry out the contract when he entered into it. Coupled with other circumstances, however, it is a significant fact. If *Croskey* had no means of his own, the payment of part of the contract price by 4000 shares, upon which he was to pay a deposit, would rather disable him from performing his contract. And the mode in which that deposit was paid, by an advance from the financial company, to be repaid out of the moneys *Croskey* would receive under the contract, ought to have raised a serious doubt as to his responsibility. This would hardly be removed by the security which he gave of a bond for £10,000 with two sureties, which is quite insignificant in comparison with his engagements. I do not think that the directors were justified in holding *Croskey* out to the world as a responsible contractor, and whether this was carelessly or designedly done seems to me to be immaterial.

The next alleged misrepresentation is of a serious character, and, as it appears to me, is completely established. The prospectus states that the contract entered into with the responsible contractor is "at a price considerably within the available capital." This statement connects itself with the representation of the amount of the capital. The Respondent, believing the capital to be £500,000, even if he had known that the contract price was £420,000, would no doubt have been satisfied that a sum of £80,000 being left, the statement that the contract was for a price considerably within the available capital was well founded; but if he had known, as the directors knew, that what remained after providing for the contract was only £30,000, he might have entertained a different opinion. I do not think that the £20,000 deposit ought to be deducted, because, although it was tied up until the commencement of the works, yet at that period it would be released, and would then form part of the available capital. Nor, on the other hand, ought the borrowing powers given to the directors by the articles of association to be taken into account, as suggested in argument, for no one would understand a power to borrow as intended by the term "available capital" of a company. It certainly was an exaggeration, to say the least of it, to describe a contract which would absorb the whole of a capital of £450,000, except £30,000, as being considerably within the available capital.

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It appears to me that this was not a fair and honest representation, but was calculated, if not intended, to deceive the public, who were invited by the prospectus to take part in the undertaking.

The last ground upon which the bill charges fraud on the prospectus is the omission to state the limitation to £20,000 of the contractor's guarantie of 2½ per cent. Lord Justice *Turner* thinks that in common honesty this limitation should have been mentioned, and I agree with him. But I should have hesitated, if the prospectus had been unimpeachable in every other respect, to have decided against the company upon this alleged concealment alone. That it ought to have been mentioned, so as to allow those who were asked to join in the undertaking to form a judgment upon it, there can be no doubt; and, looking to the other instances of suppression of facts material to be known, I cannot avoid the conclusion that this, amongst the rest, was designed for the purpose of deception, by concealing whatever would make the scheme less attractive, and so prevent persons from becoming purchasers of shares.

But the Appellants say that even admitting the prospectus to be open to the objections which are made to it, the Respondent has no ground of complaint, because he had an opportunity of ascertaining the truth of the representations contained in it, of which he did not choose to avail himself; that he was told by the prospectus that "the engineer's report, together with maps, plans, and surveys of the line, might be inspected, and any farther information obtained, on application at the temporary offices of the company;" and in his letter of application he agreed to be bound by all the conditions and regulations contained in the memorandum and articles of association of the company, which, if he had examined, would have given him all the information necessary to correct the errors and omissions in the prospectus.

But it appears to me that 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." I quite agree with the opinion of Lord *Lyndhurst*, in the case of *Small* v. *Attwood* (1), that "where representations are made with respect to the nature and character of property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a Court of common law to recover damages for the deceit so practised; and in a Court of equity a foundation is laid for setting aside the contract which was founded upon that basis." And in the case of *Dobell* v. *Stevens* (2), to which he refers as an authority in support of the proposition, which was an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he thought proper.

Upon the whole case I think the decree of the Lords Justices ought to be affirmed, and the appeal dismissed with costs.

LORD CRANWORTH:—

My Lords, the decree of the Lords Justices now under appeal was based on the principle that Mr. *Kisch*, the now Respondent, had been induced to take his 100 shares by means of false representations held out to him by the prospectus issued by the Appellants. The only question is, whether it is sufficiently alleged and proved that such false representations were made. I think it is, and so that the decree ought not to be disturbed.

The prospectus states that the object of the company is to construct and work a *Central Railway* in *Venezuela*, under a concession from the government, the first section being from *Puerto Cabello* to *San Felipe*, a distance of about fifty-four miles; and then, a little farther on, the prospectus proceeds to say that the government has by a decree and concession granted the right of making

(1) 6 Cl. & F. 395. (2) 3 B. & C. 623.

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the *Central Railway* from *Puerto Cabello* westward to *San Felipe* and southward to *Valencia*, with power of extension to *Carracas*, and has bound itself for twenty-five years not to grant any other concession for the construction of a railway in the direction of the *Central Railway*.

The obvious and natural, though not, perhaps, necessary meaning of these paragraphs is, that the decree and concession spoken of was a decree and concession to or in favour of the company issuing the prospectus. But even if that be not the necessary meaning of the paragraphs taken by themselves, yet it seems to me that they admit of no other construction when read in connexion with the preceding part of the prospectus.

The prospectus opens by describing the company as incorporated under the Act of 1862, "for the construction and working of a *Central Railway* in the Republic of *Venezuela*, under a concession and important guarantees from the government," and then, after stating that the first section from *Puerto Cabello* to *San Felipe* was about fifty-four miles, it proceeds to state that the capital was £500,000, in 10,000 shares of £50 each.

The question here arises, for what purposes was the capital to be raised? Evidently, according to the context, for constructing and working a railway. Any one becoming a shareholder in the company on the faith of the prospectus must have supposed, that, assuming all the shares to be taken, the company would have £500,000 for constructing and working the railway under a concession from the government. This is what the prospectus represents, and what it was plainly intended to represent. But it is untrue. The capital was already, before the prospectus was issued, liable to the payment of £50,000, to be applied, not in constructing or working the railway, but in purchasing from intermediate concessionaries the right to make it. So that the capital for constructing and working the railway really was only £450,000, not £500,000, as represented by the prospectus. This fact ought, in common honesty, to have been disclosed to those who were taking shares. It appears to me that in the matters I have indicated there has been both *suppressio veri* and *suggestio falsi*, and that the Respondent is entitled to the relief given to him by the decree of which the Appellants have complained.

It was indeed contended that it cannot be supposed that the prospectus meant to represent the capital of £500,000 as a free, unincumbered capital to be employed in constructing and working the railway, for the articles of association expressly declare that the directors shall adopt and carry into effect the contract or agreement bearing even date therewith, already entered into on behalf of the company by the subscribers, for the purchase of the concession for the construction of the railway. The contract or agreement so referred to was no doubt the agreement for purchase of the concession from the *National Finance Company* at the price of £50,000; and if, when the Respondent took his shares, he is to be deemed to have had notice of what is so contained in the articles of association, the argument of the Appellants is unanswerable.

But I am of opinion no such notice can be imputed to him. The *Winding-up Act*, 1862, provides (sect. 16), that the articles of association shall bind every member of the company as if he had subscribed and sealed the same, and had covenanted to conform to all the articles thereof. If the Respondent had actually subscribed and sealed these articles, he certainly could not have alleged want of notice as to the purchase of the concession out of the £500,000 capital. But he never did subscribe or seal them; and in order to make them binding on the Respondent, under the provisions of the statute, it is necessary to shew that he had become a member of the company. The case of the Respondent is, that he never was a member; that all which he did was to act on the faith of the prospectus; and if the prospectus stated what was untrue he is entitled to treat all which he did in reliance on its being true as absolutely null and void.

The statute only meant to bind those who had actually become members. Any one who had without fraud taken shares could not allege ignorance of anything contained in the memorandum of association or in the articles of association, merely because he had not signed or sealed them; but if he never actually signed or sealed them, nor had notice of what they contained, the statute cannot be taken to impute to him knowledge of their contents, so as to protect those who, by a fraud, had induced him to do that which, in the absence of fraud, would have precluded him from

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saying he was ignorant of their contents. The statute does not authorize any one to sign or seal the instruments in question till after he has become a member. The case of the Respondent is that he never was a member, for that he was induced to take shares by fraudulent representations, which entitle him to repudiate and treat as null all which he was so induced to do.

I had at one time doubted whether this ground of fraud was sufficiently alleged in the bill; but I am satisfied that it is. In the 14th paragraph there is an express charge that the prospectus fraudulently concealed from the Plaintiff the fact that the company had purchased from the *National Financial Company*, for £50,000, the concession to make the *Central Line of Railway*. And that seems to me to involve substantially the whole question.

This being my view of the case, it is unnecessary that I should examine the other alleged frauds; I am ready, however, to say that many of them, if standing alone, would not have appeared to me sufficient to warrant the relief asked; but with respect to the omission to state that the contractor's guarantie was limited to £20,000, I am strongly disposed to concur with the Lords Justices. It may be that there is little probability of the guarantie of 2½ per cent ever reaching that amount; but that is a point on which the prospectus ought to have left all persons taking shares to form their own opinion. There would have been no difficulty in stating the limitation, and I should be reluctant to encourage the notion that it was lawful to persons framing a prospectus to decide for themselves that such a restriction need not be mentioned.

The result of my examination of this case is, that I concur with my noble and learned friend in the conclusion that the appeal ought to be dismissed, with costs.

LORD ROMILLY :—

My Lords, as I concur in the observations which have been made by my noble and learned friend, the Lord Chancellor, and by my noble and learned friend opposite, I think it is unnecessary for me to say more than that I agree in the reasons they have assigned as inducing your Lordships to come to the conclusion that this decree ought to be affirmed.

It is in my opinion not merely by one or two statements in the prospectus, which are not borne out by the facts, that the matter ought to be tried, but by the combined effect of them all producing a result which would have misled any person who took shares upon the faith of the prospectus; but I think also it is very important that your Lordships should by your judgment affirm two propositions, which, I apprehend, are intended to be affirmed by the observations of my noble and learned friend, the Lord Chancellor.

The first is, that contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual.

The second proposition, which is also one of great importance, and was particularly alluded to in some of the observations of my noble and learned friend opposite, had reference to the question how far a person who applies for shares in a company is bound by the articles in the memorandum of association. On that subject I would observe that a contract between a company and an individual differs from a contract between two individuals alone in this respect, that upon the faith of his becoming a member of the company various persons are induced to deal with the company, and to become shareholders, which they would not do, except upon the belief that he was a member of it. The result is, that it becomes necessary for him, in order to set aside a contract of this description, that he should come with the utmost diligence for that purpose, so that no person may be misled by the fact of his remaining a member of the association. In this case, that question was minutely gone into by the Lord Chancellor, who shewed, in my opinion, that the party is not debarred by any laches on his part from raising that question. But if a person takes shares in a company, and forbears to make any examination into it, and becomes bound by the articles of association, and continues his connexion with it for a time, by which other persons may be induced, upon the credit of

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his name, to take shares in the association, or to deal with it, then I apprehend that your Lordships will be of opinion that it is too late for him to get rid of his liability on the ground of his having been induced by false representations to take shares in the company. These are the only observations I desire to add to those which have been addressed to your Lordships by my noble and learned friends, in which I fully concur.

LORD COLONSAY:—

My Lords, I entirely concur in the result at which your Lordships have arrived, that this judgment should be affirmed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, May 14, 1867.

Solicitors for Appellants: *Ashurst & Co.*
Solicitors for Respondent: *E. L. Sidney & Son.*

TAB 25

CITATION: Century v. New World Eng. Corp., 2013 ONSC 2140
COURT FILE NO.: 06-CL-6558
DATE: 20130513

2013 ONSC 2140 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Century Services Inc. and Clairvest Group Inc.	*Jim Patterson* and *Ruth Promislow*, for the Plaintiffs
Plaintiffs	*Peter Griffin, Jamie Spotswood and Nina Bombier,* for the Defendants Borden Ladner Gervais LLP and Magnus Verbrugge
– and –	
New World Engineering Corporation, Fred W. Bain, John C. Cheong, Lai Li Chong, Julia Cheong a.k.a. Ioulia Klenkina, Roberto Bustamante, and Roberto Bustamante c.o.b. Canada Stage Designs, Atique Choudhry, Hingson Corporation, Hingson Entertainment Corporation, Hingson Financial Corporation, Hingson Development Corporation, Hingson Capital Corporation, Hingson Media Corporation, Circa Canada Incorporated, Greenfield Capital Engineering Inc., Image Nightclub Incorporated, Banzai Restaurants Inc., Eight Restolounge Incorporated, Bustamante Holdings Corporation, 1249492 Ontario Inc., Blue Giant Productions Inc., Engineered Construction Limited, Daniel Distribution Corporation, Borden Ladner Gervais LLP, Goodman & Carr LLP Fogler Rubinoff LLP, Magnus Verbrugge, Gary Kissack, Barry Fillimore, TD Waterhouse Canada Inc., Bulent Pakdil, Hatice Pakdil, Allen De Vera and The Toronto-Dominion Bank	*Paul F. Monahan and Christine Tabbert*, for the Defendants TD Waterhouse Canada Inc., The Toronto-Dominion Bank and Allen de Vera *Peter Wardle and Danielle Gallo*, for the Defendants Fogler Rubinoff LLP and Barry Fillimore *Michael Kestenberg and Thomas M. Slahta*, for the Defendant Goodman & Carr *Alfred Esterbauer and Christine Westlake*, for the Defendant Gary Kissack *Bulent Pakdil*, in person *John Cheong*, in person and on behalf of Hingson Corporation, Hingson Capital Corporation, Hingson Development Corporation, Hingson Media Corporation, Circa Canada Incorported, Greenfield Capital Engineering Inc., Image Nightclub Incorporated, Eight Restolounge Incorporated, Bustamante Holdings Corporation and 1249492 Ontario Inc.
Defendants	

) *Julia Cheong* a.k.a. *Ioulia Klenkina*,
) in person
)
) *Fred W. Bain*, in person
)
) *David Milosevic*, for the Defendants Atique
) Choudhry, Blue Giant Productions and
) Engineered Construction Limited
)
)
)
) **HEARD:** April 2-5, 16-20, 23-27,
) May 1-3, 8, 14-17, 22-24, 30, 31,
) June 1, 4-8, 12, 14, 15, 18 and 19,
) 2012

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STEWART J.:

Nature of the Action

[1] This is an action against the Defendants for damages on various grounds arising out of loans advanced by the Plaintiffs in the principal amount of $25 million to the defendant New World Engineering Corporation ("New World").

[2] The Plaintiff Century Services Inc. ("Century") advanced funds in 2005 and 2006 by way of two loans to New World, one in the amount of $5 million (less fees and interest reserves), the other in the amount of $10 million (less fees and interest reserves). The first loan was repaid by New World.

[3] The Plaintiff Clairvest Group Inc. ("Clairvest") also advanced two separate loans to New World in 2005 and 2006: one in the amount of $5 million (less fees and interest reserves), the other in the amount of $5 million (less fees and interest reserves).

[4] In July 2006, New World defaulted on the outstanding loans of approximately $20 million. New World was quickly placed into receivership by court order and has not defended this action.

[5] The Defendants Roberto Bustamante ("Bustamante") and Roberto Bustamante c.o.b. as Canada Stage Designs were noted in default early in these proceedings and their defences were struck. No request was made to set aside those default consequences. The Plaintiffs' allegations as against them are therefore undefended by them and are taken to be true.

[6] The action as against the Defendant Hatice Pakdil has been discontinued.

[7] When the trial of this action commenced, the Plaintiffs were advancing six main claims as follows:

(a) damages for fraud, misrepresentation, deceit, conspiracy, conversion and other related claims as against John Cheong ("Cheong") and Fred Bain ("Bain"), the principals of New World, and various related parties including Atique Choudhry ("Choudhry"), and an accounting and tracing claim against those corporations and individuals to whom loan proceeds have been traced;

(b) damages for negligence as against Magnus Verbrugge ("Verbrugge") and Borden Ladner Gervais LLP ("BLG") who acted as the Plaintiffs' counsel on all four loans;

(c) damages for breach of fiduciary duty as against Verbrugge and BLG;

(d) damages based on vicarious liability as against TD Waterhouse Canada Inc. ("TD Waterhouse") for the actions of its employee, Bulent Pakdil ("Pakdil") in the fraud and damages for fraudulent misrepresentation, fraud, and conspiracy to commit fraud, or in the alternative, for negligent misrepresentation against Pakdil;

(e) damages based on vicarious liability as against the Toronto-Dominion Bank ("TD Bank") for the actions of its employee, Allen de Vera ("de Vera") in the fraud or, in the alternative, for de Vera's negligence; and

(f) damages for breach of solicitor's undertakings by Gary Kissack ("Kissack"), Goodman & Carr LLP, Barry Fillmore ("Fillimore") and Fogler Rubinoff LLP ("borrower's counsel").

[8] The Plaintiffs obtained orders preserving certain assets and bank accounts of some of the Defendants, including Certificates of Pending Litigation against property owned by them, which represent the result of the efforts made by the Plaintiffs to trace the funds originally advanced to New World and to preserve wherever possible the funds and property held by the Defendants as a result of the fraud alleged against them. In doing so, some vehicles and other property owned by the Defendants were sold by court order and the proceeds of sale placed into trust pending the determination of these proceedings.

[9] The trial of this action and its array of claims began on April 2, 2012. After several weeks of evidence, by Minutes of Settlement dated June 8, 2012 the Plaintiffs settled all of their claims as against the Defendants Verbrugge, BLG, TD Waterhouse, Pakdil, TD Bank, de Vera, and all borrowers' counsel (the "Settling Defendants").

[10] The settlement document entered into by the Plaintiffs with the Settling Defendants was structured in the form of a "Pierringer Agreement". It provided that the Plaintiffs would continue with their claims against the remaining Defendants to pursue the judgment sought against them. All claims against the Settling Defendants and all claims for contribution and indemnity by the

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Settling Defendants against the remaining Defendants would be dismissed. The Pierringer Agreement received Court approval on June 12, 2012 and its provisions were thereby made effective.

[11] The Perringer Agreement provided for a very substantial payment of $15.5 million to the Plaintiffs which was disclosed to the Court by the settling parties, although the proportionate contribution of each to that overall amount was not revealed. Any judgment obtained against any of the remaining Defendants for damages must be correspondingly reduced by the amounts paid to the Plaintiffs for damages, interest, recovery expenses and legal costs.

[12] The resolution of those claims considerably streamlined and simplified the remaining issues to be addressed at trial. In accordance with the Pierringer Agreement, the Plaintiffs continued the balance of the trial only as against the remaining Defendants.

[13] The remaining Defendants are said to have either orchestrated the fraud, assisted with the fraud and/or are persons or entities to whom the loan proceeds are alleged to have been traced and/or from whom an accounting is sought.

[14] The remaining Defendants are:

(a) Cheong, one of the principals of New World who is said to have masterminded the fraud and to whom loan proceeds are said to have been traced, who represented himself at trial;

(b) Bain, the other principal of New World who is alleged to have knowingly and willingly participated in the fraud, who represented himself at trial;

(c) Bustamante, Bain's romantic partner with whom he cohabits, who is alleged to have knowingly assisted with the fraud and knowingly received proceeds of the fraud, and whose Statement of Defence has been struck;

(d) New World, Roberto Bustamante c.o.b. Canada Stage Designs ("Canadian Stage Designs"), Hingson Corporation, Hingson Entertainment Corporation ("Hingson Entertainment"), Hingson Financial Corporation ("Hingson Financial"), Hingson Development Corporation ("Hingson Development"), Circa Canada Incorporated, Greenfield Capital Engineering Inc. ("Greenfield"), Image Nightclub Incorporated, Banzai Restaurants Inc., Eight Restolounge Incorporated, Bustamante Holdings Corporation, 1249492 Ontario Inc. Blue Giant Productions Inc., Engineered Construction Limited and Daniel Distribution Corporation ("Daniel Distribution"), (collectively, the "Corporate Fraud Defendants") being companies controlled by one or more of Cheong, Bain, Bustamante and Choudhry and which are alleged to have been used by them defraud on the Plaintiffs and to misappropriate and fraudulently convert the Plaintiffs' loan proceeds;

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(e) Lai Li Chong (Cheong's mother) and Julia Cheong (Cheong's wife), to whom loan proceeds are alleged to have been traced, who did not actively participate in the trial or give evidence on their own behalf or on behalf of any party;

(f) Choudhry, who is alleged to have knowingly assisted Cheong and Bain with the fraud and knowingly received proceeds of the fraud through Engineered Construction Limited ("Engineered Construction") and Blue Giant Productions Inc. ("Blue Giant").

[15] Following the hearing of evidence at trial, the Plaintiffs and the remaining Defendants were provided with substantial time to review the evidence and to supply submissions in writing to permit them to address the evidence and all issues raised in the action to the extent they considered necessary. I have now considered those submissions in light of all of the evidence and authorities provided.

The Positions of the Remaining Defendants

[16] Cheong agrees that the Plaintiffs were defrauded but maintains that he did not knowingly participate in the fraud. Rather, he asserts that it is Bain (with Bustamante's help) who is the real fraudster. He also asserts that the financing arrangement was Kissack's idea. Cheong makes no specific allegations of fraud against Pakdil or de Vera or anyone else at TD Waterhouse or TD Bank, but notes that de Vera was Bain's friend. Cheong alleges claims for contribution in negligence as against the lawyers and the law firms representing all parties to the loan transactions, and also submits that the Plaintiffs through their own carelessness were the authors of their own misfortune and should be held contributorily responsible for their losses.

[17] Bain agrees that the Plaintiffs were defrauded, but maintains that he did not knowingly participate in the fraud. Rather, he asserts that Cheong was the mastermind behind this fraud. He characterizes himself and Bustamante as Cheong's innocent dupes in the scheme.

[18] Although Bustamante's defence has been struck, in submissions provided by Bain the same position put forward by Bain is advanced on Bustamante's behalf: that it was Cheong who was the culprit who perpetrated this fraud on his own, without his or Bain's knowledge.

[19] Lai Li Chong and Julia Cheong did not testify at trial. To the extent that they received loan funds improperly, Cheong's assertions of innocence and lack of involvement in the fraud are taken to be repeated by them. Cheong also provided written submissions on their behalf and on behalf of the Corporate Fraud Defendants represented by him.

[20] Those Corporate Fraud Defendants which received loan proceeds directly or through which loan proceeds were said to have been channeled have the same protestations of innocence advanced on their behalf as are maintained variously by Cheong, Bain and Bustamante.

[21] Choudhry agrees that the Plaintiffs were defrauded, but maintains that he had no knowledge of or involvement in any scheme to defraud them. He swears that he was a mere

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contractor who did construction work under contract on projects for which he was hired and for legitimate payments received from Cheong and Bain, and that he had no knowledge that the money used to pay him or the companies in which he had an interest came from the Plaintiffs or as a result of any fraudulent scheme.

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Conclusion

[22] I accept without reservation the evidence tendered by the Plaintiffs against Cheong, Bain and Bustamante. This evidence provides in considerable detail how these loans were sought by Cheong and Bain, the false information provided by them, the phony promises made by them with respect to the security arrangements, and the discovery in due course that the entire apparatus was a sham designed to defraud the Plaintiffs of the loan proceeds they had advanced to New World. This evidence includes the testimony of Dean Chan ("Chan"), Rod Hudson ("Hudson"), Larry Dugdale ("Dugdale") and Bruce Maclennan ("Maclennan") of Century and Heather Crawford ("Crawford") and Kenneth Rotman ("Rotman") of Clairvest, and as augmented by the evidence of Kissack. False representations of fact were made by Cheong and Bain, with the assistance of Bustamante, with knowledge of their falsity, and with the intention they be acted upon by the Plaintiffs. The Plaintiffs did act upon these false representations to their detriment and suffered damages by doing so.

[23] I likewise accept without reservation the evidence of the Receiver of New World (Allen Shiner) and of Navigant Consulting (Ted Baskerville), who together provided a detailed account of their efforts to trace the loan funds into and through entities controlled by Cheong, Bain and Bustamante and to persons related to them after the fraud was discovered. Their persistent efforts to track down the money are further detailed in eleven Receiver's Reports filed with the Court which contain full information as to the convoluted trail of the funds they were forced to pursue.

[24] According to the Receiver, cash and property worth approximately $4 - $5 million has been traced, located and preserved thus far. The specific whereabouts of much of the rest of the $20 million loan proceeds advanced by the Plaintiffs and remaining outstanding is unknown. A considerable portion of the loan proceeds found its way into work done constructing or refurbishing night clubs in downtown Toronto's Entertainment District - most notably the now-defunct Circa – which raises the distinct suspicion that additional but unknown persons not before the Court were involved in or derived considerable benefit from the fraud.

[25] I reject the protestations of innocence offered by Cheong, Bain and Bustamante. Their evidence, except for their allegations against each other, was a tissue of lies. Their respective explanations of their involvement in the process by which the loans were obtained by New World for purposes later shown to be false, how they engaged the assistance of Pakdil and/or other unknown persons at TD Bank and/or TD Waterhouse to co-operate in a scheme designed to make the Plaintiffs and their counsel believe that the T-Bills purchased with the loan proceeds would be held secure in a locked-in account at TD Waterhouse, or why they assisted in the establishment of and involvement in an array of corporate and other vehicles through which the

loan proceeds were churned and directed to these Defendants or their related parties were completely lacking in credibility when measured against the evidence of the Plaintiffs and the volumes of incriminating documentation put forward at trial. I also find the evidence of Kenneth Robinson ("Robinson"), called by Cheong apparently to seek to characterize Bain as the mastermind of this multi-million dollar fraud, to be of very little credibility or weight when viewed against the rest of the evidence which supports a conclusion that Cheong was in charge.

[26] Cheong, Bain and Bustamante failed to provide any credible explanation as to why or how they managed to receive large sums of money from the supposedly "locked-in" accounts used by them to varying degrees to buy flashy cars, a boat, expensive houses, to carry on the construction and refurbishment of a series of fancy nightclubs in which they had an interest or involvement and to attempt to establish reserves of investment by secreting the funds in accounts held in names other than their own. Cheong's efforts to explain the justification of his receipt of funds as being payment pursuant to a $25 million "Employment Executive Agreement" with Hingson Entertainment Corporation for which he provided essentially no services are aptly described by Plaintiffs' counsel as simply preposterous.

[27] I am of the view that the evidence presented at trial presents overwhelmingly solid and substantial proof that the Plaintiffs were the victims of a fraud carried out by Cheong and Bain with Bustamante's knowing assistance. Although the evidence supports the conclusion that Cheong was the "brains" behind the fraud, Bain and Bustamante to varying degrees willingly and knowingly participated in it and enjoyed at least a portion of its financial spoils. All three must therefore be held jointly and severally liable to the Plaintiffs for the damages suffered as a result.

[28] For these and the reasons that follow, I find that the Plaintiffs have proven all of their claims against those remaining Defendants to the extent required by law. The burden on them to do so is on the civil standard of a balance of probabilities. The clear, cogent and compelling evidence presented at trial, in my opinion, very easily discharges that burden.

[29] The Plaintiffs are also entitled to all accounting and tracing orders sought in their Amended Amended Fresh As Amended Statement of Claim as against Lai Li Chong, Julia Cheong, and the Corporate Defendants to the extent these have not already been ordered and enforced. All allegations as against them of fraudulent conversion and unjust enrichment have been proven and to the extent they have received funds or the product of funds as a result of this fraud, they must be returned to the Plaintiffs.

[30] Finally, I am not satisfied that the Plaintiffs have adequately discharged their burden of proving their claims of fraud against Choudhry to the extent the law requires or have established any entitlement to recoup payments received by him from Cheong, Bain and/or Bustamante through Blue Giant, Engineered Construction or Daniel Distribution Corporation for construction work performed by him.

The Scheme

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[31] Despite the extent of evidence called at trial and the volumes of exhibits and other materials filed in the action, I must conclude the scheme employed by these individuals to defraud the Plaintiffs, when distilled to its essentials, was a conceptually simple one.

[32] The scheme was based upon a series of fraudulent misrepresentations by Cheong and Bain, assisted by Bustamante, to the Plaintiffs and their counsel concerning the nature of New World's business, the reason for seeking the loans, the security features to be attached to the security to be given for the loans, and the virtually immediate and progressive improper use of the loan proceeds in violation of the strict security arrangements which they had assured the Plaintiffs were supposed to be in place.

The Loans

[33] In order to obtain the loans in question, Cheong and Bain retained Kissack of Goodman & Carr as counsel to facilitate New World's efforts to borrow money.

[34] Cheong and Bain represented to Kissack that New World was in the business of distributing and servicing large pieces of equipment. They said that if New World could show a required amount of assets held by the company on its balance sheet, it could deal directly with the manufacturers of such equipment to obtain benefits of such direct dealings by way of significant price discounts.

[35] Cheong and Bain told Kissack that these manufacturers would not be concerned with the fact that the balance sheet for New World would show the loan as a liability because the manufacturer was only concerned with the value of assets held in the company name. It would therefore serve New World's purposes if all loan proceeds were deposited into an account at TD Waterhouse in the name of New World and made to remain there.

[36] Century is in the business of providing "asset-backed" loans. Often such loans are made to entities in some financial distress which have been rejected by more traditional lenders. Century's principal concern in negotiating such loans is to ensure that its security for the loan is rock solid. Clairvest, although a more conventional lender, similarly was vitally concerned with the quality of the security package to be put into place.

[37] On October 19, 2005, Hudson, Century's CFO, participated in a conference call with Cheong and Kissack along with Chan and Cam Deller ("Deller") of Century. Kissack explained to them the concept behind the loan sought based on information provided to him by Cheong and Bain. When asked about New World's business, Cheong explained that New World promoted, installed and monitored "process logic controllers" in manufacturing environments. Cheong represented to Century that New World acted as a reseller of these process logic controllers for large industrial manufacturers and already had a large customer base for which New World had installed such process logic controllers and continued to be responsible for their monitoring.

[38] Hudson, Deller and the other participants on the call believed Cheong when he made these representations as Cheong appeared to be very knowledgeable about process logic

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controllers. As was later discovered, all of this information conveyed to the representatives of Century was false.

[39] Indeed, New World had no such business. Following the demise in 2006 of New World, its Receiver was not able to find any evidence that suggested that New World ever operated the business for which these loans were purportedly obtained. Baskerville, the Managing Director of Navigant Consulting which had been retained by the Receiver to perform a tracing analysis of funds advanced, testified at trial that the banking records received from New World indicated that New World was not even a legitimate operating business.

[40] Crawford, Clairvest's general counsel, attended a presentation for potential lenders in October 2005 at Goodman & Carr's Toronto office organized by Kissack at the request of Cheong and Bain. At that time, Cheong and Kissack (based on information provided by Cheong) made essentially the same presentation as was made to Century, stating that New World serviced factories and that they wanted to get "higher up in the chain" of stocking distributors of such equipment to qualify for discounts and needed money to be reflected on its balance sheet in order to do so.

[41] None of this was true. New World was not operating the business for which the loans were purportedly obtained. New World had never been paid by any customers for work related to robotics or process automation during his time at the company.

[42] Throughout the time he dealt with these prospective lenders, Cheong referred to himself as "Dr. Cheong", and held himself out as a professional engineer with a doctorate in engineering and an MBA. Although he had some experience in industry, Cheong was neither a professional engineer, a doctor in engineering or an MBA.

[43] Bain also conducted himself during these negotiations as an experienced legitimate business executive. In fact, most of the time prior to 2005 Bain had been unemployed, subsisting on a small government pension. His partner, Bustamante, had worked in an A&W restaurant before taking up work in an adult video store on Yonge Street in Toronto.

[44] The financial statements of New World and Hingson Corporation (a Corporate Fraud Defendant operated by Cheong and Bain) which were provided to the Plaintiffs were inaccurate, false and misleading. These financial statements were signed by Bain and hand delivered by Bain to Kissack to be provided to the Plaintiffs. Robinson, the chartered accountant who prepared the statements and signed the Notice to Reader, swore that Cheong had provided him with all of the information contained in them and that he had just reproduced the information on the financial statements without any attempt at verification.

[45] Likewise, the information on the Hingson Group and its principals (Cheong and Bain) that was presented to the Plaintiffs and later to their counsel was false and misleading. Kissack testified that he prepared an "executive summary" that was provided to the Plaintiffs based upon information provided to him by Cheong and Bain. Kissack explained that he obtained the

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information for this executive summary from a biography Cheong e-mailed to him as well as from links to one or more websites that discussed the business operations of some or all of the companies described in the executive summary, and from discussions that he had with Cheong and Bain.

[46] The biography used by Kissack contains information which even Cheong admitted was false, including the description of the Hingson Group's (Hingson Entertainment and Hingson Financial) business and the description of Cheong's role in the Hingson Group's business.

[47] Bain admitted at trial that the "executive summary" of the Hingson Group also misrepresented Bain's experience and responsibilities as well as the business operations of New World and the Hingson entities.

[48] Essentially, Cheong and Bain procured these loans by misrepresenting who they were, what they did and what the money they were seeking was to be used for.

Involvement of TD Bank and TD Waterhouse

[49] Both Plaintiffs had expressed internally some serious reservations about proceeding with these loans given the somewhat unusual explanation given as to their purpose. However, their concerns and skepticism were assuaged by the feature of the loan agreement which required the full loan proceeds to be invested in secure T-Bills and locked into an account with TD Waterhouse and not to be released without their written consent.

[50] In order to assure the Plaintiffs that the loaned funds would remain secure, Cheong and Bain had represented and agreed that the monies loaned to New World were to be deposited into specified accounts at TD Waterhouse and used to purchase Government of Canada treasury bills (the "T-bills"). The T-bills were not to be sold, transferred, pledged or encumbered in any manner. They were to be held in a TD Waterhouse account like "gold in a box", as Maclennan described the plan.

[51] New World and TD Waterhouse purportedly agreed to place certain controls on its accounts at TD Waterhouse so that no activity could take place in such accounts without the written consent of the applicable lender.

[52] Cheong, Bain and Bustamante obtained letters from the TD Bank signed by de Vera which were provided to the Plaintiffs which stated that TD Bank would not take a security interest in the T-Bills proposed to be purchased with the proceeds of the loans and would not assert any interest in or claim to the securities in priority to the lenders' security interest therein.

[53] Cheong, Bain and Bustamante obtained additional Acknowledgement letters from TD Waterhouse purportedly signed by Pakdil which were provided to the Plaintiffs which stated that TD Waterhouse will not allow any activity in the accounts to occur without the signature of the authorized signing officer to the account and consented to in writing by the lending Plaintiff, or

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allow New World to incur any indebtedness without the prior written consent of the lending Plaintiff.

[54] Pakdil swore that he never signed any such letters. Expert handwriting analysis tendered at trial through two separate experts demonstrated that two of the letters bear Pakdil's signature but the other letters bear signatures which are not those of Pakdil. At the very least, these subsequent acknowledgement letters are suspect and it is probable that they were forged by Cheong with Bain's knowledge.

[55] On October 25, 2005, Century Loan #1 closed. Kissack, Cheong, Bain and Chan all attended at TD Waterhouse's offices. Chan's role was to ensure that TD Waterhouse understood that funds were not to be released from the account holding the loan proceeds without Century's written consent. Chan testified that he met with Pakdil at TD Waterhouse who at that time confirmed to him directly all aspects of the deal for which TD Waterhouse had assumed responsibility – that he had seen the acknowledgement, that it bore his signature and that it would be placed into the account file and flagged for special attention.

[56] Induced by Cheong's and Bain's fraudulent misrepresentations regarding their experience and qualifications, the business of New World, the purpose of the loans and the security arrangements being offered, Century and Clairvest advanced loans to New World through a series of four loans as follows:

(a) Century Loan #1: Century advanced New World $5 Million on October 25, 2005;

(b) Clairvest Loan #1: Clairvest advanced New World $5 Million on December 7, 2005;

(c) Century Loan #2: Century advanced New World $10 Million on April 5, 2006;

(d) Clairvest Loan #2: Clairvest advanced New World $5 Million on May 4, 2006.

[57] In each instance, and almost immediately after the funds were advanced and placed into TD Waterhouse accounts, they were allowed by TD Waterhouse personnel to be withdrawn from the accounts in which they were to be held. In my opinion, it is highly unlikely that this could ever have been done without the knowledge and willing assistance of some person or persons on the inside at TD Waterhouse.

How was the Fraud Discovered?

[58] Cheong and Bain could not hide their fraudulent scheme forever. As already noted, a large portion of the loan proceeds were used in the construction and refurbishment of a series of downtown Toronto night clubs. They eventually ran out of money, largely because of disputes and cost overruns for the construction of Circa, an extravagant downtown Toronto night club. Ultimately, they could no longer use the loan proceeds themselves to fund the making of regular

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interest payments owing to the Plaintiffs which had served for a while to prevent the Plaintiffs from discovering the truth.

[59] Indeed, Cheong and Bain had created forged account statements for delivery to the Plaintiffs and concocted a letter on TD Bank stationery signed by a non-existent employee to explain and apologize for a slip-up in investment of the loan proceeds which had come to the attention of one of the Plaintiffs.

[60] In July 2006, New World ultimately failed to make the monthly interest payments owed to the Plaintiffs. The fraud was discovered when this non-payment led to the making of inquiries by the Plaintiffs of the principals of New World and of TD Waterhouse. It was then determined that the TD Waterhouse cash accounts that were supposed to have been holding $20 million of the Plaintiffs' monies were empty.

[61] Bain admitted that he was not surprised when Chan contacted him in July 2006 after the fraud had been discovered, because he knew the money was missing and that the lenders would come looking for it at some point.

[62] Bain testified that, after the discovery of the fraud, Cheong contacted him and told him to blame everything on Kissack. Bain then called Kissack on July 25, 2006 to alert him to Cheong's intention to blame Kissack and to attempt to spirit away some significant portion of the missing funds. Kissack immediately contacted and advised counsel for the Plaintiffs of the information he had received. Receivership proceedings had already been started and by order of Morawetz J. dated July 21, 2006, New World and the other Corporate Fraud Defendants as detailed therein were placed into receivership. Various freezing orders were also obtained.

[63] As noted above, Cheong blames Bain and Bustamante and others. Bain and Bustamante blame Cheong. In my view, the evidence very clearly establishes that, whatever they may say now, they were working together to perpetrate this fraud.

Where did the Money Go?

[64] After the discovery of the fraud, the Receiver conducted an investigation into New World's operations. He contacted Allen-Bradley, one of the companies with which New World had purportedly had extensive dealings and from whom the fictitious "stocking discounts" were to be obtained. No one at Allen-Bradley had ever heard of Cheong, Bain, New World or the Hingson Group of Companies.

[65] The Receiver retained Navigant Consulting ("Navigant") to continue to perform an extensive tracing analysis based on corporate documents and bank records which the Receiver had obtained through the receivership process.

[66] Baskerville testified that he had carriage of the tracing analysis in this case. Baskerville is certified by the Canadian Institute of Chartered Accountants as a forensic accountant and has had extensive experience in the field of investigative forensic accounting.

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[67] The Navigant tracing analysis was not contradicted by the remaining Defendants in any material substance. Although Cheong said that he disagreed with all of it, he provided no alternative tracing or other evidence to seriously refute or undermine the Navigant analysis. I also note that Cheong was not actively co-operative with the Receiver in the efforts to determine where the funds went.

[68] Navigant traced millions of dollars of the Plaintiffs' loan proceeds to Cheong, Julia Cheong, Lai Li Chong, Bain, Bustamante and/or corporations under their control.

[69] As noted, Baskerville testified that the tracing information was based primarily upon banking and other records that had been obtained by the Receiver and provided to Navigant. This tracing information was continuously updated as additional banking information was obtained and is reflected in the periodic reports of the Receiver.

[70] Baskerville testified that the loan proceeds were funneled and churned through the bank accounts of the various Corporate Fraud Defendants of which Cheong, Bain and Bustamante were signing officers. Cheong was a director of Hingson Corporation, Greenfield and Engineering Construction, and that Bain was a director of Greenfield Capital, Hingson Financial and Hingson Entertainment. Hingson Entertainment, Hingson Financial, Hingson Development, Hingson Media and Hingson Capital are all companies affiliated with Hingson Corporation that were controlled by Cheong and Bain. Bustamante was the sole director of Bustamante Holdings Corporation. These several corporations as well as individuals were involved in the funneling of loan proceeds in various ways.

[71] The Reports prepared by Navigant record the details of the tracing exercise described in Baskerville's evidence. These are set out in summary fashion in paragraphs 33 – 101 of the Plaintiffs' Closing Argument and are adopted in substance by reference into these Reasons. Among the various results of the tracing exercise are the following notable discoveries:

(a) Bain's mentally disabled brother, Richard, was used as a means by which to funnel $2 million of loan proceeds into a TD Bank account in his name;

(b) $5 million was channeled into Bustamante's company Canadian Stage Designs and then transferred into a TD Bank account held jointly by Bustamante and Bain;

(c) Over $5 million of the loan proceeds found its way into bank or investment accounts held by Cheong, Julia Cheong or Lai Li Chong (Cheong's elderly, ailing mother);

(d) Loan proceeds were used to discharge mortgages on Cheong's residence at 28 Theobolds Circle, Richmond Hill. Title to that property was transferred to Julia Cheong for no consideration, a fraudulent transaction designed to defeat creditors and to obfuscate any efforts to trace the loan funds or attach them;

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(e) Loan proceeds were also used to purchase a residential property at 101 McGill Street, Toronto now held in the names of Bain and Bustamante.

Choudhry

[72] Choudhry is a graduate in mechanical engineering and a Certified Professional Engineer who met Cheong when he was embarking upon an internship at Chrysler Canada Corporation in Brampton, Ontario.

[73] Choudhry became involved at Cheong's invitation in the contracting of construction work done on downtown Toronto nightclub locations in which Cheong, Bain and Bustamante were involved. When he became concerned about the slipshod banking, accounting and record-keeping practices that Cheong employed in Engineered Construction, Choudhry formed Blue Giant to deal with the documentation required for receipt of funds and disbursement of payments to the various trades who worked on these projects. Compensation, based upon a percentage of the value of the contract performed, was received by him.

[74] Choudhry did not participate in the obtaining of the loans or any dealings with the Plaintiffs, TD Bank or TD Waterhouse. Neither Cheong, Bain nor Bustamante sought to implicate him in any way in the scheme. Although the payments Choudhry received may have been generous, I find that they were on the whole for work genuinely performed by him through his company.

[75] As the problems faced by Cheong, Bain and Bustamante began to mount, Choudhry started to worry that "something fishy" was going on. He was instructed by Cheong to make a few what he thought were irregular payments – for partial purchase of a boat and to Julia Cheong (under her maiden name), for instance – which caused him some concern and suspicion. There is no sufficiently compelling evidence, however, that Choudhry ever knew that the funds used to pay him came from the Plaintiffs and certainly no evidence that proves that he was aware of any fraud carried out against the Plaintiffs by Cheong, Bain and Bustamante.

[76] As it turned out, Choudhry ended up performing work for months without being paid and ultimately lost his home. There is no indication in the evidence that he has received any lasting tangible benefit from his business association with Cheong, Bain and Bustamante. I accept Choudhry's evidence and his counsel's submission that he was duped by this collection of fraudsters, as were the Plaintiffs. Perhaps he should have known that something nefarious was afoot, but that suggestion is not enough to justify a finding of fraud against him. One might easily make the same observation about the Plaintiffs themselves.

[77] Choudhry willingly co-operated with the Receiver and supplied information to him relating to Engineered Construction and Blue Giant and their activities.

[78] I therefore must conclude that Choudhry's mere involvement in the business activities carried on by Cheong, Bain and Bustamante has not been proven by the Plaintiffs to be of such a nature to support a finding of fraud or the other findings urged by the Plaintiffs against him,

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including their claim that he ought to be ordered to turn over to them the funds received by him as a result of the settlement of litigation against third parties arising out of the construction project in which he was involved. The action against Choudhry is therefore dismissed.

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Damages

[79] Pursuant to the settlement with the Settling Defendants, the Plaintiffs received a payment of $15.5 million. The settlement amount was comprised of the following components:

(a) $10.5 million in respect of the Plaintiffs' principal loss;

(b) $2.8 million in respect of pre-judgment interest;

(c) $500,000 in respect of recovery expenses; and

(d) $1.7 million in respect of legal costs.

[80] The Plaintiffs are therefore entitled to the following relief as against Cheong, Bain, Bustamante and the remaining Defendants, with the exception of Choudhry, to the extent they have obtained or are in possession of the proceeds of the fraud as traced by the Receiver:

(a) $7,184,172 in respect of the Plaintiffs' principal loss ($17,684,172 principal loss minus the $10.5 million received from the Settling Defendants);

(b) $531,883.13 in respect of recovery damages ($1,031,883.13 recovery damages minus $500,000 received from the Settling Defendants in respect of recovery damages).

[81] The Receiver's 11th Report indicates that the Receiver has frozen the following assets:

Proceeds from the sale of seized assets	$ 226,128
Funds in Receiver's Account	$ 9,300
Accounts at TD, RBC and RBCDS	$4,244,412
Cash in safety deposit box	$ 39,550
Monies held by Adam Vassos, a Toronto lawyer	$ 80,000
Total	$4,599,390

[82] In addition to the above, the assets frozen held by the Receiver include two Cartier watches and three rings that were purchased for $90,540.86 as outlined in the Receiver's 9th Report.

[83] The Receiver also has obtained and placed Certificates of Pending Litigation on properties at 28 Theobalds Circle and 101 McGill Street. To the extent the transfer of 28

Theobalds Circle from Cheong to Julia Cheong referred to herein is to be set aside as fraudulent, an order shall go accordingly. The Receiver is hereby instructed to sell the properties and turn over the proceeds of sale and the proceeds of all of the frozen assets referred to above to the Plaintiffs. No claim is made by Choudhry or Blue Grant against the proceeds of sale of the boat currently being held by the Receiver.

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Punitive Damages

[84] It was mentioned during the course of the proceedings that criminal charges arising out of these events were laid against Cheong, Bain and Bustamante, but did not proceed to trial for final determination.

[85] The conduct of Cheong and Bain is of such a willfully reprehensible nature that it should attract an award of punitive damages that will reflect the Court's strong disapproval of same, will punish and will deter others from engaging in similar behaviour. I therefore award punitive damages to the Plaintiffs in the amount of $300,000.00, a sum for which Cheong and Bain shall be jointly and severally liable. I view Bustamante's role in this scheme as being mainly supportive. I decline to make any award of punitive damages against him or against any of the other remaining Defendants.

The Pierringer Agreement – Effect on Proportionate Liability Of Cheong, Bain and Bustamante

[86] The Pierringer Agreement provides that the remaining Defendants may seek a judgment which provides for contribution and indemnity from all or any of the settling Defendants, thus potentially reducing their liability. Claims of negligence and other bases for contribution have been advanced by the remaining Defendants against certain settling Defendants.

[87] Although the action against the Settling Defendants was terminated before all of the evidence (including the evidence of several Defendants and their experts) was called, I am of the view that the state of the evidence prior to the settlement would have served to justify a finding that the Plaintiffs had been negligent in failing to carry out reasonable due diligence on the principals of New World and the purpose of the loans before advancing the funds, and failing to adequately monitor the TD Waterhouse account and respond promptly to several warning signals received by them before the funds disappeared. Similarly, there is evidence upon which it could also be concluded that the Plaintiffs' legal advisors were negligent in failing to advise the Plaintiffs of the risks of advancing the loan funds in these unusual circumstances and failing to confirm directly with the responsible legal personnel at TD Bank and TD Waterhouse that all security measures were actually legitimate and in place.

[88] Further, as already noted, it is evident that Cheong, Bain and Bustamante had some assistance from a person or persons within TD Bank and/or TD Waterhouse. The claims against Goodman & Carr, Kissack, Fogler Rubinoff and Barry Fillimore are principally for breach of solicitors' undertakings and, in my view, do not raise any issues of contribution or indemnity. If I

am incorrect in that conclusion, for the same reasons as articulated below I do not consider any order for contribution or indemnity by these Defendants would be just.

[89] Although there may be some rare circumstances in which persons found liable in fraud may take advantage of and rely upon the provisions of the *Negligence Act* or any common law right to seek contribution and indemnity from other parties, in my opinion the preponderance of authority supports the proposition that want of care is no defence to fraud (see: *United Services Fund v. Richardson Greenshields Canada Limited* (1988), 22 BCLR 322 (BCSC); *Ambico Ltd. v. Loeb Inc. et al.*, 13 O.R. (3d) 423 (Ont. C.A.)). It would be wholly unjust and highly inappropriate in this case to allow these Defendants to shift any portion of liability for their fraudulent conduct onto the Plaintiffs or any of the other Defendants. Their culpability for the Plaintiffs' losses is of such magnitude that it wholly extinguishes any argument that some want of care on the part of the Plaintiffs or any of their co-Defendants should give rise to contribution. Accordingly, the Pierringer Agreement will have no bearing upon the liability of those remaining Defendants other than to reduce the amount of the judgment to reflect the rule against any double recovery by the Plaintiffs of their losses and damages.

Conclusion

[90] If there are any related orders that are required by any of the parties which are not reflected in the above disposition, I may be spoken to.

[91] If the subjects of interest and costs cannot be agreed upon written submissions may be delivered by the Plaintiffs within 30 days from today's date, and by the remaining Defendants within 30 days thereafter.

STEWART J.

Released: May 13, 2013

2013 ONSC 2140 (CanLII)

CITATION: Century v. New World Eng. Corp., 2013 ONSC 2140
COURT FILE NO.: 06-CL-6558
DATE: 20130513

2013 ONSC 2140 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Century Services Inc. and Clairvest Group Inc.

Plaintiffs

And -

New World Engineering Corporation, Fred W. Bain, John C. Cheong, Lai Li Chong, Julia Cheong a.k.a. Ioulia Klenkina, Roberto Bustamante, and Roberto Bustamante c.o.b. Canada Stage Designs, Atique Choudhry, Hingson Corporation, Hingson Entertainment Corporation, Hingson Financial Corporation, Hingson Development Corporation, Hingson Capital Corpo-ration, Hingson Media Corporation, Circa Canada Incorporated, Greenfield Capital Engineering Inc., Image Nightclub Incorporated, Banzai Restaurants Inc., Eight Restolounge Incorporated, Bustamante Holdings Corporation, 1249492 Ontario Inc., Blue Giant Productions Inc., Engineered Construction Limited, Daniel Distribution Corporation, Borden Ladner Gervais LLP, Goodman & Carr LLP, Fogler Rubinoff LLP, Magnus Verbrugge, Gary Kissack, Barry Fillimore, TD Waterhouse Canada Inc., Bulent Pakdil, Hatice Pakdil, Allen De Vera and The Toronto-Dominion Bank

Defendants

REASONS FOR JUDGMENT

STEWART J.

Released: May 13, 2013

2013 ONSC 2140 (CanLII)

TAB 26

Court of Queen's Bench of Alberta

Citation: Chartered Professional Accountants of Alberta v Neilson, 2018 ABQB 170

Date: 20180307
Docket: 1701 04043
Registry: Calgary

Between:

Chartered Professional Accountants of Alberta

Applicant

- and -

James Russell Neilson

Respondent

And Between:

Docket: B101 960623
Registry: Calgary

In the matter of the Bankruptcy of James Russell Neilson

Between:

Chartered Professional Accountants of Alberta

Applicant

- and -

James Russell Neilson

Respondent

2018 ABQB 170 (CanLII)

Memorandum of Decision
of the
Honourable Mr. Justice J.T. Eamon

2018 ABQB 170 (CanLII)

I. Introduction

[1] The Applicant applies pursuant to section 125 of the *Chartered Professional Accountants Act*, SA 2014, c C-10.2 (the "Act") to enforce the portions of a Sanction Agreement imposing money fines and costs on the Respondent arising from three allegations of professional misconduct which he committed as a Certified General Accountant. Two of the allegations of misconduct occurred before the Respondent became bankrupt. One arose from events after he became bankrupt. The Sanction Agreement was made during his bankruptcy.

[2] The Respondent says that the financial liabilities in his Sanction Agreement are provable claims in the bankruptcy, so the Applicant cannot enforce the Sanction Agreement outside that process.

[3] The issue is whether disciplinary fines and costs imposed on a professional accountant by his or her professional regulatory authority after the accountant became bankrupt are a provable claim under subsection 121(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA").

II. Background facts

[4] The Respondent was a Certified General Accountant in Alberta ("CGA"). The CGA profession was regulated by the Certified General Accountants' Association of Alberta (the "CGAA") under the *Regulated Accounting Professions Act*, RSA 2000, c R-12 ("RAPA"). The Applicant is CGAA's successor.

[5] On November 20, 2014 a third party complainant (in this case, an accounting firm) made a complaint to the CGAA alleging that the Respondent:

(a) knowingly falsified financial statements for 2 corporations;
(b) knowingly distributed the false financial statements to third parties that included the misappropriated and unauthorized use of the complainant's logo;
(c) engaged in conduct which reflects negatively on the Respondent's honesty, integrity, trustworthiness, or suitability as a registrant of the profession.

[6] CGAA was required under section 70(1) of RAPA to send a copy of the complaint to the regulated member concerned within 30 days after receiving it.

[7] The CIC Secretary of the CGAA sent the complaint to the Respondent by letter dated January 14, 2015 and delivered February 2, 2015. There was no explanation provided why the CGAA did not meet the 30 day deadline and nothing is made of it by the Respondent in argument. There is no evidence to suggest that the delay was related to any knowledge or

concern the Respondent might go bankrupt or to manipulate the issue whether the matter is or is not a provable claim.

[8] The Respondent was notified by the CIC Secretary in the January 14, 2015 letter that he was required to respond to the complaint under subsection 70(2) of RAPA. He was provided the wrong response date (30 days from the date of the letter rather than 30 days from receipt) but nothing turns on that.

[9] The Respondent assigned himself into bankruptcy on February 12, 2015. The Respondent's response to the complaint was not yet due.

[10] On July 1, 2015 the Act came into force, replacing RAPA as the legislation governing the accounting professions in Alberta. Section 159 provides that a complaint under RAPA must be concluded as if RAPA remained in force, by the various officers, committees and tribunals under the Act.

[11] On July 29, 2015 the Respondent's registration under the Act was suspended. I was not provided information about of the grounds for suspension or when suspension proceedings were commenced.

[12] The CIC Secretary reported to the CIC Chair on September 10, 2015 that the complainant provided sufficient documentation to suggest the Respondent falsified financial statements and misappropriated and fraudulently used the complainant's logos. The CIC Secretary recommended the matter be sent for investigation.

[13] The CIC Chair directed an investigation on September 17, 2015.

[14] On September 29, 2015 the Applicant notified the Respondent that an investigator was appointed.

[15] On March 8, 2016 the Applicant's Complaints Inquiry Committee concluded there was sufficient evidence to warrant a hearing by a Discipline Tribunal and referred the allegations of professional misconduct to hearing. The substance of these (edited to remove the names of third parties) was as follows:

(a) Allegation #1: Attaching the complainant's logo to the unaudited financial statements of a named private company for the years ended September 30, 2012 and 2013, without the complainant's knowledge or authorization and without the complainant's participation in the financial statements;
(b) Allegation #2: Associating with false and misleading information by sending all or part of those financial statements to certain named persons;
(c) Allegation #3: Not responding to the CIC Secretary's request of February 2, 2015 to provide a response to the complaint and not cooperating with the investigation.

[16] Allegation #3 is an internal complaint by the CIC Secretary that arises from the Respondent's alleged failure to cooperate in the investigation of the third party complaint.

[17] The Applicant and Respondent made a Sanction Agreement on August 8, 2016 under subsection 74(1) of RAPA.

[18] Under that agreement the Respondent admitted, purportedly for that proceeding only, to the allegations of unprofessional conduct referred to hearing on March 8, 2016 by the

2018 ABQB 170 (CanLII)

Complaints Inquiry Committee. He agreed that the following sanctions would be imposed in consequence of the misconduct:

(a) cancellation of registration;
(b) fines of $20,000 for Allegation #1, $15,000 for Allegation #2, and $15,000 for Allegation #3, payable within 30 days of service of the statement of costs;
(c) costs of the investigation, hearing and compliance with any orders, payable within 30 days of service of the statement of costs;
(d) publication to all members of CPA Alberta;
(e) publication by posting the notice on the CPA Alberta website for 10 years;
(f) publication to all other regulatory accounting bodies in Canada and any other professional organization in which the Respondent was known to hold concurrent membership;
(g) publication in several named news media outlets.

[19] The Sanction Agreement provided that three other complaints, which had been referred to hearing on unspecified dates, would be stayed. Two of these complaints were from members of the public and the third was from the CIC Secretary. The CGAA agreed to stay these files because the complaints from the public were already before criminal courts and the public interest was served by the proposed Sanction Agreement. The Respondent sought disclosure of these stayed files in the present proceeding.

[20] On October 25, 2016 the Applicant requested payment of the fines and costs from the Respondent under the Sanction Agreement. The amount of costs demanded was $15,579.84 and the fines amounted to $50,000.

[21] The Respondent refuses to pay.

[22] The Respondent has not yet been discharged from bankruptcy.

[23] The Respondent says the claims are provable claims in his bankruptcy, and are subject to the stay of claims under the BIA. He stated in submissions to the Court that if he had known the CGAA's monetary claims were not stayed in his bankruptcy, he would not have agreed to the Sanction Agreement. The Respondent said in an affidavit filed in response to the application that he was told by the lawyer representing him in the negotiation of the Sanction Agreement that he and counsel for the Applicant had agreed any monetary order would not be enforceable due to the stay provided by the Respondent's assignment into bankruptcy.

[24] That lawyer is no longer acting for the Respondent. The Respondent did not provide evidence from his former lawyer. He said during argument of this application that he was not successful in obtaining from his former lawyer any information about conversations he may have had with the CGAA's counsel about a stay. He told me that he was not seeking a further adjournment to pursue evidence from his former lawyer.

[25] The Applicant provided evidence in response, including an affidavit from the Applicant's lawyer who negotiated the Sanction Agreement, to the effect that it has no record or information of any agreement that the monetary claims would be stayed. No one cross-examined on these affidavits.

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[26] The Respondent's trustee in bankruptcy was notified of this application and chose not to appear. It submitted a letter outlining its position that the costs and fines may be a contingent liability in the bankruptcy because they arose from conduct and actions prior to the bankruptcy.

III. Applicable law

[27] The parties dispute whether the monetary obligations which the Applicant seeks to enforce are a claim provable in bankruptcy under the BIA.

[28] A claim provable in bankruptcy is defined in section 2 of the BIA:

> ***claim provable in bankruptcy, provable claim or claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor;

[29] Creditor is also defined in section 2:

> ***creditor*** means a person having a claim provable as a claim under this Act;

[30] Subsection 121(1) of the BIA establishes the criteria for a provable claim:

> 121 (1) All 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 shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> (3) ...
>
> (4) ...

[31] As mentioned, the Respondent asserts the Applicant's claim is stayed. Subsection 69.3(1) of the BIA provides for a stay of proceedings for the recovery of provable claims:

> Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[32] The Respondent also relies on section 69.6 of the BIA. Subsection 2 provides:

> Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

[33] These provisions should be interpreted in light of the purposes of the BIA. One of the key objectives of the BIA is financial rehabilitation of the debtor (***Alberta (Attorney General) v Moloney***, 2015 SCC 51, [2015] 3 SCR 327 at paras 36 - 38, 77). Discharge from provable claims is the main rehabilitative tool under the BIA, and provides the bankrupt a fresh start, relieved of

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the burdens of pre-existing indebtedness (*ibid*). Parliament has created various exceptions to the discharged liabilities (BIA, section 172 and subsection 178(1); ***Moloney*** at paras 37, 79).

[34] Unlike in proceedings governed by common law or civil law, a claim may be asserted in insolvency proceedings (that is, a provable claim) even if it is contingent on an event that has not yet occurred (***Re AbitibiBowater, Inc***, 2012 SCC 67, [2012] 3 SCR 443 at para 34). ***Peters v Remington***, 2004 ABCA 5 at para 25 provides a classic description of a contingent claim:

> A contingent claim is "a claim which may or may not ever ripen into a debt, according as some future event does or does not happen": *Gardner v. Newton* (1916), 1916 CanLII 337 (MB QB), 29 D.L.R. 276 at 281, 10 W.W.R. 51 (Man. K.B.).

[35] The BIA does not specify the degree of certainty required to make a contingent or unliquidated claim provable. The need for probability of liability arising from pending Court proceedings is too high a threshold for the establishment of such a claim. The criterion used by Courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (***Re Confederation Treasury Services Ltd (Bankrupt)***, [1997] OJ No 67, 96 OAC 75 (CA); ***National Bank of Canada v Merit Energy Ltd***, 2001 ABQB 583, 294 AR 15 at paras 77 - 78, aff'd 2002 ABCA 5, 96 Alta LR (3d) 1; ***AbitibiBowater*** at para 36). Claims to discretionary remedies or awards might or might not be provable claims, depending on the degree of discretion (***Schreyer v Schreyer***, 2011 SCC 35, [2011] 2 SCR 605 at paras 26 - 28; ***Lacroix c Valois***, [1990] 2 SCR 1259 (not cited by the parties)). The assessment whether the claim is too remote or speculative is fact specific (***AbitibiBowater*** at paras 48, 58, 61).

[36] In the regulatory context, financial charges may qualify as a provable claim. Where they do, they are included in the ambit of the discharge provisions of section 178 (***Moloney*** at paras 50, 79).

[37] The rehabilitative purpose of the BIA does not, of course, erase all consequences of professional misconduct. The BIA does not prevent a professional regulator from pursuing proceedings to protect the public from unprofessional practice, including proceedings to suspend or remove the practitioner from the profession or to assess or rehabilitate the practitioner. In ***Moloney***, the Court stated:

> .... Bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct. However, by ensuring that all provable claims are treated as part of the bankruptcy regime, the BIA gives debtors an opportunity to rehabilitate themselves financially. While this does not amount to erasing all regulatory consequences of their past conduct, it is certainly meant to free them from the financial burden of past indebtedness.
>
> ***(Moloney*** at para 83)

[38] In ***Re Hover***, the Alberta Court of Appeal held that a regulated professional's failure to pay past indebtedness may have regulatory consequences post-bankruptcy, where the regulator is acting in the public interest to regulate the profession and not to collect the debt. In that case, Dr. Hover's sanctions included suspension of his license until he paid the fines and costs assessed in his discipline proceeding. He later became bankrupt and claimed the regulator could no longer refuse him a license based on his failure to pay. The Court held that Dr. Hover's failure to pay

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fines and costs imposed before his bankruptcy (which were a provable claim) did not preclude the professional regulator from refusing to reinstate him. It was acting in the public interest to regulate the profession of dentistry and not to collect a debt (***KPMG Inc. v. Alberta Dental Association (Re Hover)***, 2005 ABCA 101).

[39] ***Hover*** was discussed extensively by the Alberta Court of Appeal in ***Moloney***, but the Supreme Court of Canada did not mention it on that appeal or in the companion case of ***407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)***, [2015] 3 SCR 397, 2015 SCC 52. ***Moloney*** and ***ETR*** were concerned with debt collection schemes, not professional regulation.

[40] Parliament subsequently enacted section 69.6 of the BIA, which came into force in September 2009 (SC 2007, c 36, s 37; cif September 18, 2009, SI 2009-68). Section 69.6 only pertains to proposals and does not address the specific point in ***Hover***.

[41] Regulatory charges are not similar in all respects to financial claims between private parties. The ***AbitiBowater*** decision held that financial regulatory charges are a provable claim if three criteria are met: (1) there must be a debt, liability or obligation owed to a creditor, (2) which was incurred before the debtor became bankrupt, and (3) it must be possible to attach a monetary value to the debt, liability or obligation (***AbitibiBowater*** at para 26; ***Moloney*** at para 55).

[42] In ***AbitiBowater*** the Court described the first part of the test as follows at para 27:

> The BIA's definition of a provable claim, which is incorporated by reference into the CCAA, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. <u>The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied</u>.
>
> [Underlining added]

[43] The inquiry into the second requirement is based on section 121(1) of the BIA, which imposes a time limit on claims. The Court observed at para 28:

> The enquiry into the second requirement is based on s. 121(1) of the BIA, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt"....

(The Court noted that the statute under consideration in that case provided more flexibility for environmental claims.)

[44] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question in that case was whether the environmental orders that were not expressed in monetary terms could be translated into such terms (*ibid* at para 30). In the context of an environmental order, there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a

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monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process (*ibid* at para 36).

[45] In a recent decision of the Alberta Court of Appeal, the majority summarized this test, again in the environmental context, as follows:

> 60 If the environmental obligation is framed in monetary terms, it will qualify as a provable claim: ***AbitibiBowater*** at paras. 2, 30. If it is not framed in monetary terms, it must be examined to see whether it will "ripen into a financial liability", having regard to the "factual matrix and the applicable statutory framework" (at paras. 3, 31). There is a three part test (at para. 26):
>
> > (a) There must be a debt, liability or obligation to a creditor. When a regulatory body exercises its enforcement powers against a debtor, it is a "creditor" in insolvency proceedings (at para. 27);
> >
> > (b) The debt, liability or obligation must be incurred at the relevant time in relation to the insolvency. For environmental claims, this can be before or after the insolvency proceedings have commenced (*CCAA*, s. 11.8(9); *BIA*, s. 14.06(8)); and
> >
> > (c) It must be possible to attach a monetary value to the debt, liability or obligation. The claim may be contingent, as long as it is not too remote or speculative to be included with the other claims. That depends on whether there is "sufficient certainty" that the regulatory body will ultimately perform remediation and crystallize the claim (at para. 36). In assessing the certainty of the claim, the court can examine the entire factual context, including whether the debtor is in control of the property, whether it has the means to comply with the order, whether there are other parties responsible for the remediation, as well as the effect that compliance with the order would have on the insolvency process.
>
> (***Grant Thornton Ltd v Alberta Energy Regulator***, 2017 ABCA 124, leave to appeal granted, [2017] SCCA No 231, appeal heard and reserved February 15, 2018).

[46] The Applicant argued, relying on ***AbitibiBowater***, that to satisfy the first part of the three part test, the regulator must exercise enforcement power against a debtor before the date of bankruptcy. Otherwise, the regulatory agency is not a creditor. It argues that all that had occurred in the present case before bankruptcy was sending a letter to the Respondent asking him to comment on the complaint. This was not exercise of enforcement power, so the Applicant is not a creditor. The Respondent says it is enough that the regulator received the complaint before bankruptcy, thus engaging the complaints inquiry process.

[47] What is sufficient regulatory activity in the context of the BIA? To what extent (if any) does ***AbitibiBowater*** require enforcement proceedings before the date of bankruptcy? In answering the questions it is useful to briefly review the factual context of that case.

[48] The Abitibi companies entered debtor protection proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (“CCAA”) on April 17, 2009. On June 12, 2009, the Province asked Abitibi to provide certain reports for five industrial sites, including

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environmental site assessment reports. A claims procedure order was issued August 26, 2009. The Minister issued the environmental protection orders over the sites in issue on November 12, 2009, requiring certain remediation action plans and work. The industrial activities giving rise to the remediation claims had ceased well before the CCAA proceedings started. The dispute between the Province and Abitibi had started at least by December 2008 when the Province passed legislation expropriating three of the sites, including provisions that would shield the Province from counter-claims in any restructuring process (motion judge's reasons, 2010 QCCS 1261 at paras 184 - 190).

[49] The motion judge found that the Minister acted as a creditor both before and after making the environmental protection orders in issue (2010 QCCS 1261 at para 212). The Supreme Court of Canada observed that because the Province issued the orders, it would be recognized as a creditor (para 46) and the Province identified itself as a creditor by resorting to EPA enforcement mechanisms (para 49).

[50] In some regulatory cases, including environmental remediation cases like ***AbitibiBowater***, it is necessary to distinguish the general duty owed to the public at large to comply with legislation from those cases where a statutory debt or regulatory charge has arisen (***AbitibiBowater*** at paras 44 - 48, 72 - 74, and ***PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd***, 1991 ABCA 181, 81 Alta LR (2d) 45, 117 AR 44, leave to appeal denied, [1991] SCCA No 497 cited therein). As McLachlin CJC (as she then was) stated at para 72, the BIA draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive restructuring, and monetary claims that can be compromised. I do not read the majority's reasons as differing over this fundamental proposition (***AbitibiBowater*** at para 59).

[51] The requirement that the regulator exercise enforcement powers serves to identify it as a creditor by distinguishing the situation from the general duty on citizens to obey the law. However, I do not see any suggestion in the BIA that the requirement of a creditor means that the creditor must necessarily identify itself before the bankruptcy event. Such a strict requirement would defeat the rehabilitative objectives of the BIA, and would be contrary to subsection 121(1) of the BIA, which includes as provable claims "all debts and liabilities, present or future, … 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".

[52] That interpretation would also run counter to the ordinary principles concerning contingent claims. The essence of a contingent claim is that not all elements necessary to establish liability have occurred by the date of bankruptcy. It is not necessary that a contingent claimant identify itself before the date of bankruptcy or has decided by that date to advance its claim based on facts occurring before the date of bankruptcy. The fact the claim is disputed does not disqualify it as a contingent claim. (That is not to say that these are irrelevant. The degree of knowledge of a claim is relevant to the third part of the test, whether the claim is too speculative or remote for inclusion in the insolvency process. For a recent example, see ***RMP Energy Inc v SemCAMS ULC***, 2012 ABQB 495 at paras 41 - 51, 56, 66 - 69; leave to appeal refused, 2012 ABCA 312 at paras 28 - 29 (not cited by the parties)).

[53] Some passages in the reasons of the motion judge, Mr. Justice Gascon (as he then was), in ***AbitibiBowater*** suggest that the decision to enforce (i.e., identify as a creditor) is one of the contingencies of a contingent claim. He said:

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> [233] Contingent claims are nothing more than incomplete claims, the enforceability of which depends on some contingency or future event that has not yet occurred (and may never occur). In the case of a guarantee, it might be the non-payment by the principal debtor. In the case of an environmental claim of the sort advanced by the Province, it would be the decision of the latter to carry out the remediation and pass along the cost as the EPA provides.
>
> [234] The fact that all the elements of the claim do not presently exist does not deprive a contingent claim of its essential element of being a claim that can be quantified and the amount of which can be compromised.

[54] The Supreme Court did not discuss whether the relevant date for assessing claims was the initial Canadian Filing Date, the claims bar date, or another date. It was not necessary to deal with that, because the first part of the test (status as a creditor) was not in issue in that case (***AbitibiBowater*** at para 49).

[55] The CCAA as it existed on the date the debtors entered CCAA proceedings provided that claims would be determined, for companies other than those in bankruptcy or winding up, in the amount which might be proved under the BIA (CCAA, s 12(2)(a)(iii)). Section 19 further provided, with a few exceptions, that the only claims that could be compromised were those that related to debts or liabilities, present or future, to which the company (i) was subject on the day on which proceedings were commenced, or (ii) may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred before the day on which proceedings were commenced (CCAA, s 19 as amended by SC 2007, c 36, s 69).

[56] The fact the environmental protection orders were made well after the CCAA proceedings commenced, given the substantial similarity between section 19 of the CCAA and subsection 121(1) of the BIA, would suggest that it is not necessary that the enforcement power be exercised before the relevant claims assessment date. But again, the timing of the first part of the test was not in issue in that case.

[57] The only temporal requirement discussed by the Supreme Court of Canada in ***AbitibiBowater*** concerns the second part of the test - whether the liability was by reason of an obligation incurred before the debtor became bankrupt. Absent additional guidance from the Court, I see no reason why regulatory charges should be singled out for different treatment by requiring a contingent creditor in a regulatory context to have decided to actually advance its claim before the date of bankruptcy.

[58] With respect to the third part of the ***AbitibiBowater*** test, the Applicant relies on a line of administrative penalty cases in support of its position that administrative penalties imposed after the date of bankruptcy are too remote and speculative to be included as contingent claims: ***Association des courtiers & agents immobiliers du Québec c Fuoco***, 2007 QCCQ 292; ***Chambre de la sécurité financière c Harton***, 2008 QCCA 269, 2008 CarswellQue 756; ***Re Thow***, 2009 BCSC 1176, 57 CBR (5th) 222; ***Chambre de la sécurité financière v Thibault***, 2016 QCCA 1691, [2016] QJ No 13897, 42 CBR (6th) 8.

[59] These cases (other than ***Thibault***) refused to accept an administrative penalty imposed after the date of bankruptcy is a provable claim, on one or both of two grounds: the claim would be too remote or speculative; or, a fine imposed after the date of bankruptcy is not a provable claim.

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[60] For example, in ***Re Thow*** the Court found that a sanction imposed by a securities regulator for misconduct that occurred before bankruptcy was not a provable claim. The Court reasoned:

> 46 In my opinion, the *(Re) Air Canada* case supports the Commission's position that the penalty is not an obligation as contemplated by s. 121 of the BIA until the penalty is assessed by the Commission. Likewise, *Chaloux*, *Strini* and *Glenister* also support the Commission's position that because its decision was discretionary, there was not a contingent liability or "obligation" until the Commission actually fined Mr. Thow, which was after the date of his bankruptcy. Therefore, in my opinion the obligation did not arise until after bankruptcy and the Commission's penalty is not a provable claim in this bankruptcy.

[61] In my view, the mere fact that fines or costs were imposed after bankruptcy does not necessarily disqualify the claim as provable in bankruptcy. Some discretionary decisions lead to provable claims (***Schreyer***). Others do not (***Lacroix***). In ***Thibault***, the bankrupt attempted to plead guilty to a regulatory charge before his bankruptcy. The Court found on the facts of that case that the resulting sanctions were a provable claim in his bankruptcy although not imposed by the regulator until after the bankruptcy (***Thibault*** at paras 22 - 28). Every case is a question of fact.

[62] The Applicant also relies on a line of cases holding that a costs award in a civil claim arising out of pre-bankruptcy litigation but made after the date of bankruptcy is not a provable claim. The Applicant emphasizes that costs are discretionary and where the discretion has not been exercised before the date of bankruptcy, they cannot be considered provable claims.

[63] This line of costs cases says that costs of legal proceedings are in the discretion of the Court, and until an order for payment of costs is made there is no obligation or liability to pay them and no right to recover them. Even if the litigation were substantially or entirely completed before the date of bankruptcy, the costs would not be a provable claim if the Court had not ordered costs before bankruptcy (***Chaloux v Kingston Fairways Golf Course*** (2004), 48 CBR (4th) 237 (Ont SCJ) and ***Strini v Mihalicz***, 2006 ABQB 912, following ***Glenister v. Rowe***, [1999] EWCA Civ 1221, [1999] 3 All ER 452 (CA)). To like effect, though not cited by the parties, is the proposition stated in Houlden, Morawetz and Sara, *The 2017 Annotated Bankruptcy and Insolvency Act* (Thomson Reuters, 2017) at G36(21) that costs awarded against a bankrupt as defendant in pre-bankruptcy litigation are not provable in the bankruptcy.

[64] I would not follow the costs cases cited to me (***Glenister***, ***Chaloux***, ***Strini***) or others like them. I consider them wrongly decided and inconsistent with the principles set out in ***AbitibiBowater***.

[65] There is no watertight compartment insulating costs awards relating to pre-bankruptcy litigation from the consequences of bankruptcy merely because costs are discretionary. Rather, the question is whether a costs award is too remote or speculative to be included in the claims process.

[66] Those who engage in litigation in the Courts subject themselves to a costs regime which is well defined and predictable. Discretion is exercised in accordance with principle not whim.

[67] In Alberta, these costs principles are established in the Alberta Rules of Court, Part 10 and well developed in case law. It is probable that costs will follow the event or events (where

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costs are awarded by issue) of the litigation (Rule 10.29). Cases where party and party or solicitor and client costs are the norm are well defined in case law. Where a party and party costs award is probable, the scale of costs is predictable. Costs can, and sometimes must, be allocated to steps taken before or after an event in time such as service of a formal offer to settle (Rule 4.29). So it is possible to allocate costs to steps taken before and after the date of bankruptcy.

[68] Pre-bankruptcy costs in civil litigation are sufficiently predictable that they should be included as provable claims. They are not remote or speculative. The trustee in bankruptcy would need to value them having regard to contingencies.

[69] What about costs relating to steps taken in proceedings that continued after the date of bankruptcy? In the present case, some costs related to steps taken before the date of bankruptcy and others after. Although many civil claims against bankrupts will be stayed on bankruptcy and subsumed into bankruptcy administration, some claims can continue. As an example some personal claims do not vest in the trustee, such as ongoing non-financial parenting litigation in a matrimonial dispute. The disciplinary proceeding against the Respondent is also such a case, in the sense that it was primarily a non-financial regulatory proceeding aimed at protecting the public from unfit accounting practitioners and was not a proceeding that could be stayed under the BIA (apart from the limited circumstances where section 69.6 of the BIA applies).

[70] I am mindful of commentary cited in ***Strini*** that a bankrupt should not be entitled to "litigate with impunity" and the suggestion that a costs order made after the bankruptcy event will not be caught in the bankruptcy if the bankrupt party continues the litigation (***Strini*** at para 23 and commentary cited therein). However, the question whether a bankrupt should be released from provable claims, and to what extent, is a policy decision for Parliament in making exceptions to the section 172 and 178 discharge provisions. Other values come into that policy question, including rehabilitation of the debtor and the debtor's access to justice.

[71] Costs are a provable claim if they are a liability "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" (subsection 121(1), underlining added). That is a question of fact having regard to all the circumstances.

[72] The mere fact a person who later became bankrupt continued in litigation is not enough for the entire costs obligation to have arisen from an obligation incurred before the bankruptcy. The answer to the question depends on the context, including the type of litigation, its status and maturity at the date of bankruptcy, the opportunities to exit litigation, and formal or other settlement offers made during the course of the proceedings where a party is put to his or election to settle or suffer the consequences of a costs penalty for ongoing litigation steps.

[73] As an example, where bankruptcy occurs mid-stream of an interim parenting application, the costs to the date of bankruptcy might be associated with having undertaken litigation before bankruptcy. Perhaps the later costs associated with completing the interim application also are associated with the pre-bankruptcy decision to commence that application. It does not follow that the later costs of the larger parenting dispute qualify for the same treatment. In most civil claims there are opportunities to settle and exit litigation. It may be that at some point, costs of ongoing steps should no longer be associated with the decision to undertake or carry on proceedings before the date of bankruptcy. Or, putting it another way, some of the costs might be too remote.

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[74] Although I would refuse to follow the costs cases cited by the Applicant for the foregoing reasons, I also note that ***Glenister*** and other UK cases before and after it to like effect were unanimously overruled by the UK Supreme Court in ***Re Nortel***, 2013 UKSC 52, [2014] AC 209 at paras 87 - 93 and 136 (not cited by the parties). The majority characterized the earliest cases holding that contingent costs liabilities were not provable claims as "somewhat aberrant" in view of the purposes of bankruptcy legislation (*ibid* at para 93).

[75] How do these principles apply to the costs of the regulatory proceeding in the present case? The Alberta Rules of Court do not apply to the Applicant's discretion to award costs in disciplinary proceedings. Whether costs imposed by a regulator are too remote or speculative depends on the Court's factual assessment of the practices and policies of the regulator concerned and the context of the proceeding.

[76] The same principles apply to fines. It is a question of fact whether the prospect of a fine is remote or speculative. However, unlike costs awards, it would be a rare occasion where that prospect could be considered sufficiently certain before the sanction decision is pronounced.

[77] In any professional discipline process, sanctions serve a variety of objectives including specific and general deterrence and maintaining the public confidence in the regulated profession. Every case is fact specific. As the Saskatchewan Court of Appeal commented in ***Merchant v Law Society of Saskatchewan***, 2009 SKCA 33 at para 95:

> ... Not unexpectedly, the reasonable range of sentences in disciplinary matters is elastic. It will be impacted by considerations of age, experience, discipline history, the unique circumstances of the member, and the nature of the conduct complained of.

[78] In sanctioning, tribunals must be sensitive to proportionality; otherwise they risk judicial review by the Courts. As the Alberta Court of Appeal has said, "at the end of the day the sanction must be proportionate and reasonable…. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction…." (***Walton v Alberta (Securities Commission)***, 2014 ABCA 273 at paras 154 and 165).

[79] Accordingly, absent other evidence, a Court should presume that a professional disciplinary sanction process includes consideration of the personal circumstances of the offender at the time of sanctioning, and aggravating and mitigating factors. These often cannot be known if bankruptcy occurs at an early stage of the regulatory complaints process. In some rare cases, such as ***Thibault***, the evidence might indicate sufficient certainty of the result. It depends on all the circumstances, such as the regulator's practices, procedures and rules, the maturity of the proceedings, and the position taken by the respondent in such proceedings.

[80] In summary, in cases of administrative penalties or costs of disciplinary proceedings, the inquiry in relation to the third step of the ***AbitibiBowater*** test is whether the event that has not yet occurred is too remote or speculative. The mere fact a fine or costs award was imposed after bankruptcy does not necessarily disqualify the amount as a claim provable in bankruptcy.

IV. Analysis

[81] Before dealing with the issue of provable claims, I will deal with three preliminary issues.

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[82] First, the Respondent submitted hearsay evidence of an agreement between the lawyers for each side who negotiated the Sanction Agreement that the costs and fines would be subject to the stay under the BIA (paras 23 - 24 above). The Applicant submitted direct evidence refuting the existence of such an agreement (para 25 above).

[83] There are constraints on my resolving conflicting evidence in a summary proceeding such as this one. The Respondent's evidence is not admissible (being hearsay), but might have supported a request for a trial of an issue if it was sufficient to suggest a genuine issue for trial. However, the Respondent did not want an adjournment to obtain direct evidence from his former lawyer (para 24 above). His hearsay evidence is not sufficient to raise a triable issue, and even if admissible I would not give it any weight:

(a) The Respondent's evidence is a bare assertion, relaying a hearsay statement from a third person without any details of the words spoken in the alleged conversation or records thereof. It is well established that such assertions, without details, do not necessarily raise an issue requiring a trial (***Shefsky v California Gold Mining Inc***, 2016 ABCA 103 at para 113 per Slatter JA dissenting; approved in ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365 at paras 39 - 40).

(b) The evidence is highly suspect because it is inconsistent with the written agreement, which was signed by the Respondent while he was in bankruptcy. It provided for payment of the fines and costs within 30 days of service of the statement of costs. The Respondent's bare assertion does not explain the inconsistency.

[84] The second preliminary issue is the Respondent's request for disclosure of files from the Applicant relating to other complaints that were stayed under the Sanction Agreement (para 19 above).

[85] I have power to order records production where necessary to maintain fairness in the proceedings. I did not during argument, and still do not, see any grounds to order disclosure of those files. Nothing in the evidentiary record or submissions before me indicates they have any potential relevance or materiality to the issues whether the fines and costs agreed to in the Sanction Agreement are provable claims.

[86] The third preliminary issue is the Respondent's submission that the Applicant could not bring the application under section 125 of the Act because proceedings are stayed. The Applicant seeks permission nunc pro tunc (i.e., retroactively) in the event any claims are stayed.

[87] I exercise my discretion under section 69.4 to permit this application to be heard; as I am satisfied it is equitable to do so. All interested parties either participated or had notice and opportunity to participate. The additional expense associated with first bringing the dispute before the trustee would be needless.

[88] I turn to whether the fines and costs are provable claims.

[89] The structure for the complaints process under RAPA is typical of professional regulators. Complaints must be reviewed in the first instance by an officer of the regulator (here, the CIC Secretary). They must be sent to the member for comment. The regulator may encourage resolution between complainant and member, but may continue proceedings notwithstanding a

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settlement. Following comment and review, the regulator must decide whether to summarily dismiss the complaint or refer it for investigation. Following investigation, the Complaints Inquiry Committee (which is composed of members of the profession and, optionally, additional members selected from the public) decides whether to direct further investigation, summarily dismiss it, or refer it to a discipline tribunal for determination. A member may make a sanction agreement with the Complaints Inquiry Committee. If approved, the agreement is a finding and order of a discipline tribunal. A discipline tribunal may impose sanctions following the necessary hearing and determinations of unprofessional conduct. In addition to fines, the tribunal may order the member to pay the costs or any part of the costs of an investigation and hearing in the manner determined by the bylaws. See RAPA, sections 67 - 97, 121, 122.

[90] Costs and fines are governed by sections 92 and 93 of RAPA:

> **93(1)** If a discipline tribunal determines that the conduct of an investigated party constitutes unprofessional conduct, the discipline tribunal may make one or more of the following orders:
>
> (a) reprimand the investigated party;
>
> (b) suspend registration for a stated period or pending compliance with specified conditions;
>
> (c) restrict any or all aspects of the investigated party's public accounting practice or other areas of practice for a stated period of time, pending compliance with specified conditions, or until otherwise ordered by a discipline tribunal or a person or body specified by the discipline tribunal;
>
> (d) impose conditions or requirements on the investigated party for a stated period of time or until otherwise ordered by the discipline tribunal, including conditions that the investigated party
>
> (i) practise under supervision in accordance with specified terms,
>
> (ii) not engage in sole practice,
>
> (iii) undergo counselling in accordance with specified terms,
>
> (iv) permit periodic inspections of practice by an individual authorized by the practice review committee or complaints inquiry committee or the chair of either of those committees, or
>
> (v) report on specified matters to the accounting organization, the CIC secretary or the discipline tribunal secretary;
>
> (e) accept, for a stated period or pending compliance with specified conditions, a voluntary suspension of registration or an undertaking to restrict practice;
>
> (f) direct the investigated party to satisfy a committee or person specified by the discipline tribunal that a disability or addiction can be or has been

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overcome, and suspend the investigated party until the committee or person is so satisfied;

(g) require the investigated party to take counselling that is appropriate in the opinion of a committee or person specified by the discipline tribunal;

(h) direct the investigated party to successfully complete a particular course of studies or examinations, or both, or to satisfy a committee or person specified by the discipline tribunal as to the investigated party's professional competence generally or in a specified area of practice;

(i) direct a public accounting firm to develop and implement quality control procedures or professional development policies, to undergo a specific practice review or to increase the amount or change the type of professional liability insurance carried by the public accounting firm;

(j) direct the payment of all or part of the costs of complying with an order;

(k) prohibit, restrict or place conditions on the ability of a member of an accounting organization or a public accounting firm to train students or to supervise how students are trained;

(l) cancel registration under this Act;

(m) specify a time limit within which an order or any part of it must be complied with and specify the consequences of failing to comply, including suspension or cancellation of registration;

(n) direct the publication or posting of a decision in any manner the discipline tribunal considers appropriate to protect the public interest and to notify clients or former clients of the investigated party as the situation requires;

(o) make any further or other order that the discipline tribunal considers appropriate in the circumstances.

(2) Before making any order under subsection (1), the discipline tribunal is entitled to review and the accounting organization must provide

(a) the past disciplinary record of the investigated party, and

(b) any other information the accounting organization possesses about the investigated party concerning findings of unprofessional conduct against the investigated party in disciplinary proceedings by a professional organization in Alberta or another jurisdiction.

94(1) The discipline tribunal may order the investigated party to pay to the accounting organization

(a) the costs or any part of the costs of an investigation and hearing in the manner determined by the bylaws;

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(b) a fine not exceeding $20 000 for each finding of unprofessional conduct;

(c) costs and a fine.

(2) Unless the discipline tribunal orders otherwise, the investigated party must pay to the accounting organization, as part of the costs ordered under subsection (1), all of the reasonable costs for the indemnification of the accounting organization for the costs relating to the review of complaints, the investigation and the discipline tribunal hearing, including the legal expenses and lawyer's fees in accordance with the *Alberta Rules of Court*.

(3) The order may specify when and how the amount is to be paid.

(4) If the investigated party does not pay costs or fines in accordance with the order of a discipline tribunal or appeal tribunal, the registration of the registrant is immediately cancelled unless a discipline tribunal or an appeal tribunal otherwise directs.

[91] In all of this, the CGAA is guided by the purposes of the complaints process. Section 65 of RAPA defines those purposes:

(a) to protect the public interest,

(b) to enforce practice standards and rules of professional conduct for registrants,

(c) to provide a means by which complaints about the conduct of registrants and former registrants can be dealt with in a fair and expeditious way, and

(d) to preserve the integrity of the accounting profession.

[92] The Applicant's amended notice of application seeks a declaration that the financial amounts under the Sanction Agreement are not a contingent liability or a claim provable in bankruptcy. The onus is on the Applicant to show it is entitled to the remedy it seeks.

[93] No authority was cited to me explaining when or why a CGAA discipline tribunal would impose a fine or costs in the complaints resolution process. I was not told whether CGAA discipline tribunals have policies or procedures about costs, whether they deliver formal published reasons in support of their decisions or whether any such decisions include discussions about costs.

[94] The Respondent submitted extracts from CGAA's legacy internet site providing links to decision summaries, showing that in all the discipline cases involving the CGAA which were notified on its internet site, the CGAA discipline tribunal imposed costs or the settlement included costs. The Applicant does not contest that assertion.

[95] As mentioned earlier, sanctions in a professional discipline process serve a variety of objectives including specific and general deterrence and maintaining the public confidence in the regulated profession. Every case is fact specific. Absent any evidence of any precedent for starting points or fixed sanctions for specific regulatory misconduct imposed by CGAA discipline panels, I conclude that the sanctioning phase in a CGAA proceeding was highly discretionary as would be expected in a regulatory process having the objectives defined in section 65 of RAPA. The decision to impose fines is part of that discretionary process.

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[96] In the absence of other evidence, I conclude that the costs provisions are a cost recovery mechanism. Where the CGAA successfully disciplined a member it was extremely likely that the CGAA would seek and obtain an order for costs. That virtually invariable practice indicates that the costs awards are primarily a costs recovery mechanism. They may have a deterrent effect and exposure to them may be relevant to whether fines should be imposed, but the costs awards are not primarily a financial sanction.

[97] In this case, there were three allegations against the Respondent to which fines and costs were attached (para 15 above). Each had a discrete fine attached (para 18 above). The costs award applied to all the proceedings, without allocating specific amounts to each allegation (*ibid*).

[98] The CGAA was aware of the third party complaint (Allegations #1 and #2) and commenced reviewing that complaint as required by RAPA well prior to the bankruptcy. The CGAA may not have known all the facts at the date of bankruptcy. The Applicant emphasizes that the proceeding was in its early stages. However, it had the complaint for months before the bankruptcy. There is nothing to indicate that the third party complainant was not cooperative or informative. As a matter of common sense, the allegations in this complaint probably called for immediate attention to protect the public from fraud. Yet, the Applicant did not provide any evidence to show the allegations were not well understood or well supported, that it was unable to attend to the complaint quickly for the protection of the public, or anything about the likelihood of a conviction as of the date of bankruptcy.

[99] In contrast, the regulator's complaint (Allegation #3) had not occurred before the date of bankruptcy. The Respondent was not in default of his professional obligation to respond to the third party complaint on the day he assigned himself into bankruptcy.

[100] I cannot infer merely from the timing that the consequences of the third party complaint were remote or speculative. A professional accounting firm had complained to the CGAA that the Respondent had fraudulently taken their logo and put it on the statements of a non-client. There is no suggestion the Respondent was working for that firm or somehow mistakenly acted as an employee and issued statements without authority. It is difficult to think that a professional accounting regulator, acting in the public interest, would not proceed to investigate a complaint of fraud and act if it appeared there was a reasonable prospect of conviction.

[101] In my view, the CGAA was identified as a creditor in the context of the disciplinary matter. It received and forwarded the third party complaint to the Respondent before bankruptcy. It continued proceedings including suspension of the Respondent from practice during the bankruptcy. It would obviously investigate these serious allegations. In doing so it would incur recoverable costs. If the allegations were substantiated, it would be claiming these costs from the regulated professional. No one suggests there was some obvious and innocent explanation for the discrepancy in the financial statements. The fact the allegations were not admitted, or were disputed, does not disqualify financial claims such as costs from consideration as contingent claims.

[102] The costs of investigating and managing Allegations #1 and #2 to a voluntary settlement, both before the bankruptcy event and during the bankruptcy administration, are so closely related to the pre-bankruptcy professional misconduct and third party complaint that they should be considered as having arisen from an obligation incurred before the bankruptcy. The CGAA has

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provided no evidence to suggest that the third parry complaint would not be investigated, or that any part of the costs relating to the third party complaint were remote or unexpected.

[103] I find that those costs are a provable claim. They are subject to the stay. Whether the Respondent is released from them by the bankruptcy is not before me and I make no ruling about that issue.

[104] In contrast, costs relating to Allegation #3 were remote and speculative at the date of bankruptcy because the regulatory default had not occurred at that date.

[105] How should I deal with the fact the costs were assessed for all the allegations together? It is not unusual that a professional regulator joins a complaint for failure to cooperate to an underlying third party claim. Often, the failure to cooperate complaint is so closely tied into the underlying facts of a third party complaint that it does not occasion any material additional costs. In my view it is appropriate to consider whether there are any incremental costs associated with Allegation #3. If there are incremental costs associated with it, they would not be a provable claim on the facts of this case.

[106] I turn to the question whether the fines are a provable claim.

[107] It is clear that the fine for Allegation #3 is not a provable claim. The failures to respond and subsequently to cooperate, which were key elements, had not occurred at the date of bankruptcy.

[108] The issue concerning the fines for Allegations #1 and #2 is whether the prospect of fine was too remote or speculative. If I am incorrect that Allegation #3 was not a contingent claim at the date of bankruptcy as stated in the immediately preceding paragraph, the same issue arises for that allegation.

[109] Given the integrity issues raised in the allegations, suspension or de-registration were probably foregone conclusions if the allegations were proved. However, whether a discipline tribunal would pile on fines could not be predicted.

[110] It is one thing to predict that costs would be imposed if there was misconduct. It is a very different thing to predict as of the date of bankruptcy whether a tribunal would see fit to impose a fine. As mentioned earlier, discipline tribunals must be sensitive to proportionality and the relevant facts and circumstances at the time of sanctioning. Their sanction decision depends on a myriad of information about the specific circumstances of the Respondent, and would likely include any aggravating circumstances (such as refusing to cooperate in the investigation) and any mitigating circumstances (such as an early and meaningful acknowledgment of responsibility or guilty plea). There is nothing in the record that suggests the regulator would have had such information at the date of bankruptcy. Important pieces of the puzzle did not exist at the date of bankruptcy, including information about the Respondent’s cooperation or an early and meaningful guilty plea. At the date of bankruptcy, the disciplinary fines must have been remote or speculative.

[111] I do not accept the Respondent’s submission that section 69.6 applies. That provision modifies stays under section 69 (where a notice of intention to file a proposal is given) and section 69.1 (where a proposal is filed). It does not apply to the stay where bankruptcy occurs, as imposed by section 69.3.

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V. Conclusion

[112] The Applicant's costs claim is a provable claim, other than incremental costs (if any) associated with Allegation #3. The amount of the provable claim would be determinable by the trustee in bankruptcy in the ordinary way. If the parties need directions on any incremental costs associated with Allegation #3, they can arrange to speak to them in the application before me. The Applicant is entitled to a money judgment for those incremental costs, if sought.

[113] The Applicant's claims for fines are not provable claims. The Applicant is entitled to a money judgment against the Respondent for the fines.

[114] The formal order should provide that the Court declares pursuant to section 69.4 of the BIA that the stay under section 69.3 of the BIA does not apply to the commencement and prosecution of the application or any claim determined by the Court on this application not to be a provable claim. The stay applies to those claims determined in this application to be provable claims.

[115] If additional clarifications or directions are required, or anyone seeks costs of the application, the parties should arrange to speak to those within 45 days.

Heard on the 5th day of January, 2018.
Dated at the City of Calgary, Alberta this 6th day of March, 2018.

J.T. Eamon
J.C.Q.B.A.

Appearances:

Aidan D. Henderson
for the Plaintiff

James Russell Neilson
for the Self-Represented Litigant

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TAB 27

Citation: CIBC v. Millard et al.
2001 BCSC 982

Date: 20010703
Docket: C982379
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

PLAINTIFF

AND:

MICHAEL WHITFIELD MILLARD, SHARON WALLS, DOUGLAS F. WALLS, DANIEL J. WALLS, EMMA WALLS, FRED WALLS & SON LIMITED, FRED WALLS & SON HOLDINGS LIMITED, FRED WALLS & SON (BODY & PAINT CENTER) LIMITED, NORTH CENTRAL MOTOR LEASE LIMITED, 406392 B.C. LTD. AND 509894 B.C. LTD.

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BAUMAN

Counsel for the Plaintiff	R.J. Olson and K.S. Henriksen
Counsel for the Defendant, 406392 B.C. Ltd.	D.M. Smith
Counsel for all other Defendants	J. Christiansen
Date and Place of Hearing/Trial:	4 June 2001 Vancouver, B.C.

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[1] The plaintiff, Canadian Imperial Bank of Commerce ("CIBC"), seeks judgment against Douglas F. Walls, Michael Whitfield Millard and the numbered companies under Rule 18A for the following relief:

> …
>
> (a) a declaration that the Defendants Douglas F. Walls, Michael Whitfield, 406392 B.C. Ltd. and 509894 B.C. Ltd. Millard [*sic*] have participated in a cheque-kiting scheme to defraud the Plaintiff;
>
> (b) a declaration that the liability of the Defendants Douglas F. Walls, Michael Whitfield Millard, 406392 B.C. Ltd. and 509894 B.C. Ltd. to the Plaintiff arises through the Defendants Douglas F. Walls, Michael Whitfield Millard, 406392 B.C. Ltd. and 509894 B.C. Ltd. obtaining the Plaintiff's funds through false pretences and, or in the alternative, fraudulent misrepresentation;
>
> (c) Damages for fraud against the Defendants Douglas F. Walls, Michael Whitfield Millard, 406392 B.C. Ltd. and 509894 B.C. Ltd.;
>
> (d) Punitive and/or aggravated damages against the Defendants Douglas F. Walls, Michael Whitfield Millard, 406392 B.C. Ltd. and 509894 B.C. Ltd.;
>
> (e) General damages against the Defendants Douglas F. Walls, Michael Whitfield Millard, 406392 B.C. Ltd. and 509894 B.C. Ltd.;
>
> (f) Interest pursuant to the Court Order Interest Act R.S.B.C. 1996, c. 79;
>
> (g) Special costs against the Defendants Douglas F. Walls, Michael Whitfield Millard, 406392 B.C. Ltd. and 509894 B.C. Ltd.;
>
> …

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[2] "Cheque-kiting" has become something of a term of art in Canada. The Privy Council described it in this manner in ***Corporation Agencies Ltd. v. Home Bank of Canada***, [1927] 2 D.L.R. 1, affirming [1925] S.C.R. 706:

> There is a device known in Canada as "kiting," which is described as follows:--
>
> > Kiting is a term used with regard to obtaining money by cheques passed through banks without value being deposited against the cheque -- that is, kiting is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another, and perhaps through many more.
>
> To this Bowler, who was examined as a witness for the defendant bank, adds that kiting is a means of getting credit for the time it takes to clear a cheque from one bank to another bank. Cheques are passed from one bank account to another, and credit is obtained at the bank into which they are paid, for which they are debited at the bank on which they are drawn.

[3] The CIBC's Director of Corporate Security, Jay Stark, described a kiting scheme in his report, the admissibility of which was challenged, properly so in my view, but his description of the scheme is not controversial and I will reproduce it:

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> …
>
> A simple act of kiting may comprise a cheque drawn against insufficient funds on deposit. The scheme becomes more elaborate when the objective is to obtain unauthorized funds and maintain balances within credit or overdraft limits (sustain credit). The scheme continuously misstates account balances by showing the same amount on deposit simultaneously in two bank accounts, made possible by exploiting the time required for a cheque to clear through the banking system. Such a scheme may be accomplished as follows.
>
> A cheque, drawn against insufficient funds on deposit, is deposited to a second account. Until the outstanding cheque is cleared, the same amount is on deposit simultaneously in two accounts. During the period that amounts are on simultaneous deposit, a kiter may be able to withdraw funds from the second account, although the balance is represented by a NSF cheque. To continue the scheme, the kiter would deposit a cheque, drawn on the second account, to the first account. The amount of the cheque would be equal to or greater than the amount of the first cheque. A series of similar parallel deposits must be continuously generated to continue the scheme.
>
> The simultaneous deposits last only as long as the time required for a cheque to clear through the banking system. Because domestic cheques written against Schedule A banks clear quickly, the kiter must often write cheques on a daily basis to maintain the inflated balances. The kiter benefits from any increase in the amount of time it takes to clear funds. Therefore, some schemes involve Schedule B and foreign banks and the use of altered or mutilated cheques, each of which increases the time for the outstanding cheques to clear.
>
> …

[4] The alleged kiting scheme has resulted in a net loss to the CIBC of $1,503,712.69.

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[5] It will be seen that kiting is a commercial fraud and a criminal offence if the requisite *mens rea* is proven.

[6] Walls and Millard were the senior officers in a very large Ford dealership carrying on business in Prince George.

[7] It is essentially alleged that they masterminded a kite for in excess of a year between corporate accounts at the plaintiff and at the Spruce Credit Union.

[8] The defendants Walls and Millard oppose the application on the merits, but they also submit that it is unsuitable for disposition under the summary trial process and that the matter should proceed to trial.

[9] I have concluded that this is an inappropriate case for a Rule 18A disposition.

[10] Because of that conclusion, I think it imprudent to discuss in much detail the evidence before me. To do so, risks a premature assessment of that evidence which, because of my conclusion, must be left to be developed before the trial judge.

[11] It is sufficient to say this of the record before me: the plaintiff points to a significant body of evidence, including alleged admissions against interest by Walls and

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Millard to officers of the plaintiff, admissions by them on discovery, and voluminous documentary evidence and says that the trier of fact must be irresistibly drawn to the conclusion that the defendants have worked a fraud.

[12] Walls and Millard, on the contrary, lead affidavit evidence denying the admissions against interest and deposing, in part:

> …
>
> 3. In answer to paragraph 15 of the Affidavit of Michael Smith, I deny that I acknowledged or said that I knew that cheques drawn on the numbered companies and deposited to the accounts at CIBC were not covered by monies on deposit at the Credit Union. In fact, at all times, we believed, and to this day do believe, there were sufficient funds on deposit at the Credit Union to cover all cheques deposited to the Fred Walls accounts at CIBC. I spoke to Mr. Smith a few days after the meeting and he told me and I believe that CIBC had analysed the flow of cheques between CIBC and the Credit Union and had concluded that there would not be any shortfall in the CIBC accounts. It was only subsequently and apparently as a result of dealings between CIBC and the Credit Union, to which we were not privy, that CIBC took the position that there was a shortfall in the accounts.
>
> …
>
> 7. At all times I believed that all cheques drawn on the Fred Walls accounts and deposited to the numbered companies and all cheques drawn on the numbered companies and deposited to the Fred Walls accounts would be honoured upon presentation. The companies carried on a very

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> large business as a car dealership. The company was in the process of arranging a refinancing and expected to be able to complete a refinancing with Bank of Nova Scotia. By shutting down the operation of the bank account CIBC effectively stopped the refinancing plan before it could be completed. While I understand the steps that CIBC took to terminate the operation of the account, the steps did ultimately have the effect of destroying the value of the business as a going concern and led indirectly to the realization of the assets of the company by a Receiver appointed by Ford Credit.

…

9. I believe that several senior people within the bank who were responsible for administering the accounts of Fred Walls with the bank knew and acquiesced in the way the accounts were being operated although none of them has said so to me expressly. My reasons for believing bank employees knew include:

   a) The Fred Walls account was a very large account with the CIBC. We also generated very large spin-off business for the "Dealer Plan" arm of CIBC. As a result of our business the Dealer Plan department for CIBC was one of their largest in the country so the local branch had reasons for accommodating us.

   b) Our accounts at CIBC frequently showed large credit balances and I believe that within CIBC's organization and accounting arrangement the local branch received some form of recognition or reward for those large credit balances. I assume that CIBC would have regularly reviewed the costs and benefits of our account given its size.

   c) Our accounts were closely monitored as the result of previous financial difficulties that the companies had had.

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> d) We would occasionally have insufficient funds on deposit when cheques were presented at the CIBC and on such occasions Mr. Dabb would contact us and we would make a deposit.
>
> e) My mother, Emma Walls, would frequently make the deposit to the accounts at CIBC in the period to Thanksgiving in 1997, when she had a stroke, and then during the months of January, February and March 1998 when she returned to work from having the stroke. I am told by my mother and verily believe that her practice was to meet with Mr. Dabb personally and would hand the cheques and deposit slips to him and he would take the materials and personally attend to the deposit and then they would commonly have a cup of coffee together before she returned to the office.
>
> …

[13] It is, of course, urged by the plaintiff that this conflict in the affidavit evidence before the court can be resolved by a reference to the many documents filed and analyzed by CIBC and which, it is said, admit of only one conclusion: that fraud on the part of Walls and Millard has been made out.

[14] But fraud or deceit requires proof of a subjective element.

[15] Professor Fridman, writing in ***The Law of Torts in Canada*** (Toronto: Carswell, 1990) (v. 2 pp. 123-124), notes that the

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law of deceit includes the act of making a wilfully false statement either by words or conduct:

> … Any conduct designed to deceive another by leading him to believe that a certain fact existed was equivalent in law, as in morals, to a statement in words that the fact did exist.

[16] Professor Fridman continues:

> … Liability for deceit or fraud is based upon the idea that to lie or deceive are morally wrong acts which merit legal sanction, when they result in harm suffered by the victim. Actual fraud and not just misrepresentation must be proved.
>
> Falsehood therefore entails a deliberate, wilful, conscious distortion of the truth. It will not suffice that the maker of the deceptive statement is inaccurate unless he is also aware of the inaccuracy (or is so reckless that he does not care whether or not he is speaking the truth). He must lack honest belief in the truth of what he is stating. Nor will it suffice if the defendant is merely giving an opinion or making an estimate which he believes, although mistakenly, is or will be correct. Deceit involves facts, not opinions, estimates, advice or promises. There must be a positive assertion that is or becomes dishonest, made with the intent to deceive. …
>
> [Footnotes omitted.]

[17] Demonstrating a "lack of honest belief in the truth of what he is stating …" on the part of a defendant, to the required standard of proof, on the basis of conflicting affidavit evidence is an exceedingly difficult task. As well

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it should be in view of the stigma attaching to men or women in business upon any such finding.

[18] The summary trial process under our ***Rules of Court*** has enjoyed a significant acceptance by lawyers, litigants and judges, as an efficient and fair method for disposing of cases on the trial list. But it is not for every dispute.

[19] In cases where fraud is the issue, Justice Harvey has said in ***Campeau v. Provident Life & Accident Insurance Company,*** [1996] B.C.J. No. 1356 (B.C.S.C.) at para. 45:

> … Suffice it to say, however, that I am of the view that cases involving allegations of fraud are more likely found to be inappropriate for summary resolution than those involving many other types of issues. I say this because, as Hollinrake J.A. referred to in the reasons quoted above, fraud has a subjective element that is not easily determined or resolved with affidavit evidence alone.

[20] In ***Canadian Imperial Bank of Commerce v. Charbonnages de France International S.A.***(1994), 117 D.L.R. (4th) 262, 10 W.W.R. 232, 95 B.C.L.R. (2d) 104, Justice Hinds summarized the proper approach to Rule 18A (at para. 101, B.C.L.R.):

> The leading authority on the use of Rule 18A is *Inspiration Management v. McDermid St. Lawrence* Ltd.(1989), 36 B.C.L.R. (2d) 202 (C.A.). That case establishes that in order to give judgment under Rule 18A a judge must be satisfied that on his or her findings on the disputed or undisputed facts, the issues can be decided. Furthermore, the judge must be satisfied that it would not be unjust to

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> give judgment. In connection with the latter requirement the judge should consider the following factors:
>
> 1. the amount involved;
>
> 2. the complexity of the matter in issue;
>
> 3. the urgency of the matter;
>
> 4. the likelihood of prejudice arising from delay;
>
> 5. the cost of proceeding to a conventional trial in relation to the amount involved;
>
> 6. the course of the proceedings;
>
> 7. any other matters which arise for consideration.

[21] In the case before me the amount sought by way of damages is very substantial.

[22] Both general damages and an award of punitive damages "at the higher end of the scale" are sought.

[23] The matter is complex, however perhaps not overly so. There is little urgency that I can perceive and none was really urged upon me. (In saying this I recognize that any party who is owed the amount this plaintiff alleges feels an understandable urgency to see to its collection.)

[24] No prejudice is alleged if this matter is delayed for a traditional trial. And finally, the cost of a full trial

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would be fully justified in light of the amount involved and the risks to the defendants.

[25] In all of the circumstances, in my opinion, in the words of Rule 18A(11)(a)(ii), it would be unjust to decide the issues between these parties on this application and I include in that conclusion the arguments advanced by the defendants seeking a dismissal of the claim.

[26] Costs of this application shall be in the cause.

"R.J. Bauman, J."
The Honourable Mr. Justice R.J. Bauman

Vancouver, B.C.
3 July 2001

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TAB 28

Citadel General Assurance Co. *v.* Lloyds Bank Canada, [1997] 3 S.C.R. 805

The Citadel General Assurance Company and the Citadel Life Assurance Company *Appellants*

v.

Lloyds Bank Canada and Hongkong Bank of Canada *Respondents*

1997 CanLII 334 (SCC)

Indexed as: Citadel General Assurance Co. *v.* Lloyds Bank Canada

File No.: 25189.

1997: May 20; 1997: October 30.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for alberta

Trusts and trustees -- Breach of trust -- Liability of strangers to trust -- Knowing assistance -- Knowing receipt -- Insurance agent depositing premiums collected on insurer's behalf into bank account -- Bank transferring funds to account of insurance agent's parent company to reduce overdraft -- Whether bank liable for breach of trust on basis of knowing assistance or knowing receipt.

D sold insurance to auto dealers. After collecting the premiums, D paid commissions and settled any current claims under the policies. The balance of the premiums was remitted on a monthly basis to the appellant insurance companies, the

underwriters of the policies. In December 1986, D and its parent company started banking with the respondents (the "bank"). D used one bank account for all its transactions. Through its senior officers, the bank was aware that insurance premiums were being deposited into that account. In May 1987, a "trip report" by one of the appellants' employees indicated that D was reluctant to establish a trust account for the premiums but would do so if necessary. From June 1, D no longer settled claims under the insurance policies, with the result that the monthly premiums payable to the appellants increased significantly. In June the bank received instructions from the parent company's signing officers, who were identical to D's signing officers, to transfer all funds in D's account to the parent company's account at the end of each business day. In July and August, the transfer of funds between the accounts resulted in an overall reduction in the parent company's overdraft. In late August D advised the appellants that the July and August premiums could not be remitted. It agreed to pay these outstanding receipts by way of promissory note. After D and its parent company ceased carrying on business, the appellants brought an action against the bank for the outstanding insurance premiums. They were successful at trial and judgment was entered against the bank. The Court of Appeal allowed the bank's appeal and dismissed the appellants' claim.

Held: The appeal should be allowed.

Per La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The relationship between the appellant insurers and D was clearly one of trust. Under s. 124(1) of the Alberta *Insurance Act*, an agent who receives any money as a premium for an insurance contract from the insured is deemed to hold the premium in trust for the insurer. The promissory note was merely confirmation of the amount owed by D to the appellants and did not amount to a revocation of the trust. As well, the arrangement

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between them meets the three characteristics of a trust, namely certainty of intent, certainty of subject-matter, and certainty of object. The fact that the trust funds in D's account were commingled with other funds does not undermine the relationship of trust between the parties. Also, D's actions in failing to remit to the appellants the insurance premiums collected on their behalf in July and August 1987 were clearly in breach of trust. Moreover, the appellants did not acquiesce in the breach of trust by asking for and receiving the promissory note from D.

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There are three ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust: as a trustee *de son tort*; for "knowing assistance"; and for "knowing receipt". The first type of liability is inapplicable to the present case since the bank never assumed the office or function of trustee. A stranger to a trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees. Assuming the present case falls under this "knowing assistance" category, it is clear that only actual knowledge, recklessness, or wilful blindness will render the bank liable for participating in the breach of trust. Since the bank had only constructive knowledge, it cannot be liable under the "knowing assistance" category of constructive trusteeship.

Liability on the basis of "knowing receipt" requires that strangers to the trust receive or apply trust property for their own use and benefit. By applying the deposit of insurance premiums as a set-off against the parent company's overdraft, the bank received a benefit and thus received the trust funds for its own use and benefit. The bank cannot avoid the "property" issue by characterizing the deposit of trust monies in D's account as a debt obligation. A debt obligation is a chose in action and, therefore, property over which one can impose a trust. The receipt requirement in "knowing receipt" cases is best characterized in restitutionary terms. In this case the bank has been

enriched at the appellants' expense and thus, in restitutionary terms, there can be no doubt that the bank received trust property for its own use and benefit.

The second requirement for establishing liability on the basis of "knowing receipt" relates to the degree of knowledge required of the bank in relation to the breach of trust. While constructive knowledge is excluded as the basis for liability in "knowing assistance" cases, in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property.

On the issue of knowledge, it is clear from the trial judge's findings that the bank was aware of the nature of the funds being deposited into, and transferred out of, D's account. The bank knew that D's sole source of revenue was the sale of insurance policies and that premiums collected by D were payable to the appellants. In light of the bank's knowledge of the nature of the funds, the daily emptying of D's account was in the trial judge's view "very suspicious". In these circumstances, a reasonable person would have been put on inquiry as to the possible misapplication of the trust funds. The bank should have inquired whether the use of the premiums to reduce the account

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overdrafts constituted a breach of trust. By failing to make the appropriate inquiries, the bank had constructive knowledge of D's breach of trust. The bank's enrichment was thus clearly unjust, rendering it liable to the appellants as a constructive trustee.

Per Sopinka J.: Subject to what was said in *Gold*, issued concurrently, La Forest J.'s reasons were agreed with.

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Cases Cited

By La Forest J.

Referred to: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787; *Gold v. Rosenberg*, [1997] 3 S.C.R. 767; *Canadian Pacific Air Lines, Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233; *R. v. Lowden* (1981), 27 A.R. 91; *Bank of N.S. v. Soc. Gen. (Can.)*, [1988] 4 W.W.R. 232; *Fletcher v. Collis*, [1905] 2 Ch. 24; *Selangor United Rubber Estates, Ltd. v. Cradock (No. 3)*, [1968] 2 All E.R. 1073; *Agip (Africa) Ltd. v. Jackson*, [1990] 1 Ch. 265, aff'd [1992] 4 All E.R. 451; *Foley v. Hill* (1848), [1843-60] All E.R. Rep. 16; *Fonthill Lumber Ltd. v. Bank of Montreal* (1959), 19 D.L.R. (2d) 618; *Lipkin Gorman v. Karpnale Ltd.*, [1991] 3 W.L.R. 10; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *In re Montagu's Settlement Trusts*, [1987] 1 Ch. 264; *Polly Peck International plc v. Nadir (No. 2)*, [1992] 4 All E.R. 769; *C.I.B.C. v. Valley Credit Union Ltd.*, [1990] 1 W.W.R. 736; *Bullock v. Key Property Management Inc.* (1997), 33 O.R. (3d) 1; *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78; *Carl B. Potter Ltd. v. Mercantile Bank of Canada*, [1980] 2 S.C.R. 343; *Arthur Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363, leave to appeal refused, [1994] 3 S.C.R. v; *Glenko Enterprises Ltd. v. Ernie Keller*

Contractors Ltd. (1996), 134 D.L.R. (4th) 161; *Cowan de Groot Properties Ltd. v. Eagle Trust plc*, [1992] 4 All E.R. 700; *El Ajou v. Dollar Land Holdings plc*, [1993] 3 All E.R. 717; *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] 3 W.L.R. 64.

By Sopinka J.

Referred to: *Gold v. Rosenberg*, [1997] 3 S.C.R. 767.

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APPEAL from a judgment of the Alberta Court of Appeal (1996), 181 A.R. 76, 116 W.A.C. 76, 37 Alta. L.R. (3d) 293, [1996] 5 W.W.R. 9, 33 C.C.L.I. (2d) 241, [1996] A.J. No. 59 (QL), reversing a judgment of the Court of Queen's Bench, [1993] A.J. No. 680 (QL), imposing a constructive trust on the defendant banks. Appeal allowed.

Eric F. Macklin, Q.C., and *W. Scott Schlosser*, for the appellants.

Donald R. Cranston and *Stacy M. Neufeld*, for the respondents.

//*La Forest J.*//

The judgment of La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

1 LA FOREST J. -- This appeal concerns the liability of a bank for its customer's breach of trust. The appellants, as beneficiaries of the trust, seek recovery for unpaid insurance premiums collected by the trustee and deposited with the respondent banks. The principal question in this appeal is this: Are the respondent banks liable as constructive trustees for the breach of trust committed by one of their clients? This question deals with the liability of strangers who participate in a breach of trust and, in particular, the degree of knowledge required for the imposition of liability as a constructive trustee.

I. Factual Background

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2 The Citadel General Assurance Company and the Citadel Life Assurance Company ("Citadel") are insurance companies which carried on business in Alberta. Beginning in 1979, Citadel's business operations involved another Alberta corporation, Drive On Guaranteed Vehicle Payment Plan (1982) Limited ("Drive On"). As a wholly owned subsidiary of International Warranty Company Limited ("International Warranty"), Drive On sold consumer life, casualty, and unemployment insurance to auto dealers. The insurance premiums were collected by auto dealers at the time vehicles were sold and then remitted to Drive On. After collecting the premiums, Drive On paid commissions and settled any current claims under the policies. The balance of the premiums was remitted on a monthly basis to Citadel, the underwriter of the insurance policies. In early 1987, the premiums received during a calendar month were normally forwarded to Citadel at the end of the following month. This arrangement continued satisfactorily until August 1987 when Drive On defaulted on its payments to Citadel. As well, from 1979 until late August 1987, there was no written agreement between Citadel and Drive On.

3 In December 1986, the International Warranty Group of Companies, including Drive On and International Warranty, started banking with the now-amalgamated Lloyds Bank Canada and Hongkong Bank of Canada (hereinafter collectively called "the Bank"). During 1987, the only banker of Drive On was the Bank. Drive On used one bank account for all its transactions. The only deposits to that account were either insurance premiums collected from auto dealers or transfers of funds from International Warranty. Through its senior officers, the Bank was aware that insurance premiums were being deposited into Drive On's account. During the period after April 1, 1987, Drive On's account was usually in an overdraft position. On April 8, the Bank received instructions from International Warranty's signing officers (who

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were identical to Drive On's signing officers) to transfer funds between the International Warranty and Drive On accounts to cover overdrafts on either account.

4 Also in April 1987, the Presidents of Drive On and Citadel met to discuss their business relationship. As a result of the meeting, Citadel and Drive On agreed that a written agreement would be prepared to formalize their business relationship. It was also agreed that Drive On would no longer settle claims under the insurance policies. From June 1, 1987, Citadel assumed the adjudication and payment of all claims. As a result, the monthly premiums payable to Citadel were increased significantly. Also as a result of the presidents' meeting, Citadel ordered a detailed examination of Drive On's current procedures. A "trip report" was delivered by one of Citadel's employees on May 14. The report found that Drive On was depositing insurance premiums in a general bank account which was not set up as a trust account. The report also indicated that Drive On was somewhat reluctant to establish a trust account but would do so if necessary.

5 On June 5, 1987, the Bank received instructions from International Warranty's signing officers to transfer all funds in the Drive On account to the International Warranty account at the end of each business day. In July and August, the transfer of funds between the International Warranty and Drive On accounts resulted in an overall reduction in International Warranty's overdraft.

6 On August 7, 1987, Drive On forwarded the June premiums to Citadel. In late August, Citadel first learned of Drive On's financial difficulties. The President of Drive On advised Citadel that the July and August premiums could not be remitted. A new arrangement, effective September 1, was set in place whereby all premium monies would be forwarded directly to Citadel. With regard to the outstanding July and August

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receipts, Drive On agreed to pay Citadel by way of promissory note dated September 21, 1987. The note provided for monthly payments of $100,000. Drive On made a number of payments until it, and the other members of the International Warranty Group of Companies, ceased carrying on business in December. Citadel sued Drive On and the guarantor on the promissory note but has been unsuccessful in collecting anything. The parties agree that the outstanding amount payable to Citadel is $633,622.84.

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7 Citadel brought an action against the Bank for the outstanding insurance premiums. At trial, Citadel was successful and judgment was entered against the Bank for $633,622.84: [1993] A.J. No. 680 (QL). The Court of Appeal allowed the Bank's appeal and dismissed Citadel's claim: (1996), 181 A.R. 76, 116 W.A.C. 76, 37 Alta. L.R. (3d) 293, [1996] 5 W.W.R. 9, 33 C.C.L.I. (2d) 241, [1996] A.J. No. 59 (QL).

II. Decisions Below

A. *Court of Queen's Bench of Alberta*

8 The trial judge, Marshall J., found that a relationship of trust existed between Citadel and Drive On. This finding was based in part on s. 124(1) of the *Insurance Act*, R.S.A. 1980, c. I-5, which provides that an agent or broker who negotiates a contract of insurance with an insurer and receives insurance premiums for that contract is deemed to hold the premiums in trust for the insurer. As well, the trial judge found that the arrangement between Citadel and Drive On had the three certainties of a trust, namely, certainty of subject-matter, certainty of intent, and certainty of object. Further, the trial judge held that a breach of trust occurred when Drive On failed to remit the insurance premiums collected on Citadel's behalf.

9 The trial judge stated that in order for the Bank to be liable as a stranger to the trust, the Bank must have had knowledge that the funds were trust monies or the circumstances must have required it to inquire before dealing with the money. In scrutinizing the evidence, the trial judge found that Drive On's instructions to empty its account daily were "very suspicious" (para. 26), given the Bank's knowledge that insurance premiums were being deposited in the account. As well, the trial judge concluded that the Bank, having received a benefit from Drive On's breach of trust, was under a greater duty to explain its actions. Liability was imposed on the following basis (at para. 33):

> The Bank had actual knowledge of the nature of the funds in the Drive On account and had an obligation to inquire about their position in the circumstances. The Bank shut its eyes in circumstances which should have caused it to inquire of its customer at least. It did not do so. The Bank had constructive knowledge and is a constructive trustee within the cases . . . .

The plaintiffs received judgment for $633,622.84.

B. *Alberta Court of Appeal* (1996), 181 A.R. 76

10 On appeal to the Alberta Court of Appeal, Kerans J.A., speaking for the court, began by noting, at p. 77, that there was "no serious difficulty with the finding of creation of the trust made by the trial judge". As such, Kerans J.A. was willing to assume that a trust existed between Citadel and Drive On and that a breach of trust occurred.

11 In Kerans J.A.'s view, the real difficulty with the case was the imposition of liability on the Bank. More specifically, he disagreed with the trial judge's conclusion that constructive knowledge was sufficient to render the Bank liable as a constructive

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trustee. Relying on this Court's decision in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, Kerans J.A. concluded that only actual knowledge, recklessness, or wilful blindness could render the Bank liable for a breach of trust from which it received a benefit. This test was not met in the present case because, although the Bank had "shut its eyes" in the circumstances, the trial judge refused to find that the Bank was actually aware it was taking money in breach of trust. However, since *Air Canada v. M & L Travel Ltd*. was decided after the trial judge rendered judgment in the present case, the parties were invited to re-argue the facts before the Court of Appeal. Nonetheless, even after reconsidering the facts, Kerans J.A. concluded for the court at p. 78:

> . . . we have come to the conclusion that we cannot say on the balance of probabilities that this bank, when it honoured the direction to pay, was aware that it was moving out money in breach of any trust between the defaulting company and the insurance company. We do not have any difficulty with the trial finding that the bank had some warning that this was the case. But that is not enough. Nor do we think this is an appropriate case in which to rely on wilful blindness.

The Court of Appeal accordingly allowed the Bank's appeal and dismissed the claim.

III. Issues

12 As mentioned, one main question is raised on this appeal: Under what circumstances can the respondent banks be held liable as constructive trustees for the breach of trust committed by one of their customers?

IV. Analysis

A. *The Nature of the Relationship between Citadel and Drive On*

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13 Before beginning my analysis regarding the liability of the Bank as a constructive trustee, I note that I have read the reasons of Iacobucci J. in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, a case also dealing with the liability of a bank for a breach of trust committed by one of its customers. I generally agree with Iacobucci J.'s approach in *Gold* and, indeed, consider it similar to my own in the present appeal.

14 There can be no doubt that the relationship between Citadel and Drive On was one of trust. In this Court, the parties did not dispute the existence of a trust relationship. Relevant to the arrangement between Citadel and Drive On is s. 124(1) of the *Insurance Act*, which provides:

> **124(1)** An agent or broker who acts in negotiating, renewing or continuing a contract of insurance with an insurer licensed under this Act, and who receives any money or substitute for money as a premium for such a contract from the insured, shall be deemed to hold the premium in trust for the insurer.

From 1979 to 1987, Drive On, the insurance agent, was in the business of selling insurance policies underwritten by Citadel, the insurer. In negotiating insurance policies on Citadel's behalf, Drive On collected insurance premiums from auto dealers, paid commissions, and settled current claims under the policies. However, on June 1, 1987, the arrangement was changed and the premiums collected by Drive On were to be forwarded without deductions for policy claims. However, even when Citadel assumed the adjudication of all claims, Drive On still acted as agent or trustee and Citadel remained the principal or beneficiary of the insurance premiums. Moreover, I agree with the trial judge that the repayment arrangements between Citadel and Drive On did not amount to a revocation of the trust. The promissory note dated September 21, 1987, was merely confirmation of the amount owed by Drive On to Citadel. By agreeing to have the promissory note prepared in its favour, Citadel did not revoke its beneficial interest in the insurance premiums.

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15 As well, the arrangement between Citadel and Drive On meets the three characteristics of a trust, namely certainty of intent, certainty of subject-matter, and certainty of object; see *Air Canada v. M & L Travel Ltd., supra*, at pp. 803-4; *Canadian Pacific Air Lines, Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233 (H.C.), at p. 237. The arrangement in the present case was based on the collection of insurance premiums by the insurance agent, Drive On, and the remittance of these premiums, subject to adjustments, to the insurer, Citadel. The intent to create a trust clearly follows from this principal-agent relationship. The object of the trust is the insurer, Citadel. Finally, the insurance premiums constitute the subject-matter of the trust.

16 The fact that the trust funds in Drive On's account were commingled with other funds does not undermine the relationship of trust between the parties. As Iacobucci J. wrote for the majority of this Court in *Air Canada v. M & L Travel Ltd., supra*, at p. 804, "[w]hile the presence or absence of a prohibition on the commingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative"; see also *R. v. Lowden* (1981), 27 A.R. 91 (C.A.), at pp. 101-2; *Bank of N.S. v. Soc. Gen. (Can.)*, [1988] 4 W.W.R. 232 (Alta. C.A.), at p. 238.

17 The intention of the parties in the present case was to create a trust relationship. That Drive On deposited the funds in a general bank account, as opposed to a special trust account, does not alter this intention. In May 1987, Citadel prepared a report of Drive On's procedures. This report found that a trust account had not been set up by Drive On. However, the report also noted that Drive On would establish a trust account if required by Citadel. The report indicates, therefore, that the parties had turned their minds to the possibility of setting up a trust account to prohibit the commingling of funds. Even though the trust account was never established, the fact that

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the parties considered this possibility confirms that the relationship was viewed by Citadel and Drive On as one of trust.

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B. *The Liability of the Bank as a Stranger to the Trust*

1. General Principles

18 Having found that the relationship between Citadel and Drive On was one of trust, it is clear that Drive On's actions were in breach of trust. Quite simply, Drive On failed to remit to Citadel the insurance premiums collected on Citadel's behalf in July and August 1987. Moreover, I agree with the trial judge that Citadel did not acquiesce in the breach of trust by asking for and receiving the promissory note from Drive On. By accepting the note, Citadel did not represent that it was acquiescing in the use of the funds by the Bank. Consequently, Citadel is not barred from bringing an action against the bank for breach of trust; see *Fletcher v. Collis*, [1905] 2 Ch. 24 (C.A.); P. H. Pettit, *Equity and the Law of Trusts* (7th ed. 1993), at p. 491. The question remains whether the Bank, as a stranger to the trust between Citadel and Drive On, can be liable as a constructive trustee.

19 There are three ways in which a stranger to a trust can be held liable as a constructive trustee for breach of trust. First, a stranger to the trust can be liable as a trustee *de son tort*. Secondly, a stranger to the trust can be liable for breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees ("knowing assistance"). Thirdly, liability may be imposed on a stranger to the trust who is in receipt and chargeable with trust property ("knowing receipt"; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 809-11).

20 To be liable as trustees *de son tort*, strangers to the trust must commit a breach of trust while acting as trustees. Such persons are not appointed trustees but "take on themselves to act as such and to possess and administer trust property"; see *Selangor United Rubber Estates, Ltd. v. Cradock (No. 3)*, [1968] 2 All E.R. 1073 (Ch.), at p. 1095. This type of liability is inapplicable to the present case. The Bank never assumed the office or function of trustee; nor did it administer the trust funds on behalf of the beneficiary Citadel.

21 The two remaining categories of liability, namely "knowing assistance" and "knowing receipt", relate to strangers to the trust who knowingly participate in a breach of trust. In *Air Canada v. M & L Travel Ltd.*, *supra*, this Court considered the requirements for bringing a case within the "knowing assistance" category. In that case, the defendant travel agency collected funds from the sale of Air Canada tickets and held them in trust to be remitted to Air Canada. The funds were kept in the agency's general bank account. The individual directors of the travel agency, who had personally guaranteed a demand loan, authorized the bank to withdraw funds from the general account to cover monies owing on the loan. A dispute arose between the directors with regard to misappropriation of funds. The bank sent demand notices to the directors and withdrew the full amount owing under the loan from the agency's general account. As a result, Air Canada did not receive monies owed to it for ticket sales. The issue arose whether the appellant director, as stranger to the trust, was liable to Air Canada for the travel agency's breach of trust.

22 This Court found the director liable for knowingly assisting in a breach of trust. The liability of the director was based on his knowledge of, and assistance in, a fraudulent and dishonest breach of trust on the part of the trustees. With regard to the knowledge requirement, Iacobucci J. wrote for the majority, at p. 811: "The knowledge

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requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice." He expressly excluded constructive knowledge from this test. Iacobucci J. defined constructive knowledge, at p. 812, as "knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry".

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23 The Court of Appeal in the present case relied on the knowledge requirement set out in *Air Canada v. M & L Travel Ltd., supra*. Assuming the present case falls under the "knowing assistance" category, it is clear that only actual knowledge, recklessness, or wilful blindness will render the Bank liable for participating in the breach of trust. Constructive knowledge will not suffice. The trial judge's conclusions regarding the knowledge of the Bank were as follows (at para. 33):

> The Bank had actual knowledge of the nature of the funds in the Drive On account and had an obligation to inquire about their position in the circumstances. The Bank shut its eyes in circumstances which should have caused it to inquire of its customer at least. It did not do so. The Bank had constructive knowledge and is a constructive trustee. . . .

Kerans J.A. considered this passage from the trial judge's reasons and concluded, at p. 77:

> It is true that the judge used the words "shut its eyes", but reading the passage in its entirety, it seems clear that the judge is refusing to say that the bank was actually aware that it was taking money in breach of trust, as opposed to what it should have known or what its duty was.

I agree with Kerans J.A. that the trial judge refused to make a finding of actual knowledge by the Bank. Rather, the trial judge restricted his findings to constructive knowledge, based on the Bank's duty to inquire of its customer in the circumstances.

Moreover, there was no finding of recklessness or wilful blindness as such. It follows from the trial judge's findings that the Bank does not meet the knowledge requirement set out in *Air Canada v. M & L Travel Ltd.*, *supra*. Since the Bank had only constructive knowledge, it cannot be liable under the "knowing assistance" category of constructive trusteeship.

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24 The only basis upon which the Bank may be held liable as a constructive trustee is under the "knowing receipt" or "knowing receipt and dealing" head of liability. Under this category of constructive trusteeship it is generally recognized that there are two types of cases. First, although inapplicable to the present case, there are strangers to the trust, usually agents of the trustees, who receive trust property lawfully and not for their own benefit but then deal with the property in a manner inconsistent with the trust. These cases may be grouped under the heading "knowing dealing". Secondly, there are strangers to the trust who receive trust property for their own benefit and with knowledge that the property was transferred to them in breach of trust. In all cases it is immaterial whether the breach of trust was fraudulent; see *Halsbury's Laws of England* (4th ed. 1995), vol. 48, at para. 595; Pettit, *supra*, at p. 168; *Underhill and Hayton, Law Relating to Trusts and Trustees* (14th ed. 1987), at p. 357. The second type of case, which is relevant to the present appeal, raises two main issues: the nature of the receipt of trust property and the degree of knowledge required of the stranger to the trust.

2. Liability for Knowing Receipt

(a) *The Receipt Requirement*

25 Liability on the basis of "knowing receipt" requires that strangers to the trust receive or apply trust property for their own use and benefit; see *Agip (Africa) Ltd. v.*

Jackson, [1990] 1 Ch. 265, aff'd [1992] 4 All E.R. 451 (C.A.); *Halsbury's Laws of England*, *supra*, at paras. 595-96; Pettit, *supra*, at p. 168. As Iacobucci J. wrote in *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 810-11, the "knowing receipt" category of liability "requires the stranger to the trust to have received trust property in his or her personal capacity, rather than as an agent of the trustees". In the banking context, which is directly applicable to the present case, the definition of receipt has been applied as follows:

> The essential characteristic of a recipient . . . is that he should have received the property for his own use and benefit. That is why neither the paying nor the collecting bank can normally be made liable as recipient. In paying or collecting money for a customer the bank acts only as his agent. It sets up no title of its own. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit. . . . [Footnotes omitted.]
>
> P. J. Millett, "Tracing the Proceeds of Fraud" (1991), 107 *L.Q.R.* 71, at pp. 82-83.

26 Thus, a distinction is traditionally made between a bank receiving trust funds for its own benefit, in order to pay off a bank overdraft ("knowing receipt"), and a bank receiving and paying out trust funds merely as agent of the trustee ("knowing assistance"); see *Underhill and Hayton*, *supra*, at p. 361.

27 In the present case, we saw, Drive On deposited trust funds, namely insurance premiums collected on Citadel's behalf, in an operating account at the Bank. Drive On's parent company, International Warranty, also had an account at the Bank. In April 1987, the Bank transferred funds between the Drive On and International Warranty accounts to cover overdrafts in either account. As well, in June, the Bank transferred the balance of any funds in the Drive On account to the International Warranty account on a regular basis. As a result of the transfers between the accounts

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in July and August, a net amount was transferred to the International Warranty account. This amount, which was in excess of the July and August premiums deposited by Drive On, was used to reduce International Warranty's overdraft. Although the Bank was instructed by Drive On's signing officers to make the transfers, the Bank did not act as mere agent in the circumstances. The Bank's actions went beyond the mere collection of funds and payment of bills on Drive On's behalf. The Bank, by applying the deposit of insurance premiums as a set-off against International Warranty's overdraft, received a benefit. This benefit, of course, was the reduction in the amount owed to the Bank by one of its customers. It follows that the Bank received the trust funds for its own use and benefit.

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28 In this Court, the respondents argued that they could not be liable on the basis of "knowing receipt" because they had not received the trust property. The respondents took the position, accepted by the authorities, that a bank deposit is simply a loan to the bank; see *Foley v. Hill* (1848), [1843-60] All E.R. Rep. 16 (H.L.); *Fonthill Lumber Ltd. v. Bank of Montreal* (1959), 19 D.L.R. (2d) 618 (Ont. C.A.), at p. 628. Accordingly, the deposit of money in Drive On's account was characterized as a debt obligation owed by the Bank to Drive On. This debt obligation gave rise to a credit in Drive On's favour. On instruction from its customer, the Bank simply transferred "credits" from Drive On's account to International Warranty's account. The transfer of credits had the incidental effect of reducing an overdraft in the International Warranty account. In other words, the transfers between the accounts in July and August simply amounted to an off-setting of debt obligations. In the respondents' view, the Bank was not receiving trust property but simply transferring credits from one account to another.

29 The respondents' arguments are not convincing. A debt obligation is a chose in action and, therefore, property over which one can impose a trust. This conclusion is

supported by the House of Lords' decision in *Lipkin Gorman v. Karpnale Ltd.*, [1991] 3 W.L.R. 10. In that case, a firm of solicitors was authorized to operate a client's bank account. One of the firm's partners subsequently stole funds from the account and used them for casino gambling. Considering whether the solicitors could trace their client's funds at common law, Lord Goff of Chieveley wrote, at pp. 28-29:

> The relationship of the bank with the solicitors was essentially that of debtor and creditor; and since the client account was at all material times in credit, the bank was the debtor and the solicitors were its creditors. Such a debt constitutes a chose in action, which is a species of property; and since the debt was enforceable at common law, the chose in action was legal property belonging to the solicitors at common law.

The respondents cannot avoid the "property" issue by characterizing the deposit of trust monies in Drive On's account as a debt obligation. The chose in action, constituted by the indebtedness of the Bank to Drive On, was subject to a statutory trust in Citadel's favour. That same chose in action can also be the subject of a constructive trust in Citadel's favour.

30 Nonetheless, the respondents' arguments reflect a difficulty with the traditional conception of "receipt" in "knowing receipt" cases. In my view, the receipt requirement for this type of liability is best characterized in restitutionary terms. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, I stated that a restitutionary claim, or a claim for unjust enrichment, is concerned with giving back to someone something that has been taken from them (a restitutionary proprietary award) or its equivalent value (a personal restitutionary award). As well, in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-3, I stated that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is

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restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." In the present case, the Bank was clearly enriched by the off-setting of debt obligations, or transferring of credits between the Drive On and International Warranty accounts. That is, the amount due to the Bank was reduced. As well, the Bank's enrichment deprived Citadel of the insurance premiums collected on its behalf. Moreover, the fact that the insurance premiums were never in Citadel's possession does not preclude Citadel from pursuing a restitutionary claim. After all, the insurance premiums would have accrued to Citadel's benefit. The Bank has been enriched at Citadel's expense. Thus, in restitutionary terms, there can be no doubt that the Bank received trust property for its own use and benefit.

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(b) *The Knowledge Requirement*

31 The first requirement for establishing liability on the basis of "knowing receipt" has been satisfied. The Bank received the trust property for its own benefit and, in doing so, was enriched at the beneficiary's expense. The second requirement relates to the degree of knowledge required of the Bank in relation to the breach of trust. With regard to this knowledge requirement, there are two lines of authorities. According to one line of jurisprudence, the knowledge requirement for both "knowing assistance" and "knowing receipt" cases should be the same. More specifically, constructive knowledge should not be the basis for liability in either type of case. A second line of authority suggests that a different standard should apply in "knowing assistance" and "knowing receipt" cases. More specifically, the authorities favour a lower threshold of knowledge in "knowing receipt" cases.

32 A leading case in relation to the first line of authority is *In re Montagu's Settlement Trusts*, [1987] 1 Ch. 264. That case involved a dispute arising out of a 1923

settlement in which the future tenth Duke of Manchester had made an assignment of certain chattels to a number of trustees. The trustees were under a fiduciary duty to select and make an inventory of the chattels after the ninth Duke of Manchester died. The selection and inventory did not occur and the tenth Duke took absolutely whatever chattels he wanted. Megarry V.-C. held that the Duke was not liable as a constructive trustee because he did not know that the chattels were subject to a trust. In discussing the degree of knowledge required of the Duke, Megarry V.-C. emphasized that liability in "knowing receipt" cases is personal in nature and arises only if the stranger's conscience is sufficiently affected to justify imposing a constructive trust. Although cases involving actual knowledge, recklessness, and wilful blindness justify imposing a constructive trust, Megarry V.-C. doubted, at p. 285, whether the carelessness associated with constructive knowledge cases could sufficiently bind the stranger's conscience.

33 *In re Montagu's Settlement Trusts* was followed in *Polly Peck International plc v. Nadir (No. 2)*, [1992] 4 All E.R. 769 (C.A.). There, the plaintiff company sought to impose liability on a bank for assisting in the misapplication of trust funds and for receiving and dealing in some way with trust property. The bank had been instructed by the trustee to transfer substantial trust funds into offshore accounts. Scott L.J. dealt with the case on the basis of both "knowing assistance" and "knowing receipt" because some of the transfers were made by the banker as agent while others were received for the bank's own benefit. With regard to the "knowing receipt" claim, the plaintiff beneficiary argued that, in the circumstances, the bank should have been put on inquiry as to whether there were improprieties in the transfers. Addressing the "knowing receipt" claim, Scott L.J. commented, at p. 777:

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> Liability as constructive trustee in a 'knowing receipt' case does not require that the misapplication of the trust funds should be fraudulent. It does require that the defendant should have knowledge that the funds were trust funds and that they were being misapplied. Actual knowledge obviously will suffice. Mr. Potts [lawyer for the plaintiff] has submitted that it will suffice if the defendant can be shown to have had knowledge of facts which would have put an honest and reasonable man on inquiry, or, at least, if the defendant can be shown to have wilfully and recklessly failed to make such inquiries as an honest and reasonable man would have made. . . . I do not think there is any doubt that, if the latter of the two criteria can be established against the Central Bank, that will suffice. I have some doubts about the sufficiency of the former criterion but do not think that the present appeal is the right occasion for settling the issue.

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It should be noted that Scott L.J. went on to apply the test for constructive knowledge, but found that the bank was not liable because it did not have cause to suspect improprieties and was not put on inquiry.

34 The English approach favouring exclusion of constructive knowledge received the approval of the Manitoba Court of Appeal in *C.I.B.C. v. Valley Credit Union Ltd.*, [1990] 1 W.W.R. 736. In that case, a business obtained a line of credit from the plaintiff bank. Under the bank's general security agreement, the customer became trustee of monies paid to it with respect to accounts receivable or sales of inventory. The customer subsequently opened an account with the defendant credit union and used this account to deposit trust monies. The bank became aware of the other account, eventually called the customer's loans, and brought an action against the credit union to recover the funds in the customer's account. Philp J.A. refused to find the credit union liable as a constructive trustee. Without distinguishing between the categories of "knowing assistance" and "knowing receipt", Philp J.A. doubted whether the carelessness associated with constructive knowledge was sufficient to impose liability on the bank as a constructive trustee. Relying in part on *In re Montagu's Settlement Trusts*, *supra*, he stated, at p. 747:

> I do not think that it can be said that it has been authoritatively decided in Canada that carelessness or negligence is sufficient to impute constructive knowledge to a stranger, and to impose upon him liability as a constructive trustee. I think that it is a doubtful test, particularly in the case of a bank. The relationship between a bank and its customer is contractual and a principal obligation of the bank is to pay out as directed the moneys its customer has deposited. It seems to me that that obligation should be a paramount one, save in special factual circumstances sufficient to hold the bank privy to its customer's breach.

It should be noted, however, that later in his reasons Philp J.A. applied the test for constructive knowledge, but found that it had not been met in the circumstances.

35 That constructive knowledge should be excluded as a basis for liability in "knowing receipt" cases is also supported by the Ontario Court of Appeal's decision in *Bullock v. Key Property Management Inc.* (1997), 33 O.R. (3d) 1. There, a trustee had deposited trust funds in a bank account. The funds were then used to service the trustee's own interests, including the reduction of the trustee's indebtedness to the bank. The court dismissed the action against the bank on the grounds that it did not have the requisite degree of knowledge of the breach of trust. The court did not deal with the categories of "knowing assistance" and "knowing receipt" and apparently found it unnecessary to distinguish between the various heads of liability. Apparently assuming that there was only one category of liability, the court concluded, at p. 4:

> As the law presently stands, a stranger to a trust will be held liable for a breach of that trust by the trustee only where the stranger has actual knowledge or is reckless or wilfully blind as to both the existence of the trust and the dishonest conduct of the trustee in connection with the trust. The inquiry must be directed to what the stranger to the trust actually knew or suspected and not to what the stranger would have known had reasonable inquiries been made. Failure to make reasonable inquiries may have evidentiary value in determining what the stranger to the trust in fact knew or suspected, but it is not a basis for the imposition of liability as a constructive trustee.

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36 As well, the Court of Appeal in the present case concluded, without restricting its comments to any particular head of liability, that constructive knowledge should be excluded as a basis for imposing liability on a stranger to the trust. Relying on Iacobucci J.'s reasons in *Air Canada v. M & L Travel Ltd.*, *supra*, Kerans J.A. wrote, at p. 77, that "[a] stranger to a trust is not liable for a breach of trust from which it received a benefit unless it had both actual knowledge of the trust and participated in the breach".

37 According to a second line of authority, however, constructive knowledge is sufficient to find a stranger to the trust liable on the basis of "knowing receipt". A leading English authority, in terms of formulating the test for constructive knowledge in breach of trust cases, is *Selangor*, *supra*. There, a company director carried out a fraudulent takeover bid by using the company's funds to purchase its own shares. Two banks were involved in the takeover. One bank acted on behalf of the director by paying, for a fee, those shareholders who had agreed to sell. The bank's fee was paid for by way of an advance from a second bank, where the company's account had been transferred. The second bank was repaid with trust funds drawn from the company's account. In addressing the banks' liability, Ungoed-Thomas J. did not distinguish between receipt and assistance cases. He presumed, at p. 1095, that there was only one category of liability for strangers to the trust who, unlike trustees *de son tort*, "act in their own right and not for beneficiaries". Relying on this single category of liability, Ungoed-Thomas J. held, at p. 1104:

> The knowledge required to hold a stranger liable as constructive trustee in a dishonest and fraudulent design, is knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on enquiry, which the stranger failed to make, whether it was being committed.

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Ungoed-Thomas J. found both banks liable as constructive trustees.

38 The *Selangor* decision was followed by the British Columbia Court of Appeal in *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78. There, a construction company deposited trust funds collected from building contracts with the defendant bank. These trust funds were then used to repay the company's indebtedness to the bank and to reduce personal overdrafts belonging to a director of the company. As well, the director stole trust monies from the company's account and transferred them to a personal account at a second bank. Addressing the liability of the second bank as a constructive trustee, Robertson J.A. wrote, at p. 136, that he was dealing with a "collecting bank" and not a "paying bank", thereby suggesting that the case fell under the "knowing receipt" category. Relying in part on *Selangor*, *supra*, Robertson J.A. found, at p. 138:

> Under what I think is the proper test no necessity to take care arises until either it is clear that a breach of trust is being, or is intended to be, committed, or until there has come to the attention of the person something that should arouse suspicion in an honest, reasonable man and put him on inquiry. The person, for his own protection, in the first event should have nothing to do with the improper transaction, and in the second event should not continue to be involved in the suspected transaction until his inquiry shows him — or, more correctly, would show a reasonable man — that the suspicion is unfounded.

39 The *Selangor* decision was also applied by this Court in *Carl B. Potter Ltd. v. Mercantile Bank of Canada*, [1980] 2 S.C.R. 343. In that case, the plaintiff bid for the construction of a waste treatment plant. The bid was accompanied by a tender deposit cheque, to be held in trust by the owner of the project. The proceeds of the tender cheque eventually found their way into the owner's collateral account where they were drawn upon to meet the owner's obligations to the defendant bank. In these circumstances, it appears that the trust funds were received by the bank for its own use

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and benefit, thereby meeting the first requirement under the "knowing receipt" head of liability. Ritchie J., at p. 347, approved of the following test regarding the bank's knowledge of the breach of trust:

> The position of a banker who has been placed "on inquiry" in the manner aforesaid is summarized in the following brief paragraph from *Halsbury's Laws of England* (4th ed.) vol. III, para. 60:
>
> > A banker may be a constructive trustee of money in his customer's account and in breach of that trust if he pays the money away, even on the customer's mandate, in circumstances which put him upon inquiry.

The footnote references for this passage, although not referred to by Ritchie J., included *Selangor*, *supra*. Ritchie J. went on to apply this test to the facts and found the bank liable for breach of trust.

40 A similar test of constructive knowledge was applied by the Ontario Court of Appeal in *Arthur Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363, leave to appeal refused, [1994] 3 S.C.R. v. In that case, the defendant bank was sued by a trustee appointed under the *Construction Lien Act*, R.S.O. 1990, c. C.30. The bank had agreed to administer the accounts of a number of associated construction companies, in accordance with a "mirror accounting system". Among other things, this system eliminated the need to monitor overdrafts in individual accounts and permitted the informal transfer of debits and credits between all of the operating companies' accounts. The trial judge's findings implied that the funds in the accounts were transferred in breach of the trust requirements under the *Construction Lien Act*. Considering the liability of the bank as a constructive trustee, Grange and McKinlay JJ.A. thus wrote in their joint reasons, at pp. 381-82:

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> We consider that the law on this point can be summarized thus: in the absence of sufficient facts or circumstances indicating that there is a good possibility of trust beneficiaries being unpaid there is no duty of inquiry on a bank to determine whether the trades have been paid or will be able to be paid.
>
> . . .
>
> Only if a bank is aware of facts which would indicate that trades would not be paid in the normal course of business should it be charged with a duty of special inquiry.

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It should be noted that Grange and McKinlay JJ.A. formulated this test without distinguishing between receipt and assistance cases. However, their comment, at p. 385, that the "Bank can only be liable for a breach of trust, and that breach would have to involve making use for its own benefit of money held on a trust for trade creditors", suggests that the case fell under the "knowing receipt" head of liability.

41 This analysis was endorsed by the Manitoba Court of Appeal in *Glenko Enterprises Ltd. v. Ernie Keller Contractors Ltd*. (1996), 134 D.L.R. (4th) 161. On facts similar to *Arthur Andersen, supra*, the court, at pp. 164-65, considered "whether a bank which has applied trust funds received from a building contractor to reduce an account overdraft has participated in a breach of trust and must therefore account to the beneficiaries of that trust for those funds". The funds in question, which were misappropriated by the defendant contractor, were subject to trust requirements under the *Builders' Liens Act*, R.S.M. 1987, c. B91. Considering whether the bank was a party to a breach of trust by its customer, Scott C.J.M. held, at p. 167:

> . . . the Bank is not liable for the builder's breach of trust if the Bank, in the ordinary course of business, accepted deposits and allowed cheques to be written thereon — or for that matter if it applied the funds on the overdraft — unless it had or clearly should have had knowledge of the breach of trust by the contractor or of facts to put it on notice.

The court went on to agree with the trial judge, at p. 176, that the bank, although it apparently received the trust funds for its own benefit, was not liable because "the inquiries and arrangements for further information which were made by the bank . . . were reasonable in all the circumstances".

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42 There are also a number of recent English authorities supporting the view that constructive knowledge is sufficient to impose liability on the basis of "knowing receipt". In *Agip (Africa) Ltd.* (Ch.), *supra*, Millett J. made a number of comments regarding "knowing receipt" cases, even though the case before him was of the "knowing assistance" category. With regard to the degree of knowledge required in "knowing receipt" cases, he wrote, at p. 291:

> The first [category of "knowing receipt" cases] is concerned with the person who receives for his own benefit trust property transferred to him in breach of trust. He is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that the transfer to him was a breach of trust; or if he received it without such notice but subsequently discovered the facts.

However, Millett J.'s comments must be read in light of a later passage, at p. 293, where he refused to express an opinion as to whether constructive knowledge sufficed in "knowing receipt" cases.

43 Millett J.'s comments were subsequently referred to by Knox J. in *Cowan de Groot Properties Ltd. v. Eagle Trust plc*, [1992] 4 All E.R. 700 (Ch.). In this "knowing receipt" case the issue arose whether a purchaser company had knowledge of a breach of duty arising out of the sale of another company's property. The purchaser's liability as a constructive trustee turned on whether or not it had knowledge that the directors of the vendor company were deliberately selling at a gross undervalue. Knox

J. noted, at p. 758, that there was a "substantial body of authority in favour of the proposition that constructive notice based on what a reasonable man would have concluded though falling short of want of probity on the part of the person charged as a constructive trustee may suffice in a knowing receipt case". Despite this body of authority, Knox J. preferred a test based on actual knowledge, wilful blindness, or recklessness. However, he added that if, contrary to his view, constructive knowledge was sufficient, there would still have been no liability on the facts before him. As well, at p. 761, he suggested "that the underlying broad principle which runs through the authorities regarding commercial transactions is that the court will impute knowledge, on the basis of what a reasonable person would have learnt, to a person who is guilty of commercially unacceptable conduct in the particular context involved".

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44 Millett J. reiterated the views he expressed in *Agip (Africa) Ltd.*, *supra*, in *El Ajou v. Dollar Land Holdings plc*, [1993] 3 All E.R. 717 (Ch.). That case involved a massive share fraud carried out by three Canadians in Amsterdam between 1984 and 1985. The plaintiff, the largest single victim of the fraud, claimed to be able to trace some of the proceeds of the fraud from Amsterdam through locations in Geneva, Gibraltar, Panama, back to Geneva, and then to London, where they were invested in a joint venture to carry out a property development project. In this "knowing receipt" case, Millett J. was prepared to assume that constructive knowledge was a sufficient basis for liability. At p. 739, he stated:

> In the absence of full argument I am content to assume, without deciding, that dishonesty or want of probity involving actual knowledge (whether proved or inferred) is not a precondition of liability; but that a recipient is not expected to be unduly suspicious and is not to be held liable unless he went ahead without further inquiry in circumstances in which an honest and reasonable man would have realised that the money was probably trust money and was being misapplied.

45 According to the second line of authority, then, the degree of knowledge required of strangers to the trust should be different in assistance and receipt cases. Generally, there are good reasons for requiring different thresholds of knowledge under the two heads of liability. As Millett J. wrote in *Agip (Africa) Ltd.*, *supra*, at pp. 292-93:

> The basis of liability in the two types of cases is quite different; there is no reason why the degree of knowledge required should be the same, and good reason why it should not. Tracing claims and cases of "knowing receipt" are both concerned with rights of priority in relation to property taken by a legal owner for his own benefit; cases of "knowing assistance" are concerned with the furtherance of fraud.

46 In other words, the distinction between the two categories of liability is fundamental: whereas the accessory's liability is "fault-based", the recipient's liability is "receipt-based". In an extrajudicial opinion, Millett J. described the distinction as follows:

> . . . the liability of the accessory is limited to the case where the breach of trust in question was fraudulent and dishonest; the liability of the recipient is not so limited. In truth, however, the distinction is fundamental; there is no similarity between the two categories. The accessory is a person who either never received the property at all, or who received it in circumstances where his receipt was irrelevant. His liability cannot be receipt-based. It is necessarily fault-based, and is imposed on him not in the context of the law of competing priorities to property, but in the application of the law which is concerned with the furtherance of fraud. [Footnotes omitted.]
>
> "Tracing the Proceeds of Fraud", *supra*, at p. 83.

47 S. Gardner makes a similar point in "Knowing Assistance and Knowing Receipt: Taking Stock" (1996), 112 *L.Q.R.* 56, at p. 85:

> . . . it is questionable whether knowing receipt is about wrongfully causing loss at all. There may be more than one other thing that it could be about,

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> but most modern opinion takes it to be a restitutionary liability, based on the fact that the defendant has acquired the plaintiff's property.

The same view was expressed by the Privy Council in *Royal Brunei Airlines Sdn. Bhd. v. Tan*, [1995] 3 W.L.R. 64, at p. 70: "Different considerations apply to the two heads of liability. Recipient liability is restitution-based; accessory liability is not." These comments are also cited with approval by Iacobucci J. in *Gold, supra*, at para. 41.

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48 Given the fundamental distinction between the nature of liability in assistance and receipt cases, it makes sense to require a different threshold of knowledge for each category of liability. In "knowing assistance" cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in "knowing assistance" cases; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 811-13. However, in "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in *Gold*, *supra*, where he finds, at para. 46, that a stranger in receipt of trust property "need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice".

49 This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy. As I wrote in *Lac Minerals*, *supra*, at p. 670, "[t]he determination

that the enrichment is 'unjust' does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief". In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

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50 Some commentators go further and argue that a recipient may be unjustly enriched regardless of either a duty of inquiry or constructive knowledge of a breach of trust. According to Professor Birks, a recipient of misdirected funds should be liable on a strict, restitutionary basis. In his article "Misdirected Funds: Restitution from the Recipient", [1989] *L.M.C.L.Q.* 296, he argues that a recipient's enrichment is unjust because the plaintiff did not consent to it, not because the defendant knew that the funds were being misdirected. In particular, he writes, at p. 341, that "[t]he 'unjust' factor can be named 'ignorance', signifying that the plaintiff, at the time of the enrichment, was absolutely unaware of the transfer from himself to the defendant". Birks, however, lessens the strictness of his approach by allowing a defendant to take advantage of special defences, including a defence arising out of a *bona fide* purchase for value. (See also P. Birks, "Overview: Tracing, Claiming and Defences", in P. Birks, ed., *Laundering and Tracing* (1995), 289, at pp. 322 *et seq.*)

51 In my view, the test formulated by Professor Birks, while not entirely incompatible with my own, may establish an unjust deprivation, but not an unjust enrichment. It is recalled that a plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly deprived but, rather, because the defendant has been unjustly

enriched, at the plaintiff's expense. To show that the defendant's enrichment is unjustified, one must necessarily focus on the defendant's state of mind not the plaintiff's knowledge, or lack thereof. Indeed, without constructive or actual knowledge of the breach of trust, the recipient may very well have a lawful claim to the trust property. It would be unfair to require a recipient to disgorge a benefit that has been lawfully received. In those circumstances, the recipient will not be unjustly enriched and the plaintiff will not be entitled to a restitutionary remedy.

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52 In the banking context of the present case, it is true that s. 206(1) of the *Bank Act*, R.S.C., 1985, c. B-1, negates any duty on the part of a bank to see to the execution of any trust, whether express, implied or constructive, to which a deposit is subject. In accordance with this provision, a bank is not under a duty to regularly monitor the activities of its clients simply because the funds deposited by those clients are impressed with a statutory trust. Nonetheless, this provision does not render a bank immune from liability as a constructive trustee or prevent the recognition of a duty of inquiry on the part of a bank. Indeed, in certain circumstances, a bank's knowledge of its customer's affairs will require the bank to make inquiries as to possible misapplication of trust funds. As discussed earlier, the degree of knowledge required is constructive knowledge of a possible breach of trust. It follows that a bank which is enriched by the receipt of trust property and has knowledge of facts that would put a reasonable person on inquiry is under a duty to make inquiries of its customer regarding a possible breach of trust. If the bank fails to make the appropriate inquiries, it will have constructive knowledge of the breach of trust. In these circumstances, the bank will be unjustly enriched and, therefore, required to disgorge the benefit it received at the plaintiff's expense.

53 The respondents argued that imposing liability on a banker who merely has constructive notice of a breach of trust will place too great a burden on banks, thereby

interfering with the proper functioning of the banking system. While this may be true in assistance cases where a banker merely pays out and transfers funds as the trustee's agent, the same argument does not apply to receipt cases where a banker receives the trust funds for his or her own benefit. Professor Harpum addresses this point in "The Stranger as Constructive Trustee" (1986), 102 *L.Q.R.* 114, at p. 138:

> Although there should be a reluctance to allow the unnecessary intrusion of "the intricacies and doctrines connected with trusts" into ordinary commercial transactions, considerations of speed and the importance of possession which normally justify the exclusion of these doctrines, are less applicable to a banker who chooses to exercise his right of set-off than they are to other commercial dealings. Where a banker combines accounts, he alone stands to gain from the transaction. Because of that benefit, more should be expected of him than if he gained nothing. [Footnotes omitted.]

In "knowing receipt" cases, therefore, it is justifiable to impose liability on a banker who only has constructive knowledge of a breach of trust.

54 In the present case, it has already been established that the Bank was enriched at Citadel's expense by the receipt of insurance premiums collected by Drive On and subject to a statutory trust in favour of Citadel. The only remaining question is whether the Bank had the requisite degree of knowledge to render the enrichment unjust, thereby entitling the plaintiff insurer to a remedy.

55 On this issue, it is clear from the trial judge's findings that the Bank was aware of the nature of the funds being deposited into, and transferred out of, Drive On's account. On discovery, two of the Bank's employees stated that they knew Drive On's sole source of revenue was the sale of insurance policies. The Bank also knew that premiums collected by Drive On were payable to the plaintiff insurer. The Bank's knowledge of the nature of Drive On's deposits must also be considered in conjunction

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with the activities in Drive On's account. It is recalled that in April 1987 the Bank began transferring funds between the Drive On and International Warranty accounts to cover overdrafts in either account. As well, in June 1987, the Bank was directed to empty the Drive On account on a daily basis, again to facilitate the transfer of funds to the International Warranty account.

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56 In light of the Bank's knowledge of the nature of the funds, the daily emptying of the account was in the trial judge's view "very suspicious". In these circumstances, a reasonable person would have been put on inquiry as to the possible misapplication of the trust funds. Notwithstanding the fact that the exact terms of the trust relationship between Citadel and Drive On may have been unknown to the Bank, the Bank should have taken steps, in the form of reasonable inquiries, to determine whether the insurance premiums were being misapplied. More specifically, the Bank should have inquired whether the use of the premiums to reduce the account overdrafts constituted a breach of trust. By failing to make the appropriate inquiries, the Bank had constructive knowledge of Drive On's breach of trust. In these circumstances, the Bank's enrichment was clearly unjust, thereby rendering it liable to Citadel as a constructive trustee.

57 I make one additional point regarding the nature of the Bank's liability in the present case. As already established, recipient liability is restitution-based. The imposition of liability as a constructive trustee on the basis of "knowing receipt" is a restitutionary remedy and should not be confused with the right to trace assets at common law or in equity. The principles relating to tracing at law and in equity were thus set out by the English Court of Appeal in *Agip (Africa) Ltd.*, *supra*, at pp. 463-64 and 466:

> Tracing at law does not depend upon the establishment of an initial fiduciary relationship. Liability depends upon receipt by the defendant of the plaintiff's money and the extent of the liability depends on the amount received. Since liability depends upon receipt the fact that a recipient has not retained the asset is irrelevant. For the same reason dishonesty or lack of inquiry on the part of the recipient are irrelevant. Identification in the defendant's hands of the plaintiff's asset is, however, necessary. It must be shown that the money received by the defendant was the money of the plaintiff. Further, the very limited common law remedies make it difficult to follow at law into mixed funds.
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> . . .
>
> Both common law and equity accepted the right of the true owner to trace his property into the hands of others while it was in an identifiable form. The common law treated property as identified if it had not been mixed with other property. Equity, on the other hand, will follow money into a mixed fund and charge the fund.

58 In my view, a distinction should be made between the imposition of liability in "knowing receipt" cases and the availability of tracing orders at common law and in equity. Liability at common law is strict, flowing from the fact of receipt. Liability in "knowing receipt" cases is not strict; it depends not only on the fact of enrichment (i.e. receipt of trust property) but also on the unjust nature of that enrichment (i.e. the stranger's knowledge of the breach of trust). A tracing order at common law, unlike a restitutionary remedy, is only available in respect of funds which have not lost their identity by becoming part of a mixed fund. Further, the imposition of liability as a constructive trustee is wider than a tracing order in equity. The former is not limited to the defence of purchaser without notice and "does not depend upon the recipient still having the property or its traceable proceeds"; see *In re Montagu's Settlement Trusts*, *supra*, at p. 276.

59 Despite these distinctions, there appears to be a common thread running through both "knowing receipt" and tracing cases. That is, constructive knowledge will suffice as the basis for imposing liability on the recipient of misdirected trust funds.

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Notwithstanding this, it is neither necessary nor desirable to confuse the traditional rules of tracing with the restitutionary principles now applicable to "knowing receipt" cases. This does not mean, however, that a restitutionary remedy and a tracing order are mutually exclusive. Where more than one remedy is available on the facts, the plaintiff should be able to choose the one that is most advantageous. In the present case, the plaintiff did not seek a tracing order. It is therefore unnecessary for me to decide whether such a remedy would have been available on the facts of the present appeal, and I have not explored the issue.

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V. Disposition

60 For these reasons, I would allow Citadel's appeal with costs and restore the judgment rendered at trial.

//*Sopinka J.*//

The following are the reasons delivered by

61 SOPINKA J. -- Subject to my reasons in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, I agree with Justice La Forest.

Appeal allowed with costs.

Solicitors for the appellants: Duncan & Craig, Edmonton.

Solicitors for the respondents: Cruickshank Karvellas, Edmonton.

TAB 29

Alberta Court of Queen's Bench
Colborne Capital Corporation v. 542775 Alberta Ltd.
Date: 1995-05-31

John Marshall, Q.C., Randall W. Block and John L. Ircandia, for Stampeder Exploration Ltd., Westar Petroleum Ltd. and Ricinus Holdings Ltd.

Aleck H. Trawick and Bryan Duguid, for Colborne Capital Corporation.

Raymond A. Coad and Matthew Lindsay, for 542775 Alberta Ltd. and Westar Group Ltd.

Alan D. Hunter, Q.C., and James T. Eamon, for Thomas Pointer.

J. Pat Peacock, Q.C., for Peter Williams.

(Calgary 9301-12382)

May 31, 1995.

1995 CanLII 9100 (AB KB)

I. PREAMBLE

1. *The Actions*

[1] VIRTUE J.: – These proceedings arise out of efforts by two competitors - the plaintiffs Grenon, Edwards and Colborne, on the one hand, and the defendant Stampeder/Ricinus on the other - to acquire interests in the shares of Petro, from the owner, Group. Group sold its shares of Petro to Stampeder.

[2] The plaintiffs allege they had a right of first refusal from Petro which entitled them to carry out a restructuring of Petro, which would have resulted in the plaintiffs acquiring a substantial equity position in the restructured company. They claim that Group's sale of its shares to Stampeder constituted a breach by Petro of its agreement with the plaintiffs and, further, that Stampeder and Group wrongfully interfered with their contractual rights, or failing that, their economic interests.

[3] Stampeder, by counterclaim, alleges it suffered damage as a result of a conspiracy between the plaintiffs and Thomas Pointer (an officer and director of Petro) to interfere with a public share offering which Stampeder planned to issue to cover the costs of acquiring the Petro shares and that this was done as part of a fraudulent scheme to force Stampeder into making a deal to transfer Petro's tax losses to the plaintiffs.

[4] In addition, Stampeder, Group and Petro seek to be indemnified by Pointer, in the event that the plaintiffs' claim against them should succeed.

[5] After the main action was commenced, the Plaintiffs joined Peter Williams as a defendant, claiming that Williams, Stampeder and Group caused damage to Colborne by a tortious breach of confidence.

[6] A second action was joined for trial with the Colborne action. In those proceedings Pointer claims against Stampeder, 542 and Petro, for breach of an agreement between Pointer and Petro and/or Group, to pay Pointer the sum of $100,000 in lieu of an option to participate in the equity of Petro; and further, for breach of a balance due under a severance agreement between Pointer and Petro.

[7] Petro counterclaims against Pointer, alleging fraudulent misrepresentation on Pointer's part with respect to the severance agreement. Petro seeks to recover the amount paid to Pointer under the severance agreement, before the fraud was discovered.

2. *The Parties*

[8] The parties are as follows:

[9] Petro was a private corporation which operated as a small oil and gas company, with offices at Calgary, Alberta. The entire issued capital of the company was owned by the defendant Group, a private holding company with offices in Vancouver, B.C. The other major stakeholder in Petro was the Bank of Montreal which held security on all of the assets of the company and had an option on 49.9% of the company's shares for a debt of $43.5 million. The physical assets of Petro had a value of about $30 million, so the company, on the face of it, had no net worth. Petro did, however, have $100 million in tax losses and resource pools.

[10] Group had pledged the shares of Petro to a consortium of bankers (the Group lenders), to whom Group owed the sum of $300 million. As a consequence, Group, the Bank of Montreal, and the Group lenders were the three principal stakeholders in Petro.

[11] Stampeder is a publicly traded junior oil and gas company, with offices at Calgary, Alberta. Stampeder, with the concurrence of the Group lenders, purchased (through its subsidiary Ricinus) the issued shares of Petro from Group, for $2 million, and, at the same time, Stampeder purchased the entire debt and security position of the Bank of Montreal in Petro, for $28 million. Both transactions closed on August 3rd, 1993.

[12] Grenon and Edwards are merchant bankers who sometimes referred to themselves as GE, and frequently carried out their investments through Colborne, a private company controlled by them.

[13] Pointer was, at all material times, a director and an officer, but not a shareholder, of Petro.

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[14] When the events giving rise to these actions began, the defendant Williams was a law partner in the firm of Bennett Jones Verchere who, during the course of the events giving rise to these actions, became the vice-president of Stampeder.

[15] 542 was a wholly-owned subsidiary of Group, which, during the course of the events, came to hold Group's shares of Petro, as a trustee for Group.

[16] Ricinus is a wholly-owned subsidiary of Stampeder.

3. *The Issues*

[17] Thfe major issues confronting the Court are:

(i) Did the negotiations between Group, Colborne and Petro result in an agreement between Colborne and Petro, under which Colborne was entitled to a right of first refusal agreement from Petro;

(ii) If so, did such an agreement bind Group with respect to the disposition of its shares of Petro;

(iii) If so, was a right of first refusal to restructure Petro conditional upon Colborne presenting, and Group approving, a satisfactory restructuring plan;

(iv) If so, did Group approve a restructuring plan presented by Colborne;

(v) If Colborne came to have a right of first refusal to restructure Petro, did Group and Stampeder conspire to: (a) wrongfully interfere with a contractual right held by Colborne, or (b) wrongfully interfere with Colborne's economic interest;

(vi) Was Pointer, as an officer and director of Petro, or otherwise, entitled to have Petro enter into a secret right of refusal agreement with Colborne, and a secret unanimous shareholders agreement between 542 and Colborne, affecting Group's ability to deal with its shares of Petro, without the knowledge or consent of his fellow directors, and without the knowledge or consent of Group;

(vii) Did the actions of Grenon and Pointer, in executing and keeping secret the rights of first refusal and unanimous shareholder agreements, while encouraging Stampeder to complete its purchase of Group's shares, constitute an actionable tort against Stampeder, and if so, did Stampeder suffer any loss thereby;

(viii) Did Pointer's conduct disentitle him to the benefits provided by the equity agreement and the severance agreement, and entitle Petro to rescind the agreements and recover the monies paid under the severance agreement;

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(ix) Did Colborne's lawyer, Alan Ross, improperly disclose confidential tax information received from his client, the plaintiff Grenon, to the defendants Stampeder, and if so, are Ross's partner Williams and Stampeder, or either of them, liable to Colborne for the tort of breach of confidence, and if so, did Colborne suffer any damage thereby;

(x) Did the tactics of any of the parties, carrying on business in a free enterprise society, exceed the bounds of ethical corporate behaviour to such an extend as to warrant the interference of the Court, and if so, what damages or other remedies follow upon such behaviour?

4. *Historical Background*

[18] While the events set out below are not without significance, they are recorded primarily to set the background against which the more critical events of 1993 can be understood and assessed.

[19] Group is the successor to B.C. Resources Investment Corporation (the BRIC). During the latter part of 1992, a change occurred in the control of the Board of Directors of Group. Until that time the Board was mainly controlled by the Harrowston Group of companies, represented on the Board by David Bookbinder and Brent Belzberg. After the change of control, and during the events of 1993, the Board of Directors of Group was controlled by the Jim Pattison group of companies. Peter Geer was the president of Group, and Robert Chase was the chief financial officer of the company. Chase was also one of three directors of Petro, the other two being the defendant Pointer, and David Savage.

[20] Group, a holding company, owned and operated a number of subsidiaries in the resource field, one of which was Petro, its oil and gas arm. The drop in world commodity prices which began in 1984 had an adverse effect on the performance of Group's timber, mining, and oil and gas subsidiaries. The only subsidiary which continued to perform well was Westshore Terminals Ltd., which operated a successful coal terminal and seaport facility near Vancouver, B.C.

[21] In 1991, Group found it necessary to sell its timber and pulp operations. In September 1992, Group's subsidiary Westar Mining Ltd. went into bankruptcy, leaving unpaid a very substantial debt to the Bank of Montreal. (The Bank claims to have suffered the largest single loss in the history of Canadian banking.) The result was that the relationship between Group and the Bank of Montreal was strained.

[22] In 1985 a drop in world oil prices, coupled with the effects of the National Energy Program, created serious financial difficulties for Petro. The company's surplus cash flow

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was eliminated, its oil and gas operations became uneconomical, and it owed the Bank of Montreal $70 million, a sum substantially more than the value of its assets, all of which were held as security by the Bank. Petro's debt repayment to the Bank was renegotiated in 1986, and thereafter the Bank conducted a monthly cash sweep of Petro's revenues, leaving the company with just enough of its revenue to carry on its existing operations, but nothing for exploration, or for the development of its existing land holdings.

[23] By September 1986, Petro's financial situation was such that the value of Group's share interest in Petro was written down by Group, to nominal value.

[24] Group itself was indebted, to the extent of $300 million, to a consortium of banks, headed by the Royal Bank of Canada, which I have referred to as the Group lenders. Group had pledged the shares of Petro to these lenders, as security for Group's debt.

[25] In 1988, Group, by having Petro sell most of its land holdings in British Columbia, reduced Petro's debt to the Bank of Montreal from $70 million to $43 million. At the same time Group began searching for opportunities to sell its shares of Petro, or to restructure the company, so as to obtain some sort of return for its investment in the company.

[26] The persons chiefly responsible for carrying out this initiative for Group were David Bookbinder, a director of Group, and Chase, its chief financial officer. Pointer, as chief financial officer of Petro, provided technical assistance.

[27] Pointer, a chartered accountant, had joined Petro in June 1985, as a financial analyst. He was appointed chief financial officer, and a director of the company, in May 1991. From that time on, until December 1992, the members of the Board of Directors of Petro were: Larry Bell (a director of Group and president of Petro) and Robert Chase (the chief financial officer of Group), both of whom were resident in Vancouver; and Thomas Pointer and David Savage (who was the chief operating officer of Petro), both of whom were resident in Calgary. At the end of December 1992, the Jim Pattison group of companies took control of Group. Bell resigned his positions in both Group and Petro, and thereafter Chase, Pointer and Savage remained as the three directors of Petro. From that time forward, Pointer understood that he was to report to Jim Pattison, but he did so in fact, by reporting to Chase and to Nick Geer, who became president of Group at the beginning of 1993. Pointer and Chase were in frequent and regular communication with respect to Group's efforts to sell its shares of Petro or to restructure the company, and

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both Pointer and Savage were called upon from time to time to make formal reports to the entire Board of Directors of Group.

[28] One of Pointer's responsibilities, both prior to and during 1993, was to devise a method, for Group's consideration, of using Petro's accumulated tax losses and resource pools to create some value in the company for Group. Pointer worked closely with the various presidents of Petro, and with various members of the management team of Group in seeking to carry out this objective.

[29] In 1989, Pointer had approached the plaintiff, Murray Edwards, who was then associated with Peters & Co., about doing a transaction involving Group's shares of Petro. Peters & Co. investigated various possibilities but nothing concrete developed.

[30] In 1991, Petro engaged Tom Olson, a tax lawyer, to obtain advice on how the tax losses might be sold or otherwise employed to produce value for Group. The Bank of Montreal held security on all of Petro's assets, so it was essential that a method be devised that would be satisfactory to the Bank. Olson thought it possible to reorganize Petro so as to separate off the tax attributes into another entity, leaving the Bank with its security on the physical assets, and then negotiating with the Bank to reduce its debt to the level of the value of the physical assets. The idea then would be to use the tax attributes to raise capital for exploration and development. Over a period of several months Olson approached 15 or 20 prospects but again nothing developed.

[31] By an engagement letter dated July 11, 1991, Group engaged Peters & Co. Limited, a firm of investment counsellors, to provide financial assistance in raising capital by employing Petro's tax losses. The plaintiffs Grenon and Edwards were associated with Peters at that time, and it is significant to note that the engagement letter (Tab 37) was addressed to Group, not Petro. The letter suggested raising capital by selling Petro's tax deductions. Action on the proposal was deferred because the Bank of Montreal was demanding payment of its loan, and dealing with that problem became the more pressing issue for Group.

[32] The Board of Directors of Group, on the advice of David Bookbinder, a member of the Board, concluded that if Group was to salvage something from its ownership of Petro, it should first negotiate an agreement with the Bank of Montreal to refinance the debt owed by Petro to the Bank, on more favourable terms. The negotiations were led by David Bookbinder, with Pointer providing technical information and assistance.

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[33] In August 1991, in preparation for the negotiations with the Bank, Chase had Pointer arrange to have Peters & Co. prepare an evaluation of Petro's tax pools for the Board of Directors of Group. Peters estimated the value to be $5 million to $6 million.

[34] Bookbinder was able to negotiate a restructuring of Petro's debt with the Bank of Montreal, which was approved by the Board of Directors of Group. The documents setting out the new arrangement were prepared by Lawson Lundell, Group's solicitors in Vancouver, and executed by Group, Petro, and the Bank, on April 30th 1992.

[35] Under the new arrangement Petro's $43.2 million debt to the Bank was converted into $24.4 million in distress preferred shares, and an oil bond for the remaining 18.4 M (the interest on which was indexed to the price of oil). The Bank took security on all of the assets of Petro, and an option on 49.9% of Group's shares of the company.

[36] It is worth noting that the intercorporate method followed for the restructure of Petro's debt to the Bank in 1992, was to obtain the approval of the Board of Directors of Petro, obtain the approval of the Group's management committee, and finally, to obtain the approval of the Group Board of Directors.

[37] As a result of the 1992 restructuring, the Bank of Montreal became a major stakeholder in Petro. The Bank held security on all of Petro's assets and a 49.9% option on Group's shares, so that, as between Group and the Bank, the Bank had as much, if not more, control over any plan affecting Group's shares or a further restructuring of Petro, than Group itself.

[38] Under the new arrangement with the Bank of Montreal, the amount of interest payable by Petro was reduced, but the Bank continued to do a cash sweep, so that Petro still had no access to funds for further development or exploration, so Group was still interested in using Petro's tax losses to increase the value of its shares. Immediately after closing the restructuring with the Bank, Chase, Bookbinder and Pointer went back to work on the problem. Once again they turned to Peters & Co., and on June 9th 1992, a letter agreement was signed by Pointer, engaging Peters & Co. Capital Limited as financial advisor. Peters & Company Capital Ltd. was a joint venture arrangement between the plaintiffs Grenon and Edwards, and Peters & Co.

[39] Peters & Company Capital Ltd. had intended that its contract of engagement should, once again, be with Group, but Pointer intervened and by telling Grenon that he was not authorized to sign for Group, arranged to have the engagement letter addressed to Petro rather than Group. Pointer knew that Petro was not the proper party to the agreement but he told Peters that he would deal with the matter of moving the obligation

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from Petro to the appropriate party when the strategy was more fully developed. This arrangement (concurred in by Grenon) was the beginning of a series of actions Pointer took in an effort to personally control matters affecting Group's shares and the restructuring of Petro.

[40] By the latter part of October 1992, Grenon, with technical input from Pointer, and Petro's tax lawyer Olson, had developed a plan for the restructuring of Petro which involved, among other things, inserting a new company between Group and Petro, to hold Group's shares. Pointer and Grenon realized the plan would require the consent of the Bank of Montreal, so in October 1992, Pointer went to Toronto to meet with officials of the Bank. Pointer did not tell anyone at Group that he was going to the Bank with a proposal. The Bank expressed some interest in the ideas discussed, but doubted that the Group lenders, who held a pledge of Group's shares of Petro as security for Group's indebtedness to them, would agree.

[41] On November 5th, 1992, Pointer sent a follow up letter to the Bank (Ex. 30) confirming the details of the proposal but did not send a copy of the letter to Group. Instead he sent a memo to Chase on that day, enclosing copies of two letters from Olson, setting out the essence of the proposal, which, Pointer said in his memo to Chase, had been "tabled with the Bank of Montreal."

[42] The plan involved the insertion of a new company between Group and Petro which would hold Group's shares of Petro. Chase obtained the consent of the Group lenders (who held a pledge on Group's shares of Petro) to the change.

[43] On December 10th, 1992, Pointer attended a meeting of the Group Board of Directors seeking approval of the plan, as well as the Board's approval of a share option for himself and Savage. The idea of a share option was put off by the Board, but the plan was discussed. The Board authorized the acquisition of an off the shelf company which the Board understood would be wholly-owned by Group and would hold Group's shares of Petro as part of the plan of re-organization. Pointer led the Board to believe that if this was done immediately, so as to be completed before year end, it would result in a saving of $300,000 in Saskatchewan capital tax.

[44] Group's shares were then transferred to 542775 Alberta Ltd., which held Group's shares of Petro. Although 542 was a subsidiary of Group, Pointer had arranged that he and Savage would own a 10% minority interest in anticipation of obtaining the Group Board's approval of the share option plan (which, as we have seen, was deferred by the Board). In addition Pointer had set the company up so that he was the sole director

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and president. When Chase learned of this in late December 1992 or early January 1993, he directed Pointer to transfer the shares back to Group. Pointer saw to this, but only after Chase advised him it had better be done by the next meeting of the Group Board of Directors, or Pointer didn't have to bother showing up. The proposal to save Saskatchewan capital tax never materialized. Although Pointer knew that the Board of Directors of 542 was to mirror that of Petro, he did not complete this so that he remained the sole director and president of 542 for several months and, as we shall see, Pointer purported to use his false position as president and sole director of 542 to the disadvantage of Group.

[45] In the latter part of 1992, the Jim Pattison group of companies became the controlling shareholder of Group and Jim Pattison became a member of the Group Board. On December 31st, 1992, Larry Bell, who had been president of both Group and Petro, resigned his offices, and Nick Geer - a nominee of the Pattison Group of shareholders - became chairman of the Board and president of Group.

[46] As previously indicated, Group owned Westar Terminals Ltd., which in turn owned the shares of Westshore Industries Ltd. (Industries), a corporation which owned and operated a large coal terminal and seaport facility at Point Roberts, near Vancouver, B.C. The Preferred C shares of Industries were held by the Bank of Montreal as its security for the indebtedness of Group to the Bank, in the amount of $27 million. The combination of Group's debt to the Bank of Montreal, and its $300 million debt to the Group lenders, greatly exceeded the value of its assets and the Bank had no realistic hope of recovering its debt from Group. Both Group and the Bank regarded the Preferred C shares, which the Bank held as security, as having little or no intrinsic value. However, the directors of Group hoped to be able to restructure and refinance Group, and they regarded the acquisition of these shares from the Bank, and their cancellation, as fundamental to that plan. Because of the strained relationship between Group and the Bank of Montreal referred to earlier, the Bank was not prepared to readily give up the shares without extracting as much as possible from Group, despite their insignificant worth.

II. THE EVENTS OF 1993

[47] The plaintiffs, Grenon and Edwards, were former corporate lawyers who, through working with Peters & Co. as brokers, and participating in a number of ventures, had honed their skills as merchant bankers. They carried out their business activities in a loose and ill defined relationship, but in their dealings with Petro, Group and Stampeder they acted together, and their rights and liabilities are the same. They sometimes used the

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designation GE, or the name Colborne Capital Corporation (a private company which they controlled), as the entity which would carry out their investment activities. For the sake of convenience I will refer to the plaintiffs as Colborne. Grenon was the person mainly in charge of the plaintiffs' efforts to acquire an interest in group's shares of Petro.

[48] On January 18th, 1993, Grenon advised Pointer that he and Edwards had severed their connection with Peters & Co. and he proposed that they should participate in the restructuring of Petro by the introduction of capital in exchange for an equity position, and be involved as principals, rather than as agents. Pointer was interested in this and it was agreed that the first step should be for Pointer and Grenon to approach the Bank of Montreal in Toronto, and while in Toronto to discuss the proposition with Bookbinder and another director of Group, Brent Belzberg.

[49] Grenon's plan at this time was to negotiate with the Bank of Montreal to sell its debt and security position to Colborne at a substantial discount to its face value, and to acquire one half of the Bank's 49.9% option on Group's shares of Petro, for a nominal amount, on the basis that Colborne would inject capital into Petro which would enhance the Bank's security. He planned further to have Group transfer one half of its share in Petro to Colborne for a nominal amount so that Colborne would have a 50% equity in the company. Thereafter Colborne would use its expertise to restructure the company so as to obtain value for Petro's $100 million tax attributes, and then take the company public, in a corporate vehicle, the shares of which would be owned by Colborne, Group, the Bank of Montreal and the management team of Pointer and Savage.

[50] Pointer and Grenon went to Toronto on February 9th 1993 to meet with officials of the Bank of Montreal. Pointer took with him, and gave to the Bank, a copy of a letter from Grenon to Pointer dated February 8th (Tab 109) in which Grenon described the arrangements set out above which, he said, would be directed towards the "reincarnation" of Petro.

[51] The Bank officials expressed some general but conditional interest, but made it clear to Grenon and Pointer that the Bank would not look at a proposal until Colborne had obtained the approval of Group and came back with a specific proposal. Chase learned of Pointer's visit to the Bank from third party sources.

[52] Following the meeting, Embury and Konigsmann, who had attended the meeting as part of the Bank contingent, met with their superior Keith Lewis, who was the vice-president of the Bank's special accounts management unit. He had ultimate responsibility for Petro's account with the Bank. Lewis and the others reviewed Grenon's proposal and

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concluded that the only people who would be winning would be Colborne, and that there was nothing in it for the Bank. The discussion did, however, stimulate the Bank's interest in disposing of its security on Petro's assets, and its option interest in Group's shares, for cash. The Bank was not getting any interest on its loan and Lewis thought that if the Bank could convert a non-producing asset to cash, it would be wise to do so.

[53] Neither Lewis, nor the Bank, heard anything further from Colborne after the meeting of February 9th 1993, until July 2nd, an interval of almost five months.

[54] After the meeting with the Bank on February 9th, Grenon and Pointer met with Bookbinder and Belzberg, two directors of Group who resided in Toronto. They expressed interest in Grenon's proposal. Pointer told Bookbinder and Belzberg that he intended to come to the next directors' meeting of Group to present a proposal. Pointer knew there was to be a Board meeting of Group on February 24th 1993, and he thought this would provide an opportunity to get the approval of Group to a new proposal.

[55] On the return trip from Toronto, Grenon and Pointer discussed a more detailed proposal. During the course of their discussions, it became apparent that Grenon's idea was to sell off Petro's oil and gas assets, but to retain the tax losses to be used in a merger with a revenue company. Pointer opposed this and ultimately persuaded Grenon to go along with an approach that would see the tax losses internalized so as to keep Petro going as an operating oil and gas company. I am satisfied that Pointer's position was motivated by his concerns for his personal future. Grenon appeared to concede.

[56] In his discussions with Pointer, Grenon raised the concern that Colborne might do the work with respect to such a restructuring, and then be excluded from the transaction. In a letter to Pointer dated February 18th (Tab 114) Grenon stated (in part): "… we would like somehow to protect ourselves against the risk that we invest a lot of effort trying to get everything resolved only to find ourselves on the outside looking in …" The letter refers as well to the need to obtain the approval of Group, and the approval of the Bank of Montreal, to any proposal. The target date for Bank approval was March 23rd.

[57] During the two-week period following the visit to Toronto, Grenon, with input from Pointer and tax advice from Grenon's lawyer Alan Ross, of Bennett Jones Verchere, developed a tentative plan to be submitted to a meeting of the Board of Directors of Group, which was scheduled for February 24th. Pointer incorporated Grenon's plan in a document he prepared for Group entitled "Westar Petro Ltd. Corporate Strategy. New Equity Investment" (Tab 119), and dispatched it by fax to Pattison, Geer, and Chase on February 22nd, for their review prior to the Group Board meeting scheduled for February 24th.

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[58] In the document Pointer said that Grenon planned to acquire from the Bank of Montreal its reducing term loan to Petro of $18.8 million, for $.5 million, on the basis that Colborne would contribute $1.5 million to Petro's assets thereby increasing the value of the Bank's security. Colborne would then be entitled to convert the term loan into a 49.9% ownership of the shares of Petro, following which the ownership of the shares of Petro would be: Colborne:– 49.9%; Group:– 22.6%; Bank of Montreal:– 22.5%; Management:– 5%. Petro would use the $1.5 million to acquire assets from major oil companies on a discounted basis by purchasing them without tax pools. By using its tax attributes, Petro would shelter its increased revenue from tax, thereby increasing the value of the company. Colborne would then take the company public.

[59] Pointer stated in the document that the Bank of Montreal would be willing to accommodate the plan, on terms which Pointer set out. This statement was an exaggeration of the level of the Bank's interest.

[60] The document set out a timetable that Grenon had suggested to Pointer in his letter of February 18th, and referred to Grenon's suggestion that there be a letter agreement between Petro and Colborne providing Colborne with an exclusive right to work on the equity investment for a period of time. The timetable extended to April 6th 1993.

[61] Chase reviewed the "New Equity Investment" document when he received it from Pointer on February 22nd. He questioned in his own mind the suggestion that there be an exclusive period, but thought if there was to be one it should be of short duration.

[62] Pointer attended in Vancouver on February 23rd, and met with the management committee of Group, prior to the Board meeting scheduled for the following day. There were present at the meeting Geer, the new president and chairman of the Board of Group, together with Chase, Bookbinder, Pointer and Savage. Pointer knew that there had been a shift of power on the Board and that Geer was now the key player.

[63] Pointer reviewed the new equity proposal with the meeting. The committee was generally interested in the proposal and Chase agreed that he would present it to the Board meeting the next day. The management committee recognized that the agreement of the Bank of Montreal was the key to any reorganization of Petro.

[64] The matter of a period of exclusivity for Colborne was discussed and Geer stated that he was not interested in such an arrangement unless he had a proposal prepared and presented by Colborne that met his approval. That ended the matter and the issue was not pursued further by Pointer.

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[65] Chase prepared a memorandum with respect to the new equity proposal for the consideration of the members of the Board of Directors (Tab 121). In the memo Chase described in brief terms the new equity concept and stated: "Specifically, the management of Westar Petro would like to know if the Board would in principle support an idea which involved further dilution of Group's remaining 50.1% interest." Each board member also received a copy of the New Equity Investment document (Tab 119) in which Pointer had described the Grenon concept. On a slide which he prepared for presentation to the Board Chase described the concept as a "smaller equity in a bigger pie."

[66] Pointer made a brief presentation to the Board of Group on February 24th. The members expressed an interest in the New Equity concept, and Savage and Pointer were requested to bring back a specific proposal for consideration by the Board. It was clear that any proposal from Colborne would have to come to the Board of Group for consideration and approval, and that this should occur before any further approach was made by Pointer to the Bank of Montreal. It was made clear to Pointer that neither Geer nor the Board of Directors was prepared to give Colborne any period of exclusive negotiation, or a right of first refusal.

[67] The minutes of the Board of Directors meeting record the following:

> It was agreed that Mr. Geer, Mr. Bookbinder and Mr. Chase would review and confirm the estimated current value of Westar Petro Ltd. and that inquiries would be made to verify the credibility and reputation of the proposed investor. It was further agreed that Mr. Savage and Mr. Pointer would obtain a specific proposal for review by the Directors and, at the appropriate time, the Bank of Montreal.

[68] Following the meetings, Pointer and Chase had a private discussion in which they agreed that if it became necessary to provide a period of exclusivity to Colborne in order to retain their interest, it should be on terms that allowed Group to deal with any third parties, who came forward on their own initiative, seeking to do a transaction with respect to Petro, and in this context Chase told Pointer that two such parties were Focal Resources and Jeff Tonken of Stampeder Exploration Ltd. Chase asked Pointer to contact both Focal Resources and Stampeder.

[69] On his return from Vancouver, Pointer reported to Grenon his discussions with Group. He arranged to meet with Grenon on February 26th, and arranged to meet with Tonken, the president of Stampeder, on the same day.

[70] The background with respect to Stampeder's interest in Petro is that on February 22nd, Chase received a conference telephone call from Jeff Tonken and Bill Dickson, the president and vice-president of Stampeder, indicating that Stampeder was

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interested in acquiring Group's shares of Petro. Chase agreed to get back to Tonken after the Group Board meeting on February 24th.

[71] Stampeder's interest in Petro stemmed from the fact that the properties of the two companies in the Kindersley area of Saskatchewan were intermingled, and their operations were similar. Stampeder had acquired Allheart Resources, a company that held extensive interests in the Kindersley area, in October 1992, and had carried out a successful public financing of that purchase, which had caused Stampeder's shares, which were listed on the Toronto Stock Exchange, to rise substantially. In January 1993, Stampeder was looking for another acquisition.

[72] Stampeder did its banking with the Bank of Montreal in Calgary. In late January or early February 1993, Donald Archibald, who was in charge of resource based companies for the Bank, brought to Tonken's attention the fact that the Bank was interested in selling its debt and security position in Petro and that he had noticed that Stampeder and Petro had land holdings in the same area. Archibald inquired if Stampeder might be interested in acquiring the Bank's interest. Tonken indicated that he was interested. Archibald arranged for Tonken to speak with Embury, of the Bank's special accounts section, in Toronto.

[73] Tonken spoke with Embury in mid-February and learned from him the details of the Bank's security and option interest in Petro, including the fact that the Bank did not hold the shares of Petro as security, so it became evident to Tonken that Stampeder would have to buy the debt and share option from the Bank, and then buy the shares from Group.

[74] Tonken made a soft offer to the Bank of $28 million for its interest and gained the impression that the Bank would likely accept such an offer. He then telephoned Chase on February 22nd to indicate Stampeder's interest in purchasing Group's shares. Chase told him that he would get back to him after the Group Board meeting of February 24th. After the meeting Chase telephoned Tonken and asked him to contact Pointer to do a specific review of the company so as to be in a position to make an offer. Pointer called Tonken and a meeting was arranged for February 26th.

[75] Tonken and Dickson met with Pointer in the Petro offices on February 26th and Pointer gave them full and detailed information on all aspects of Petro's assets, land holdings, debt, staffing, tax attributes, cash flow, production, costs of production, and other details of the company in which Tonken was interested. Pointer subsequently sent Petro's land maps to Tonken. Tonken concluded that the acquisition of Petro would be very

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advantageous to Stampeder, and that such an acquisition would increase the value of its shares.

[76] Following this meeting Tonken met again with Embury to indicate that Stampeder intended to offer money to Group for its shares. Embury was unhappy with this. The Bank of Montreal had suffered very substantial losses at the hands of Group and was of the view that Group's shares were of little value because Petro's debts greatly exceeded it assets. The Bank was not prepared to see Group benefit, at the expense of the Bank, from any disposition of its shares of Petro. Tonken was able to persuade the Bank that in order to complete the transaction with the Bank, Stampeder was going to have to pay Group something of value for the shares and the Bank eventually agreed.

[77] On March 2nd Stampeder wrote to Group (Tab 131) offering 750,000 shares of Stampeder stock in exchange for Group's shares of Petro. At the same time, Tonken arranged to meet with Geer and Chase in Vancouver, on March 3rd.

[78] Tonken and Larry Shaw (Stampeder's chairman) met with Geer and Chase as arranged. Geer said that Group was not interested in Stampeder's offer of shares but would be interested in an offer for cash. Geer indicated that if Stampeder wished to pursue the purchase they should get back to Geer or Chase, and that Stampeder was free to contact Pointer for technical information.

[79] On March 15th, Stampeder sent a letter offering to purchase Group's shares of Petro for $2.25 million cash.

[80] After sending the offer, Tonken was in frequent communication with Chase but could get no definite response. Geer and Chase would only say that Group was considering a number of options and would get back to Tonken.

[81] The other options that Group was considering were firstly the Colborne proposal; and secondly, the possibility of recovering from the Bank of Montreal the Preferred C shares of Industries (referred to earlier), which the Bank held as security for Group's debt to the Bank.

[82] I return to the events concerning the Colborne proposal.

[83] On his return from Vancouver Pointer reported to Grenon what had occurred at the meetings with Group, and Chase's position that Group had to be free to consider offers from Stampeder and others. In the next few days, Pointer met frequently with Grenon while Grenon struggled with the problem as to how he could get something in writing with respect to a period of exclusivity. Grenon and Pointer had originally intended that the letter

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agreement that Grenon was drafting, which would include references to exclusivity and a right of first refusal, should be addressed to Group, but after discussing the matter with Pointer following his meetings with Group on February 23rd and 24th, they decided that the letter agreement should be addressed to Petro, and executed by Pointer. I am satisfied that they knew that if they addressed the proposed letter agreement to Group, as originally intended, it would be rejected, and that Grenon addressed the letter agreement to Petro in an attempt to draft his way around the difficulty that Group was not prepared to grant a period of exclusivity or a right of first refusal. Grenon did not send a copy of the letter agreement to Group, although it directly affected Group's shares.

[84] The letter agreement (Tab 127) was dated March 3rd, and was sent to Pointer on that day. By coincidence, Geer phoned Pointer on March 5th, to tell him that he was satisfied with the credentials of Colborne. Although Pointer had the March 3rd letter in his possession when Geer phoned (still unsigned), he made no reference to the letter or its subject matter in his conversation with Geer, although it was a letter agreement with Colborne that could have the effect of restricting Group's ability to deal with its shares. I believe Pointer deliberately kept the existence of the letter from Geer because he knew Geer would not allow him to sign it. Pointer signed the document after his conversation with Geer.

[85] I am also satisfied that Pointer did not send a copy of the March 3rd letter agreement to Chase. This was unusual because the record amply discloses that the consistent practice, on matters affecting Group's interests, was for Pointer to record everything in writing and to send copies to Chase. I find Pointer's failure to send a copy of the March 3rd letter agreement to Chase to have been a deliberate act on Pointer's part to keep this particular document from Group's attention. Pointer's equivocal evidence, when he is so positive on everything else, renders his credibility on this point suspect. When I couple these facts with Chase's positive testimony that the letter was never sent to him by Pointer nor disclosed or discussed with him until June 29th, I am reinforced in my view that Pointer deliberately kept the letter from Group to achieve his personal objectives as to how Group's shares should be dealt with.

[86] I also note that Pointer knew, when he signed the March 3rd letter agreement on March 5th, that Chase would be coming to Calgary to meet with him on March 9th. It is remarkable that he did not wait until he met with Chase before signing the letter, and it is worth noting as well, that he did not mention or discuss the letter with Chase at their March

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9th meeting, or subsequently until the letter agreement was disclosed to Chase on June 29th.

[87] The key points in the March 3rd letter agreement (Tab 127) relative to exclusivity and a right of first refusal are:

– In the event Group Approval is obtained to the Restructuring plan:

• Colborne shall be granted an exclusive period of one month to obtain the approval of the Bank of Montreal;

• Colborne will be granted a right of first refusal to match any offer contemplating a restructuring;

• Prior to obtaining the approval of Group to a restructuring plan involving Colborne, Petro shall be free to meet with other parties to respond to enquiries about the potential for a restructuring involving them.

[88] The agreement was signed by Pointer without the approval of the Petro Board of Directors, and without having it reviewed by counsel, and no copy was provided to Savage, although he was a director and chief operating officer of the company.

[89] When he signed the document on March 5th, Pointer knew of Stampeder's interest in acquiring Group's shares. He had met with Tonken and Dickson on February 26th and he had received a copy of Stampeder's offer dated March 2nd. Pointer was meeting almost daily with Grenon during that period, and the inference is inescapable that he had kept Grenon fully informed as to Stampeder's offer to Group including the fact that Stampeder proposed to finance an acquisition of Group's shares by a public financing.

[90] Several things emerge from this sequence of events: Pointer attended the meetings of February 23rd and 24th to present the Grenon plan to Group and to obtain Group's instructions. The Board instructed Pointer to obtain a detailed proposal from Grenon for the Board's review and made it clear to Pointer that neither Geer nor the Board of Directors of Group was prepared to give Grenon an exclusive period, or a right of first refusal. In the face of this knowledge, Pointer entered into the March 3rd letter agreement, purporting to act on Petro's behalf. The March 3rd letter agreement was not the product of either the Petro Board or the Group Board, and was not revealed to Group by either Grenon or Pointer until the 29th of June. Despite this, it is the foundation upon which the plaintiffs seek to establish a right of first refusal with respect to Group's shares of Petro.

[91] Group, unaware of the March 3rd document, continued to be interested in the possibility of a transaction with Colborne. Geer and Chase arranged to meet with Grenon

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and Edwards in Calgary on March 9th, and at the conclusion of the meeting Geer encouraged Grenon to work with Pointer to prepare a detailed plan for the consideration of the Group Board. Neither Grenon nor Pointer referred to the March 3rd letter agreement during the meeting although it was a key document and had been executed by Grenon and Pointer just a few days previously. Although Chase made it clear to Grenon that Group was considering competing offers, neither Grenon nor Pointer raised the question of exclusivity or a right of first refusal.

[92] During the balance of the month of March, Grenon - with technical input from Pointer, and from his tax lawyer Alan Ross (of the firm of Bennett Jones Verchere) - developed a proposal to be presented to Group. The document is unsigned, but is dated March 30th, and is stated to have been prepared for Group by Murray Edwards and Jim Grenon or their nominee (herein "GE"). It has been referred to throughout the trial as "the March 30th Proposal" (Tab 151).

[93] The March 30th proposal is an ambiguous and confused document. It seeks "Group's approval in principle", and acknowledges that: "the precise legal structure can only be resolved after the Bank has agreed on Phase II." The proposal speaks of three "Phases" and acknowledges that "Phase III is not described at all …" It acknowledges that nothing can be accomplished without the co-operation of the Bank of Montreal, and states specifically that "… it is not proposed that any steps for Phase I (the negotiations between Group and Colborne to establish the terms of Colborne's involvement in the restructuring) be effected without first having obtained the approval of the Bank of Montreal for Phase II. It proposes a contribution of $1.5 million capital by GE "on condition that an agreement be reached with the Bank …" It proposes that Group's shares of Petro be redistributed: 50% to GE, 22.5% to Group, 22.5% to the Bank, and 5% to Pointer and Savage. There is no reference in the proposal to the March 3rd letter agreement nor is there any reference to a period of exclusivity or a right of first refusal.

[94] Geer and Chase reviewed the March 30th proposal (which they considered to be only an outline of an idea, or a discussion paper) and agreed to determine what actual value Colborne was placing on Group's shares. Chase passed this on to Pointer and on April 1st, Pointer faxed Chase stating that Colborne would make a cash offer for Group's shares. At the same time, Pointer arranged for Geer and Chase to meet with Grenon on April 7th, in Calgary.

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[95] On April 5th, Grenon faxed a letter to Chase (Tab 158) to the effect that Colborne would be prepared to offer $2.5 million for Group's shares if a satisfactory arrangement could be made with the Bank of Montreal.

[96] Before dealing with Group's response to this, it will be helpful to return to a review of the progress of Stampeder in its negotiations with Group and the Bank of Montreal.

[97] In its letter of March 15th to Group (Tab 139), Stampeder proposed to purchase Group's shares of Petro for $2.25 million cash, and to negotiate with the Bank of Montreal to reduce Petro's debt to the Bank to approximately $30 million, which debt Stampeder would then assume, following which Stampeder would inject $15 million into an infill drilling program on Petro's properties.

[98] A few days after receipt of this offer from Stampeder, Chase told Grenon that Stampeder was aggressively pursuing the acquisition of Petro, and had made an offer to Group which was conditional on Stampeder making an arrangement with the Bank of Montreal.

[99] On March 22nd Tonken, and his counsel Williams, of Bennett Jones Verchere, met with Lewis, Embury and Konigsmann of the Bank of Montreal in Toronto. Tonken advised the Bank of the offers Stampeder had made to Group on March 2nd and March 15th. Tonken felt that by that time he had reached a "soft agreement" with the Bank - through his negotiations with Embury - to purchase the Bank's debt, security and the Bank's 49.9% option on Group's shares, and the purpose of the visit to Toronto was to meet with senior officials of the Bank, on a face to face basis. In addition, because Tonken had been unable to get a response from Chase following Stampeder's March 15th offer to Group, he wanted to discuss with the Bank what could be done to entice Group to sell its shares to Stampeder.

[100] On April 5 th, Tonken spoke again with Chase who arranged for Geer and Chase to meet with Tonken on April 7th (the day planned for Chase's meeting with Grenon) at Stampeder's offices in Calgary. On the day before the meeting, Tonken had made a verbal offer to the Bank of Montreal to pay the sum of $28 million cash for the Bank's debt and option interest in Petro, subject to Stampeder being able to purchase Group's shares. Tonken understood that Embury would recommend the acceptance of the offer. Tonken followed this with a written offer to the Bank in the same terms (Tab 164) dated April 8th. The Bank formally accepted Stampeder's offer on April 27th, and the transaction subsequently closed on that basis, on August 3rd.

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[101] On April 7th Geer and Chase came to Calgary. They met first with Pointer and Savage, then with Tonken and Dickson of Stampeder, and following that with Grenon and Edwards.

[102] At the meeting with Pointer and Savage, both the Colborne and the Stampeder proposals were discussed. Geer told Pointer and Savage that the Bank was keen to do a deal with Stampeder and that it might be difficult to convince the Bank to deal with Colborne. Pointer and Savage were concerned that if the deal with Stampeder went through it would result in a merger and there would be no jobs for them, but that if the Colborne proposal to revitalize Petro materialized, their employment would continue. Both opposed very vehemently any transaction with Stampeder. After hearing from Pointer, Chase thought there was some possibility the Bank might be persuaded to consider a deal with Colborne.

[103] Geer and Chase then met with Tonken and Dickson. Dickson made an unconditional offer of $2 million cash for Group's shares. This was the first offer Group had ever received which was not made conditional on the offeror being able to make an arrangement with the Bank of Montreal relative to Petro's debt. The offer was subject only to due diligence requirements. Chase and Geer were interested, but were concerned that Stampeder might use the due diligence requirement as a means of backing out of its offer to Group, after obtaining Group's commitment, so Geer told Tonken he would get back to Stampeder with respect to its offer.

[104] Geer and Chase then met with Grenon and Edwards. There are differences of interpretation as to what occurred at the meeting. I find the facts to be that Geer and Chase told Grenon that they considered the March 30th proposal to be only a concept, and that they needed more details before a proposal would be considered by the Board of Group. They encouraged Colborne to move as quickly as possible to finalize a plan for Group's consideration, including a definite arrangement for dealing with the Bank of Montreal. They discussed the fact that Stampeder was dealing directly with the Bank. Geer and Chase indicated that they favoured the Colborne approach and left the meeting expecting to receive a more detailed proposal from Colborne. The March 3rd letter was not referred to by Grenon or Edwards, nor did they raise the matter of exclusivity, or a right of first refusal.

[105] The plaintiff Edwards says that he called Geer about two weeks after the April 7th meeting, and that Geer told him Group's approval would be forthcoming. Geer denies that he said that to Edwards. I prefer Geer's testimony on this point, particularly in view of

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the fact that the evidence of Edwards' partner, Grenon, is: "Mr. Edwards told me that he had phoned Mr. Geer … three or four days after the meeting and asked Mr. Geer to confirm that we had the approval and did not obtain that approval from him…"

[106] Sometime between April 5th and May 10th, Grenon arranged for Pointer to sign a document (Tab 443), which broadened the scope of the exclusivity and right of first refusal rights referred to in the March 3rd letter agreement. Pointer signed it without consultation with Chase, or Savage, or his Board of Directors, and he did not reveal the document to Group, despite the fact that he knew of Group's ongoing discussions with Stampeder, and the apparent preference of the Bank of Montreal to deal with Stampeder. The document is, surprisingly, undated. I am not prepared to make a finding as to when it was signed, other than to say it was prepared by Grenon and signed by Pointer at a time when Grenon thought he wanted it. The reasons given by Grenon for the creation of this document are incomprehensible and I am suspicious as to why and when this document came into existence other that to suit Grenon's purpose, which was to create a weapon to ensure that Colborne, and not Stampeder, ended up acquiring Group's interest in Petro.

[107] There were at least two reasons why Stampeder was having difficulty obtaining a definite response from Group to its March 15th offer. One was that Group was considering its position with respect to the Colborne offer which it preferred at that point, and the other was that Group was not prepared to make a deal with anyone (which would involve the Bank of Montreal) unless it reached an agreement with the Bank to recover the Preferred C shares of Westar Industries, which the Bank held as security for Group's indebtedness to the Bank in the sum of $27 million.

[108] I do not agree with the plaintiffs' suggestion that Group "sacrificed" Petro in order to recover these shares. Group had been negotiating with the Bank for the return of the shares ever since the bankruptcy of Westar Mining Ltd., in September, 1992. The Bank convened a meeting on January 12th 1993, to discuss a number of matters which remained outstanding from the bankruptcy. Chase attended on behalf of Group. One of the items discussed was the matter of the Preferred C shares. Chase expressed the view that the shares were valueless and that Group would like them returned as they were an impediment to an easy reorganization of Group. The Bank officials appeared to agree with Chase as to the value of the shares, but were not ready to give them up. The Bank had not forgiven Group for the enormous loss it sustained when Westar Mining Ltd. went bankrupt, and was not about to do Group any favours. Despite this Chase thought he saw a small

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window of co-operation developing with the Bank. In a memorandum to file (Ex. 128) Chase noted that continued cultivation of the relationship with the Bank would be required.

[109] On April 9th, Pointer received a phone call from Greg Wood of the Bank of Montreal asking for the Fairies Engineering reports on Petro's oil and gas reserves. Wood disclosed to Pointer that the reports were required to enable the Bank to assess an offer which the Bank had received from Stampeder. Pointer passed this information on to Chase. This was the first time either Chase or Pointer knew that Stampeder was dealing directly with the Bank and that the Bank was seriously considering the acceptance of Stampeder's offer.

[110] On April 12th, Chase had a meeting with Geer, where they discussed a number of items, including the matter of the Preferred C shares. Geer urged Chase to endeavour to bring the matter of the recovery of the shares to a conclusion. Geer was prepared to have Group pay cash to the Bank for the shares but he did not want the Bank to have any continuing involvement in the affairs of Group. Chase telephoned Horton of the Bank in Toronto, and a meeting was arranged for April 15th.

[111] During the course of the April 15th meeting, various officials of the Bank were called into Horton's office depending on the subject being discussed. On the subject of Petro, Embury told Chase that the Bank was considering an offer from Stampeder for its debt and option position, for a sum (which Chase gathered) was between $24 million and $30 million. Chase understood that if the offer was accepted, the Bank would be financing Stampeder's purchase prior to Stampeder going to the equity market. Chase told the Bank about Stampeder's offer to purchase Group's shares of Petro for $2 million. Embury was not happy with that because he considered that anything that went to Group for its shares of Petro (which were of negligible value) was really coming out of what the Bank would receive for its debt.

[112] Chase told Horton and Embury that although Group was considering the offer from Stampeder, it preferred the proposal made by Colborne. Chase explained the Colborne concept, and expressed the opinion that it was at least equal to the Stampeder offer, with an additional upside for the Bank, because the Bank would continue to hold shares of Petro which might go up in value after a re-organization. He urged the Bank to consider a presentation from Colborne. Horton indicated that the Bank was still evaluating the Stampeder offer, and that he would think about the Colborne concept.

[113] When it appeared to Chase that the Bank was seriously considering selling its debt and security interest in Petro (which from a practical standpoint could not readily be

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done without Group's co-operation), Chase suggested to the Bank the possibility of making the return of the Preferred C shares a condition of Group selling its shares to anyone. There was no immediate response to this suggestion and Chase was informed that the Bank was in the process of obtaining an independent evaluation of the Preferred C shares. Horton told Chase the Bank would get back to him on the various issues discussed at the April 15th meeting, during the following week.

[114] Chase called Horton on April 21st, and learned that Embury was recommending acceptance of the Stampeder offer to the senior officials of the Bank. Embury told Chase that the Stampeder offer required the purchase of Group's shares, and sought Group's co-operation. Chase indicated that if the Bank wanted Group's co-operation, Group would like some co-operation from the Bank on the Preferred C shares issue.

[115] Chase reported to Pointer and Grenon what had occurred at his meeting with the Bank, and told them that Stampeder had made an offer to the Bank in the $24 million to $30 million range. Grenon's response was that this information would allow Colborne to make a competitive offer to the Bank. Chase encouraged Grenon to make a definitive offer to Group and to the Bank. Chase made reference to the fact that Group was looking to the Bank for accommodation on another issue, by which he meant, without specifically identifying it, the issue of the Preferred C shares. Chase hoped that by holding off the Bank on the Preferred C issue, he could achieve an opportunity for Grenon to sell the Bank on the Colborne concept, and come up with a specific proposal that Group could consider.

[116] On April 27th, the Bank wrote to Pointer, with a copy to Chase, advising that it had accepted an offer from Stampeder for the Bank's debt and equity interest in Petro (Tab 175). The Bank had in fact accepted Stampeder's offer of $28 million cash on that day. In its letter to Chase, the Bank stated that it considered the issue of the Preferred C shares to be separate from the sale of Group's shares in Petro, but that the Bank was prepared to consider the Preferred C issue in due course, and stated that: "… it is in the best interest of Westar Group to fully examine the sale of Westar Petro to Stampeder Exploration Ltd."

[117] Geer and Chase were indignant about the Bank accepting the Stampeder offer without Group's consent, and resented the tone of the Bank's letter. Chase discussed the letters with Pointer.

[118] On April 28th, Pointer reported to Chase that Tonken had advised him that in order to finance the $28 million purchase of the Bank's interest, Stampeder intended to

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raise funds on the equity market, and that this would take about six to eight weeks to accomplish. I think it a fair inference that Pointer conveyed the same information to Grenon.

[119] On April 29th, the Bank of Montreal convened a meeting to discuss some 20 items remaining outstanding from the Westar Mining Ltd. bankruptcy. During the course of the meeting, Chase raised the matter of the Preferred C shares, and was informed that the Bank had engaged Ernst & Young to value the shares. The Bank gave Chase a list of additional information required by Ernst & Young in order to complete its evaluation. The Bank was not prepared to accept Group's attempt to tie the Preferred C shares issue to the Bank's desire to sell its Petro loan to Stampeder, and instead wanted to know how much Group would pay the Bank for the return of the shares. Nothing further developed at that time (Ex. 131).

[120] There was a further meeting with the Bank on May 13th, with respect to the Preferred C shares. The Bank was still upset about Group's suggestion that the sale of its Petro shares to anyone be tied to the return of the Preferred C shares. Chase asked why the Bank would not consider the plan proposed by Colborne, and continued to take the position that any transaction which involved dealing with Group's shares would be tied to the return of the Preferred C shares. Chase told the Bank that Group wouldn't consider selling its shares of Petro to anybody, "Stampeder, Colborne, or the man-in-the-moon", unless the Bank dealt with the Preferred C shares issue. The Bank indicated it would check Grenon's and Edwards' credentials and would see whether its commitment to Stampeder precluded their consideration of a Colborne proposal.

[121] Chase's memo of what took place at the May 13th meeting (Tab 192) records the fact that: "… we have two players competing for our interest in Westar Pete …" and the fact that: "The Colborne deal with Pete and the Bank is potentially much better for us", and concluded with the statement that:

> Current action by Westar (Group) includes:
> – Keeping both Colborne and Stampeder interested in doing a deal with Pete.
> – Assisting Colborne to get a foot in the door with the Bank.
> Current action by the Bank includes:
> – Consideration of whether Colborne will be allowed to pitch them.
> – Review of information provided relative to value of Industries.
> – An analysis of options available to them if we persist in our position of tying a Pete deal to a WIL deal.

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[122] Chase kept Grenon aware of the fact that he was seeking an accommodation from the Bank. Grenon did not know the details of the accommodation, but Grenon's position was that the longer the accommodation issue remained unresolved, the longer Colborne would have to complete arrangements he was attempting to make with Trocana, a company with whom Grenon hoped to merge Petro. Chase emphasized to Grenon that it was the Bank that controlled the timetable, not Group, and told him that as soon as the Bank made up its mind on the accommodation issue, Group was going to have to move very quickly. He emphasized to Grenon that it was the Bank that would make the final decision between Stampeder and Colborne.

[123] The standoff between Group and the Bank with respect to the Preferred C shares issue (and hence the completion of any sale of the Bank's interest in Petro) continued throughout the month of May and into the month of June.

[124] As of June 8th, Stampeder was urging Group to accept its offer, and the Bank was still working on its valuation of the Preferred C shares. Grenon advised Chase that Colborne still needed two to three weeks to put a competing offer forward to the Bank, and he asked Chase to continue to stall the Stampeder deal. Chase again reminded Grenon that Group was not the stalling party and told him that as soon as the Bank made an arrangement with Group for the return of the Preferred C shares, Group would consider the Stampeder offer (Tab 208). It is worth recalling at this point, that the Bank had heard nothing at all from Colborne since the meeting with Grenon and Pointer on February 9th.

[125] When the Bank finally received its independent opinion as to the value of the Preferred C shares, Brannan, on behalf of the Bank, and Chase began negotiating a cash deal for the return of the Preferred C shares to Group, and ultimately, on June 18th, they agreed upon a figure of $500,000.

[126] Chase took the position with the Bank officials that the return of the Preferred C shares would have to be unconditional, irrevocable, and not dependent on the Bank completing the sale of its interest in Petro. He brought this to the attention of the Bank. On July 7th Embury confirmed that the Bank would agree to return the Preferred C shares on that basis.

[127] Despite this assurance from the Bank, Chase did not consider the Preferred C issue closed until he heard from Group's solicitor, Smith, on July 19th, that all matters had been agreed upon with the Bank's solicitor.

[128] I return now to a consideration of the events relative to the Colborne proposal following the April 7th meeting in Calgary between Chase, Geer, and Grenon.

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[129] On May 10th, Grenon telephoned Chase to the effect that he needed approval from Group so that he could approach a Phase III candidate. After Chase spoke with Geer, he phoned back and told Grenon, "you have our approval." Grenon said he would like to follow that up with a letter and he did so. The letter was faxed to Chase, signed by him and returned to Grenon. This document has come to be known as the May 10th letter (Tab 186).

[130] The plaintiffs' contention is that this letter, coupled with the March 3rd letter, and the March 30th proposal, combine to entitle Colborne to a right of first refusal agreement in favour of the plaintiffs, which would allow Colborne the right to meet any competing offer for Group's shares. The thrust of the plaintiffs' submission is that the May 10th letter constituted the approval of Group to the Colborne proposal of March 30th, which "triggered" the right of first refusal rights referred to in the March 3rd letter agreement between Colborne and Petro. In my view the plaintiffs' position is not supported either by the evidence or an interpretation of the documents.

[131] The circumstances giving rise to the May 10th letter were that Chase had been pressing Pointer and Grenon to produce a definitive plan for consideration first by the management committee of Group and then, if the plan passed the management committee test, by the Board of Group. In particular, Chase had been pressing Grenon to develop a definite approach to the Bank of Montreal, whose concurrence would be required before any plan could proceed. Chase wanted a specific and detailed proposal from Grenon because he was endeavouring to have the Bank consider Colborne's plan despite the Bank's apparent intention to deal with Stampeder. On May 10th, Grenon told Chase that he would have to talk with an unidentified Phase III (takeover) candidate in order to develop a definite position. He said he wanted something in writing from Group to show such a candidate that Group was interested in dealing with Colborne. Chase agreed to sign a letter for that purpose, which Grenon said he would prepare.

[132] Grenon faxed a draft to Chase. Chase discussed it with Geer. Chase requested alterations in paras. i and iii. Grenon made the changes and the letter was signed by Chase and returned to Grenon on May 12th. The change to para. i removed a reference to Colborne dealing direct with Stampeder. The change to para. iii involved adding the words: "… provided that this restriction shall not apply in respect of a party with which Petro or Group is currently in active discussion with respect to a Restructuring."

[133] The May 10th letter referred to Grenon's discussions with Chase and the fact that Colborne was involved in negotiations "which may allow us to generate an offer for the

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Bank's position in Petro. We are hopeful that the offer will appeal to the Bank more than the current proposal that is in front of it (by which Grenon meant Stampeder) and that it will also be more attractive to Group." In the third paragraph the letter states: "However, with the alternative proposal currently in front of the Bank we are probably going to need much more of a final solution to get the Bank's approval". On p. 2, para. ii, Grenon says: "To the extent that Group or Petro does approve of any transactions that we may propose …" and in para. iii, "If Group or Petro does not approve of a transaction proposed by GE…"

[134] Given this language, and no matter what the balance of the letter may or may not say, it is difficult to comprehend how the plaintiffs can honestly have believed that Chase's signature on that letter constituted the approval by Group to a restructuring plan as referred to in the March 3rd letter agreement, or at all.

[135] Grenon knew that approval by Group meant approval by the Group Board of Directors. He knew further that no Colborne plan would ever get to the Group Board until he had satisfied Chase and Geer that Colborne had a plan that would satisfy the Bank of Montreal. Grenon knew that Colborne had made no approach whatsoever to the Bank since the conversation on February 9th.

[136] Chase was not aware of the March 3rd letter agreement and it was not referred to either in Grenon's conversation with Chase seeking the May 10th letter, nor in his conversations with Chase about the changes to para. iii, nor was it referred to at all in the May 10th letter which Grenon drafted and asked Chase to sign.

[137] If Grenon honestly expected that the May 10th letter was to constitute the approval of Group to the Colborne proposal, then he deceived Chase as to the purposes for which he was seeking the letter.

[138] From Chase's point of view, it is improbable that he would purport to execute an agreement approving a proposal from Colborne given the state of Group's negotiations with the Bank, and with Stampeder, at that point in time.

[139] I have referred to the fact that Chase faxed the May 10th letter to Geer who agreed that it should be signed. Geer's understanding was that the letter would allow Colborne to meet with a third party, and thereby expedite Colborne's efforts to present a definite proposal to Group. This was especially necessary because Chase had arranged to meet with officials of the Bank of Montreal in Toronto on May 13th, to discuss a number of issues, one of which was trying to get the Bank to listen to a proposal from Colborne.

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[140] I am firmly of the view, based upon my interpretation of the document referred to, and the facts surrounding its creation, that the May 10th letter did not constitute Group's approval of a Colborne proposal for the restructuring of Petro as referred to in the March 3rd letter agreement, or at all. I am also of the view that Grenon knew that to be the case.

[141] A demonstration of this is a letter which Grenon wrote to Chase and Geer as late as June 4th, in which he states in part: "We will hopefully have a tentative proposal within two weeks, before which we will provide details of Target's asset base to Petro staff for their review." In Chase's memorandum to file dated June 8th, he records the fact that: "Colborne Capital (Jim Grenon) Need 2 to 3 weeks to put a competing offer forward to the Bank."

[142] I also note that despite the plaintiffs' attempt to portray the May 10th letter as a key document, neither Grenon nor Chase sent a copy to Pointer, or mentioned it to him, nor did Grenon proceed with the preparation of the right of first refusal, which under the March 3rd letter he was to be entitled to once Group approval was obtained. In fact, Pointer was unaware of the existence of the May 10th letter until June 29th when Grenon brought it to his attention for the first time.

[143] The day after Grenon received the May 10th letter, he met with John Halliwell, the President of Trocana, a wholly-owned subsidiary of Petro-Canada, and members of his staff (Sanders and Cheung) to explore details of a merger of Trocana with Petro. While Grenon had proposed to Group that Colborne would invest $1.5 million in Petro, in exchange for an equity position, so as to revitalize Petro, Grenon in fact intended to broker a merger of Petro with Trocana, which was interested in Petro's tax losses and resource pools, on such a basis that Trocana would put up the required funds, merge with Petro so as to acquire Petro's tax attributes, sell off the bulk of Petro's physical assets to pay the Bank, and provide Colborne with a substantial equity position in a merged company without Colborne investing anything other than Grenon's time.

[144] The attraction to Trocana was that it had projected oil and gas revenues of $40 million per year but no offsetting tax losses or resource pools. If it could get access to Petro's losses and pools by a merger, it could offset its taxable revenue for several years and thereby greatly enhance the market value of the merged company. Trocana was not interested in Petro's oil and gas properties, or other tangible assets, and planned to sell off 80% of them, if a deal was struck.

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[145] It is true as well that Grenon's hopes were that Group, in exchange for its shares in Petro, would also have an equity in the merged company, and significantly, that Pointer and Savage would also end up with an equity position which, on the basis that Grenon was touting the deal, would have given Pointer an equity worth $650,000, with a considerable upside if the merged company was taken public and the market response was favourable. This potential for personal profit if the Colborne plan went ahead was well known to Pointer.

[146] Grenon's proposal to Trocana was that Group, Colborne and Petro management (Pointer and Savage) would together receive a 6.25% to 6.5% interest in the merged company which Grenon projected would have a value of $200 million. This would produce an equity interest worth $13 million (6.5% of $200 million), to be shared on the basis of 50% to Colborne, and 50% to Group, out of which Group would pay 10% to Pointer and Savage. Other variations of this proposed division were discussed, including Pointer's insistence that he and Savage should receive 10% of the projected $13 million, or $1.3 million, to be shared equally between them (Tab 223). The precise division was never resolved.

[147] Grenon's statement, in a letter which he wrote to Trocana on May 18th, is a revealing commentary as to the style of his negotiations up to that point. He says in para. 3: "Since GE has committed substantial effort and resources into manoeuvring Petro into a position where we believe a deal can be done …"

[148] Colborne's proposal to Trocana was highly speculative in that: (1) it required the approval of the management committee and the Board of Directors of Group, which had not been obtained; (2) it required an arrangement with the Bank of Montreal which had not yet been approached; (3) the Bank had, to Grenon's knowledge, agreed to accept an offer from Stampeder on April 27th, and notified Tonken, Pointer and Chase to that effect; (3) it required the approval of Trocana, which was never obtained; (4) it required the approval of the Board of Directors of Petro-Canada, which was never obtained; (5) it depended upon the merged company being able to use Petro's tax losses and resource pool to offset revenue, after selling off 80% of Petro's assets, which was a doubtful proposition which would have to meet the requirements of the *Income Tax Act*, as to which there was considerable risk.

[149] Colborne's negotiations with Trocana continued during the month of May and June and into July. Grenon's intention was to try and get a commitment from Trocana before approaching the Bank, so that Colborne would not have to put up any money.

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[150] By about mid June, Grenon and Edwards, who were aware of the fact that Stampeder appeared to have the Bank tied up, began thinking about, and discussing with Halliwell of Trocana, the possibility of persuading Stampeder to purchase 85% of Petro's tangible assets. This would leave Petro's tax losses and pools for the Petro/Trocana merger; provide the funds to pay off the Bank; and resolve Grenon's concern that Stampeder had reached an arrangement with the Bank which might result in destroying Colborne's hopes for a profit of $6.5 million. From this point forward both Grenon and Edwards wanted to "cut a deal" with Stampeder.

[151] I return briefly to review the state of Stampeder's negotiations with the Bank and with Group.

[152] The Bank of Montreal accepted Stampeder's offer of $28 million cash, for the Bank's interest in Petro, on April 27th. The terms of the acceptance required Stampeder to provide the Bank with a deposit of $1 million (50% non-refundable) within 10 days of April 27th, and Stampeder was given until May 11th, to confirm that the terms were acceptable.

[153] When Stampeder's offer was accepted by the Bank on April 27th, Tonken arranged to obtain tax advice on the proposed transaction from Alan Ross, of Bennett Jones Verchere. A meeting was arranged for April 30th. It will be remembered that Ross had previously given Grenon tax advice with respect to Colborne's interest in acquiring an equity holding in Petro. The plaintiffs submit that Ross revealed to Stampeder confidential information which he had received from his client Grenon. That claim is dealt with herein, under a separate heading entitled: "The Plaintiffs' Claim v. Williams and Stampeder/Ricinus for Breach of Confidence."

[154] Very little transpired, insofar as Stampeder was concerned, from April 30th until Group reached its understanding with the Bank of Montreal with respect to the Preferred C shares on June 19th. On June 21st, Stampeder paid the sum of $500,000 to the Bank as a deposit on its purchase of the Bank's interest in Petro. Although the deposit was to be non-refundable with respect to the arrangement between Stampeder and the Bank, it was to be refunded if Stampeder was unable to purchase Group's shares.

[155] On the same day, June 21st, Pointer called Chase to describe the plan which Grenon was endeavouring to arrange with Trocana. He indicated Grenon wanted to talk with Stampeder to make a deal to sell Petro's assets to Stampeder, and he told Chase that Colborne was suggesting that it had some sort of a right of first refusal. Chase asked Pointer to look into this suggestion. I accept as a fact Chase's evidence that the first

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reference he heard to Colborne claiming a right of first refusal was when this discussion took place with Pointer in their telephone conversation on June 21st.

[156] I find this to be the case despite the plaintiffs' efforts to discredit the evidence of Chase through references to a previous statement at examination for discovery, and by calling the evidence of Leslie Peace, a handwriting expert, who gave opinion evidence with respect to an entry made by Chase in his diary (Ex. 130) with respect to Pointer's telephone call of June 21st. I reject Peace's opinion. His opinion was, to a significant extent, based upon infra-red photographs taken for him by Paul Birnie. In my view, Birnie was not sufficiently experienced in the field of infrared photography, to take, expose and print photographs of sufficient reliability to permit Peace to make the type of subtle examination required to support his opinion. Birnie did not follow the instructions that were given to him as to how the photos should be taken or exposed and printed and he did not use the copy stand recommended for this type of work. Furthermore I am satisfied that neither Peace, nor anyone else, could arrive at the conclusions he expressed, on the basis of what he observed. In short, I was not at all impressed with Peace's evidence, and I am not prepared to accept his opinion that the entries he examined in Chase's note book (Ex. 130) were made with a different writing instrument. Even if they were, I find that the impugned entries were validly made by Chase at the times he says they were.

[157] Tonken was having numerous phone calls with Chase but getting nowhere. Chase was encouraging Tonken to meet with Colborne to see if an arrangement could be made between them because Chase felt that the Colborne offer was better for Group than the Stampeder offer. Tonken refused to deal with Colborne and repeated to Chase that his information was that the Bank would not permit any transaction in which Group would receive more that $2 million for its shares. In order to try and break the log jam, Tonken arranged for a meeting in Calgary, on June 29th, between officials of the Bank, Group, and Stampeder. Lewis and Embury attended for the Bank. Lewis had specific instructions not to allow any transaction where Group would receive more than $2 million for its shares.

[158] During the course of the June 29th meeting, three positions evolved: Chase wanted the Bank to consider the Colborne plan, and was adamant that Group would not make a disposition of its shares to anyone without absolute assurance that it would recover the Preferred C shares from the Bank for $500,000, on an unconditional basis. Chase also was not prepared to take a chance on Stampeder's ability to raise funds on the equity market and took the position that any transaction Group might agree to with Stampeder would have to be on a cash for shares basis. Tonken was anxious to purchase

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Group's shares and get on with its public financing while the junior oil market was still hot. The Bank was committed to a deal with Stampeder and adamant that it would not allow any transaction to take place that would result in Group getting more than $2 million for its shares. Compromises were discussed and Chase appeared to be about ready (without making a commitment) to recommend to the Board of Directors of Group that the company sell its shares to Stampeder. Chase agreed to bring Pointer to a meeting that afternoon to provide further technical information to Stampeder.

[159] Chase then left the meeting with Stampeder and the Bank, and met with Pointer and Savage. They were disappointed to learn that a deal with Stampeder was a distinct possibility. They were of the view that they had a better opportunity to continue operating the company under the Colborne plan. Chase asked Pointer if he had learned anything more about Grenon's assertion that Colborne had a right of first refusal. Pointer mentioned the March 3rd letter to Chase for the first time, but said it was just a letter that laid out the working relationship between the parties. Chase asked Pointer to send him a copy of the March 3rd letter to him in Vancouver, which Pointer did on June 30th.

[160] Later in the afternoon of the same day (June 29th), Chase brought Pointer to meet with Lewis and Embury in an effort to persuade the Bank to consider a proposal from Colborne, but the Bank officials simply reiterated their position that the Bank would not agree to any transaction that would result in Group getting more than $2 million for its shares. Furthermore, Lewis pointed out that Colborne had not made an offer, and that the Bank was, in any event, committed to deal with Stampeder.

[161] During the course of the afternoon of June 29th, Chase and Pointer met with Tonken and Brockway, and Pointer provided detailed information with respect to tax losses and resource pools, infill drilling programs, and other technical information which Stampeder required about Petro. Tonken recognized that Chase had not made any commitment to Stampeder with respect to the sale of Group's shares to Stampeder at that point.

[162] There was no discussion at the meetings with Stampeder and the officials of the Bank, on June 29th, about any right of first refusal, nor did Pointer at any time raise the March 3rd letter agreement with Chase, Stampeder or the Bank as something that might prevent Group from completing a sale of its shares to Stampeder, if it should decide to do so.

[163] Later in the day on June 29th, Chase and Pointer met with Grenon, and described to him what had taken place at the meeting with Stampeder and the Bank

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officials, including the fact that the Bank was refusing to consider an offer from Colborne. Chase, Pointer and Grenon discussed how they might persuade the Bank to change its mind and agreed that Colborne should send a written offer to the Bank.

[164] On the following day, Pointer telephoned Grenon to encourage him to send an offer to the Bank quickly. Grenon responded by saying: "Why should I hurry, I'll just rely on the right of first refusal," and referred to the March 3rd letter agreement, claiming that a right of first refusal had been created when Chase signed the May 10th letter. Pointer asked Grenon to send him a copy of the May 10th letter, which he did. Pointer's evidence is that when he read the May 10th letter he concluded that Colborne was entitled to a right of first refusal under the terms of the March 3rd letter agreement. Pointer telephoned to discuss this with Chase. Chase asked Pointer again to send him a copy of the March 3rd letter, which Pointer did on June 30th.

[165] I am satisfied that from this point forward, Pointer saw the possibility of relying on Grenon's claim to a right of first refusal as an opportunity to advance his own interests. Thereafter, Pointer was prepared to, and did sign in Petro's name, anything suggested by Grenon that might advance the Colborne proposal and defeat Stampeder's endeavours to close its deal with the Bank, and purchase Group's share.

[166] It was apparent to Grenon, when he met with Pointer and Chase on June 29th, that Chase was under very great pressure from the Bank to conclude a deal with Stampeder. Grenon telephoned Edwards after the meeting, and on the following morning Edwards telephoned Tonken to suggest that Stampeder, Colborne, and Group make a deal, under which Stampeder would acquire the oil and gas properties of Petro, and Colborne would acquire the tax attributes. Tonken said that Stampeder preferred to do the deal on its own. I accept Tonken's evidence that Edwards made no reference to any alleged rights of first refusal in his conversation with Tonken. Edwards reported the results of the conversation to Grenon, and told Grenon to deal with it.

[167] On the afternoon of June 30th, Grenon faxed a letter to Tonken (Tab 243) proposing an arrangement under which Stampeder would acquire most of the resource properties of Petro, and Colborne receive most of the tax deductions. In the letter, Grenon said, in part: "If we do not come to such an agreement, it is my belief that there is a significant risk that the acquisition will get more expensive for the successful party, whomever that may be." Grenon also stated: "You may not be aware of this, but we have been granted a right of first refusal to effect any restructuring that Group/Petro wishes to enter. Certainly we would exercise that right of first refusal for the transaction you currently

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propose." I accept Tonken's evidence that this was the first he had heard about an alleged right of first refusal.

[168] Tonken responded, requesting a copy of the right of first refusal, but on July 1st, Grenon replied stating in part: "We are not prepared to provide the details of our right of first refusal." Stampeder continued its negotiations with Group.

[169] On June 30th, Grenon had contacted Alan Ross, of Bennett Jones Verchere, who arranged for Grenon to meet with Yorke-Slader, a litigation lawyer in that firm. Yorke-Slader examined the March 3rd letter, the March 30th proposal, the May 10th letter and other correspondence and discussed the circumstances with Grenon. Yorke-Slader told Grenon that the documents did not justify an application for an interim injunction.

[170] Following his meeting with Yorke-Slader, Grenon prepared, and had Pointer sign, a letter (Tab 255), which stated that the May 10th letter "… constitutes the approval of Group to the Restructuring plan presented to Group by Colborne as required by the March 3, 1993 letter to Westar Petro Ltd. from Colborne, such that certain terms and conditions that commence to operate on such approval are now in effect." Pointer signed the letter without consulting either Group, or the Board of Directors of Petro.

[171] In my view, the creation of this letter, and its execution by Pointer on July 2nd, was a major step in a plan of deception devised by Grenon and Pointer, to force Stampeder into a position where it would make a deal to turn over the Petro tax losses and pools to Colborne.

[172] On July 2nd, Grenon also wrote to Chase asserting a right of first refusal. Grenon wrote in part:

> To the extent anyone attempts to conclude a restructuring without regard to our right of first refusal, we will be seeking an injunction, launching a lawsuit, etc. I can only speculate how the Bank and the potential money raisers for Stampeder might react to this. Even a relatively short delay, which is about the worst we can expect to achieve, may see the currently over-heated equity markets cool to the extent that Stampeder can't raise the money it needs.

[173] This letter forecasts precisely the course of action the plaintiffs followed and discloses as well their true motives in launching a lawsuit, that is to make it difficult for Stampeder to raise the money it required on the equity market.

[174] Chase replied to the letter, denying the existence of a right of first refusal.

[175] On July 2nd, Colborne also, for the first time, made an offer to the Bank of Montreal offering to pay the Bank 28 M for the Bank's interest in Petro. The Bank replied stating: "We note your offer expires July 30/93".

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[176] On July 5th, Grenon met with Geer and Chase in Vancouver. Geer demanded that Grenon retract the assertion that Colborne had a right of first refusal, and that he do so formally, and in writing. Grenon agreed to do so, and wrote a letter of retraction to Group on the following day (Tab 264). Geer told Grenon that Group was still waiting for a definitive proposal from Colborne that could be considered by the Group Board. On July 7th, Grenon wrote to Group referring to a cash offer for Group's shares, but stating that it was subject to the condition that "… this is not a binding offer." Geer considered the revised offer vague and unspecific and not something that he could take to his Board and Chase communicated this to Grenon by telephone on July 8th.

[177] On July 10th, Grenon, following a suggestion made by Yorke-Slader, prepared what became the first of many versions of a "Statement of Facts" which Grenon drafted and Pointer signed. Each draft referred to "the attached right of first refusal" although there was no such document either attached or in existence. The first draft of the "Statement of Facts" signed by Pointer (Tab 278) had in it a final sentence, in which Pointer said (with reference to a right of first refusal agreement): "… I do not feel I should execute such agreement without the approval of Group, which approval I am sure will not be forthcoming." When Yorke-Slader saw this "Statement of Facts", he suggested to Grenon that the words I have quoted above be removed, and they were.

[178] Yorke-Slader also suggested that a right of first refusal document be prepared and suggested that Grenon contact Bruce Libin, a member of the Bennett Jones Verchere firm, for assistance. Grenon met with Libin on July 12th, and thereafter they worked together almost daily to create documents, which Pointer willingly signed, designed to force Stampeder into a position where it would have to make an arrangement with Colborne. All of this was done secretly by Grenon, Libin and Pointer, without the knowledge of Chase or Geer, or the Board of Directors of Petro.

[179] A new "Statement of Facts" was prepared by Grenon, deleting the final words I have referred to, and it too was signed by Pointer. Later a third version was signed by Pointer. When Libin first saw it he asked Grenon if he had offered Pointer anything to sign it, because it seemed to him that Pointer was "acting against the wishes of his corporate bosses". Grenon said he had not but that Pointer knew that if the Stampeder deal went through, Pointer would lose his job.

[180] Libin's notes of his first meeting with Grenon on July 12th, disclose what Grenon was intending to achieve. Grenon wanted Libin to create a right of refusal document between Petro and Colborne that would be broad enough to encompass everyone (Petro,

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542, Group and Stampeder), and everything (any transaction in Group's shares), and he wanted it to be a tough agreement. He wanted provisions that would prevent the agreement from being disclosed to Stampeder or to Group or to the Bank or to the other directors of Petro. He wanted an agreement that would be a "poison pill" to anyone other than Colborne. He wanted the agreement to "demonstrate" that Group had approved Colborne's proposal.

[181] Libin recognized that the right of first refusal document he and Grenon drafted for Pointer's signature went beyond anything referred to in the March 3rd letter (which spoke only of a right to match a restructuring offer), in that the right of first refusal agreement was drafted so as to have application to a sale of Group's shares.

[182] Libin had never before, in his considerable corporate experience, drafted a document to be signed by the director of a corporation, where the director was prohibited from revealing the document to his corporation, or to his fellow directors, but he did so on this occasion.

[183] In addition, Libin's notes of his discussions with Grenon (Tab 279) reveal that Grenon's view was that: "we have enough to screw the Stampeder deal", and that the idea should be to "build the arsenal, then negotiate", with Stampeder.

[184] Several versions of a right of first refusal agreement between Petro and Colborne were prepared by Libin and massaged by Grenon. In an early draft the concept that Colborne would make a contribution of capital to Petro and that the purpose of the restructuring should be the rejuvenation of Petro (as per the March 3rd letter) was included, but these references were subsequently removed by Grenon, and did not find their way into the final draft. A provision was added which would render Petro liable to Colborne in the sum of $17 million as liquidated damages. Although the right of first refusal agreement was between Colborne and Petro, it was drafted in such a way that a breach could occur, by the actions of Group, Stampeder, or the Bank, parties over whom Petro had no control.

[185] While this drafting was going on, Grenon was attempting to negotiate a transaction with Trocana which would have seen Petro merged with Trocana, and the oil and gas assets of Petro sold off.

[186] On Libin's suggestion, Pointer sought the advice of Reid, a lawyer with whom Pointer had worked closely, as to his position in signing such a document. Reid advised him strongly not to sign it, but Pointer ignored Reid's advice, and persisted in signing the

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document. He also ignored Reid's advice to the effect that if Pointer insisted on signing it, the document should be authorized by a resolution of the Petro Board of Directors.

[187] While these statements and documents were in the process of preparation, Grenon had a discussion with Chase in which Chase suggested that Colborne should increase its offer to the Bank, and on July 14th Grenon sent two offers to the Bank of Montreal (Tab 288). The one increased Colborne's July 2nd offer of $28 million to $29 million, and the other was an offer to pay the Bank $500,000 for the release of "the accommodation" (the Preferred C shares) to Group. The Bank replied on the following day stating that it was unable to consider the offers at this time.

[188] Grenon at no time revealed to Chase or to the Bank the fact that he, Pointer and Libin were in the process of preparing the right of first refusal and unanimous shareholder documents I have referred to.

[189] Ultimately, on July 21st, three copies of the right of first refusal agreement (Tab 276) were prepared, and each was signed by Pointer as an original. One bore the date May 10th (which was totally misleading), one bore the date July 21st and a third was left undated, to be filled in with whatever date should later prove to be most useful from Colborne's standpoint.

[190] A further document was prepared by Grenon and signed by Pointer on July 21st. It purports to be a letter agreement between Petro and Colborne to the effect that if the Colborne proposal cannot be completed "… because of the failure of the Bank to cooperate and provided that no other Proposal is completed, then Westar Petro Ltd. shall not be liable to any damages which would otherwise arise from such noncompletion."

[191] On July 22nd, Grenon prepared and had Pointer sign a document purporting to be a resolution of the Board of Directors of 542 (Tab 311). The document purports to give Pointer, among other things, the widest possible powers to enter into agreements with Colborne. This document was prepared by Grenon, in his office (without the knowledge of Libin), signed on July 22nd, although stated to refer to a one-man meeting of Pointer on July 14th (which I believe to be a fiction), and was not revealed to Libin, or to Group, or to the directors of Petro. Pointer well knew that the directors of 542 were in fact, if not in form, the same as the directors of Petro, namely: Chase, Savage and Pointer.

[192] On July 25th, Grenon gave instructions to Libin to draft a unanimous shareholders agreement between 542 and Colborne. Libin doubted that Pointer would sign such an agreement but Grenon assured him Pointer would. Libin drafted a unanimous shareholders agreement and a resolution of 542 purporting to authorize "any director" to

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execute it. Pointer signed the resolution on July 27th, as "the sole director of 542" and purported to sign the unanimous shareholders agreement on behalf of 542 (Tab 321).

[193] The unanimous shareholders document purported to prohibit Petro from furthering any proposal (a term so defined as to be wide enough to include a sale of Group's shares to Stampeder) without the consent of Colborne, and to give Colborne the right to appoint one of two directors of Petro so as to stalemate the Board. The USA contained a paragraph prohibiting the disclosure of the document "to any person, including the directors, officers, employees, agents, financial or professional advisors and legal counsel and advisors to the shareholders of Petro". The document is replete with conditions which purport to affect "the shareholders of Petro" which, of course, was Group, the sole shareholder of 542. The agreement and resolution were signed on July 27th, but Grenon had three originals signed, one as of May 10th, one as of July 24th and one with the date blank. All three were signed as originals by Pointer.

[194] The various statements of fact, rights of first refusal, unanimous shareholder agreement and accompanying resolutions, were all prepared and kept secret by Grenon and Pointer. Pointer at no time consulted with Chase or Geer or with the Bank of Montreal, nor did he ever call a meeting of the Petro Board of Directors nor the 542 Board of Directors.

[195] I am firmly of the view that these were not agreements or resolutions in any true sense, that is, the honest recording of genuine agreements between the parties, nor were the resolutions the honest expression of corporate intent. Rather, they were concoctions falsely created by Grenon and Pointer in a benighted and devious effort to force Stampeder to deal with Colborne on Grenon's terms. The documents were not to be revealed to Stampeder until it had completed its purchase of Group's shares, at which point Grenon planned to bring Stampeder to heel by springing on them the right of first refusal and the unanimous shareholders agreement. (Libin and Grenon's so called "nuclear arsenal".)

[196] Grenon knew by July 30th, that Stampeder intended to sign - on August 3rd - agreements to purchase Group's shares and the Petro debt from the Bank. He knew that on that date, Stampeder would commit itself to the expenditure of millions of dollars without any knowledge of the right of first refusal or the unanimous shareholders agreement. And he knew further that Stampeder was relying on being able to complete a successful public offering of shares based upon the acquisition.

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[197] The plan which Grenon evolved with Libin was that the existence of the right of first refusal and unanimous shareholder agreements would not be revealed to Stampeder until it had completed the execution of the purchase documents. Grenon gave strict instructions to Pointer and to Libin that the documents were not to be revealed to Stampeder, or anyone else, until he gave the word to do so. His instructions were that the documents were not to be disclosed until after Stampeder closed its transactions with Group and the Bank, and was "fully in the snare."

[198] Under these circumstances Grenon faxed a letter to Stampeder on July 30th (Tab 356) in which he stated that Colborne was aware of the imminent closing of Stampeder's purchase of the shares of Petro. He said Colborne had decided not to bid up the price for the shares, and that: "We are hopeful that you will meet with us shortly *after closing the Petro acquisition* to discuss a prospective transaction with us involving Petro," and concluded with the statement: "I look forward to being able to present our proposal to you *after you have closed your transaction with Group*" (Emphasis mine).

[199] I am satisfied that this letter was intended by Grenon to lure Stampeder into completing the transaction, after which Grenon intended to spring the trap and display his "nuclear arsenal" in an attempt to force Stampeder into making a deal with Colborne.

[200] When Yorke-Slader and Libin saw the July 30th letter to Stampeder, they told Grenon they thought it could constitute a waiver of any rights Colborne may have had, and that the letter should not have gone to Stampeder.

[201] As a result of this advice, and after furious drafting and redrafting, Grenon sent a further letter to Stampeder on August 3rd, purporting to retract the letter of July 30th.

[202] Neither the July 30th nor the August 3rd letters to Stampeder made any reference to the right of first refusal and unanimous shareholder agreements which Grenon (with Pointer's concurrence) had designed with the specific intent to put Stampeder in a position where, on completion of the purchase, Stampeder would find itself with an obligation to pay Colborne $17 million liquidated damages (Grenon's poison pill).

[203] The Group, Bank of Montreal, Stampeder transaction closed on August 3rd. Stampeder purchased Group's shares of Petro for $2 million, and acquired the Bank's interest in Petro for $28 million, both in cash.

[204] One of the terms of the sale of Group's shares to Stampeder was that Pointer and Savage should each receive, at closing, a severance payment in the amount of $175,000, and $225,000 respectively, and a further sum of $100,000 in settlement of a

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right to share in any value received for Group's shares in Petro. Pointer made Grenon aware of this entitlement and sought to make certain that he obtained payment before Group and Stampeder learned that he had signed the right of first refusal and unanimous shareholder agreements.

[205] On August 3rd, Grenon agreed that Stampeder should not be told of the agreements until after Pointer got his money.

[206] Grenon further discussed with Libin on that day the deal they would try to have Stampeder make with Colborne. The strategy Grenon intended to use was to have a firm of solicitors commence legal action against Stampeder, but at the same time, Libin would act as a "good guy" and offer to deal with Stampeder. They discussed the fact that commencement of legal action against Stampeder seeking to set aside Stampeder's acquisition of Petro would "block the investment dealers", who Grenon knew Stampeder would be approaching to do its equity financing. The Statement of Claim (which is the subject of this action) was issued on August 3rd but not served until some days later.

[207] When the Group, Bank, Stampeder transaction closed on August 3rd, Pointer received a cheque for $87,500, being one half of his severance pay. Despite Pointer's attempt to arrange for immediate payment of the entire sum, the balance was held back by Stampeder pursuant to its right to have Pointer's services for the period until the completion of 30 days after closing. In addition, Pointer had arranged with Group that he would be paid the sum of $100,000 for his "share" on August 6th, and he informed Grenon of this. Grenon agreed to wait until that date to notify Stampeder of the existence of the agreements. At 3:45 on that day Grenon gave instructions to Libin to call Williams, of Stampeder, but to give him only the unanimous shareholders agreement.

[208] On the same day, that is, August 6th, Colborne issued a press release (Tab 398) aimed at the investment community announcing that Colborne was "in the process of filing a lawsuit against Stampeder Exploration Ltd. (Stampeder) seeking to terminate the transaction recently announced by Stampeder concerning the acquisition of shares of an unnamed private company or seeking damages in the alternative." There is no doubt in my mind that the plaintiffs' intent, in filing the statement of claim and issuing the press release to announce that fact, was to block Stampeder's ability to raise the funds from the investing community that it needed to complete the purchase, as a means of forcing Stampeder to make a deal with Colborne.

[209] Again on August 6th, on Grenon's instructions, Libin telephoned Peter Williams, who was now the vice-president of Stampeder. He asked Williams if he had seen the

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Statement of Claim. Williams replied that he had not seen the Statement of Claim but that he had seen the press release. Libin told Williams that Stampeder would be better off making a deal with Colborne rather than allow the matter to be dealt with in the courts. Williams refused to deal with Libin telling him: "This reeks of devious action."

[210] Again on August 6th, Grenon had his solicitors, Blake, Cassels & Graydon, write to Stampeder's solicitors, Howard Mackie, enclosing a copy of the unanimous shareholder agreement and demanding that the Board of Petro be reconstituted to consist of one director appointed by Colborne and one appointed by Petro.

[211] On August 7th, James Surbey, a lawyer with Howard Mackie, telephoned Libin and asked for a copy of the right of first refusal agreement. Libin refused, saying he had no authority from Grenon to release it, but, Libin said, there was still a deal to be done. Surbey's reply was: "How can there be a settlement in a matter that constitutes fraud?" and he hung up the telephone. Later in the day Pointer spoke with Grenon by telephone and it was agreed that the right of first refusal document should now be shown to Stampeder. Pointer then produced the unanimous shareholder and right of first refusal agreements from his locked briefcase and gave them to Williams, the vice-president of Stampeder.

[212] Stampeder continued to refuse to be driven to a deal with Colborne and this lawsuit proceeded.

[213] Several weeks after the lawsuit was commenced Colborne agreed to pay Pointer's legal fees.

III. LEGAL ANALYSIS

1. *The Plaintiffs' Claim v. Group, 542 and Petro*

[214] The plaintiffs' claim against these defendants is based upon two assertions: Firstly, that Colborne acquired a right of first refusal to Group's shares by entering into a right of first refusal agreement with Petro. Secondly, that Group and Stampeder conspired to interfere with a contractual right, or economic interest that Colborne had acquired in Group's shares. I do not agree with either assertion for the following reasons:

(a) *Only Group had the power to grant a right of first refusal with respect to its shares*

[215] The shares of Petro were registered in the name of 542, and were beneficially owned by Group. They were not owned by, nor were they the property of, Petro. Group itself did not at any time execute a right of first refusal agreement, nor did 542. Counsel for

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the plaintiffs asserts that through their business dealings with Group, Petro, and 542, the plaintiffs "achieved" or "earned" a right of first refusal.

[216] Short of some statutory right, which is not asserted here, the law proceeds upon the basis that rights with respect to property are acquired by entering into an agreement with the owner.

[217] The law recognizes a legal ownership in shares as property which can be bought and sold. No one other than Group had the right to enter into an agreement which would interfere with Group's right to dispose of its property. Neither Group nor 542 executed a right of first refusal agreement nor any other documents which constituted the granting of such a right.

[218] The only other legal entities that had an interest in or right to the Petro shares were the Bank of Montreal, which held both a 49.9% equity option on the shares and, through its debt security, a de facto veto in respect of the transfer of those shares, and the Group lenders, to whom Group had pledged the shares. The plaintiffs had no agreement with the Bank or the Group lenders.

[219] The only form of agreement between the plaintiffs and Group was the May 10th letter (Tab 186) which makes no reference to Group's shares and does not grant a right of first refusal affecting those shares. The only restriction the letter places upon Group's actions is found in the paragraph numbered iii, which states:

> If Group or Petro does not approve of a transaction proposed by GE, Petro and Group shall be precluded from pursuing a Restructuring with the party involved in GE's proposed transaction for a period of two years, unless GE approves, provided that this restriction shall not apply in respect of a party with which Petro or Group is currently in active discussions with respect to a Restructuring.

[220] The transaction referred to was the plaintiffs' attempts to merge Petro with Trocana, and the plaintiffs do not claim a breach of that provision.

[221] Group, to the knowledge of the plaintiffs, was negotiating with Stampeder at that time.

(b) *Plaintiffs' actual knowledge of Petro's lack of authority*

[222] The plaintiffs submit that Pointer had actual or ostensible authority to commit Group to a right of first refusal agreement and that he did so when he entered into the March 3rd letter agreement between Petro and Colborne (Tab 135), one of the provisions of which was:

> 2. In the event Group Approval is obtained to the Restructuring plan: ii. Colborne will be granted a right of first refusal (the "Right of First Refusal") to match any offer or

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> agreement in principal contemplating a restructuring which Petro proposes to accept within three months of the Exclusive Period. The detail of this Right of First Refusal shall be further elaborated in a Right of First Refusal Agreement to be prepared by Colborne for the approval of Petro.

[223] I do not accept the plaintiffs' submissions with respect to either the interpretation of this document or its legal effect.

[224] Firstly, the right to match any offer contemplating a "restructuring" of Petro does not include a sale by Group of its shares. The term "restructuring", as it was used in the March 3rd letter agreement, meant an internal revamping and refinancing of Petro by an injection of capital, so as to revitalize the company. The plaintiffs drafted the words used, and, if there is any doubt about their meaning, that doubt should be resolved against the plaintiffs.

[225] Furthermore, a right to match any offer contemplating a restructuring of Petro, as contemplated in the March 3rd letter agreement, did not envision the type of right of first refusal agreement Libin and Grenon drafted and had Pointer sign in July. The July document was, in my view, drafted with one specific purpose in mind, that is, to cover Group's proposed sale of its shares to Stampeder, and to load Petro, and hence the purchase of Group's shares, with a $17 million obligation in liquidated damages when the sale went through. That was neither the intent nor the effect of the words used to describe the right of first refusal contemplated in the March 3rd letter agreement.

[226] Even if the term "restructure", as used in the March 3rd letter agreement, was to be interpreted so that a sale by Group of its shares would trigger a right of first refusal, the document is, in my view, without effect because Pointer had no authority to have Petro enter into a right of first refusal agreement concerning Group's shares and Grenon knew this to be the case.

[227] In any event, the plaintiffs' submission that Pointer was entitled to have Petro enter into an agreement enabling Colborne to demand a right of first refusal agreement, hinges upon the plaintiffs' ability to satisfy the court on each of a staged sequence of events:

1) That Pointer had actual or ostensible authority from Group, on March 3rd, to have Petro provide Colborne with a right of first refusal on Group's shares;

2) If so, that Group had approved a Colborne plan to restructure Petro, which was a fundamental condition that had to be satisfied - as set out in the March 3rd letter agreement - before Colborne would be entitled to a right of first refusal;

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3) If so, that Pointer had authority to have Petro enter into a right of first refusal agreement in late July, without Group's knowledge or consent, which would give Colborne the right to purchase Group's shares, when Pointer knew that Group had agreed to sell its shares to Stampeder;

4) If so, that Pointer had the authority to have 542 (a company wholly-owned and controlled by Group) enter into a unanimous shareholders agreement with Colborne requiring 542 to enforce the right of first refusal agreement.

The plaintiffs have not satisfied me on any of these matters.

[228] I am satisfied that Pointer had no authority - actual or ostensible - to have Petro enter into an agreement granting Colborne a right of first refusal affecting Group's rights to dispose of its shares of Petro. Such an action was contrary to the explicit instructions Pointer received from the Group management committee on February 23rd, and the Board of Directors of Group on the following day. Pointer was told that Group was not prepared to grant Colborne any period of exclusivity nor a right of first refusal. Pointer's only role was to bring back a proposal for consideration by Group's Board of Directors.

[229] It was clear to Grenon from the outset of his involvement with Petro that any transaction respecting Group's shares of the company would have to be made with Group. Pointer told Grenon as early as June 5th 1992, that he did not have authority to sign for Group. On February 9th 1993, officials of the Bank of Montreal told Grenon, in Pointer's presence, that he would have to deal with Group with respect to anything affecting Group's shares. On the way back from that visit to Toronto, Pointer again told Grenon that any proposal should be made to Group. Later in February, Pointer told Grenon that Group wanted a proposal to consider at the February 24th meeting of its Board of Directors.

[230] When Colborne's March 30th proposal was made, it was said to be prepared by Grenon and Edwards for: "Westar Group Ltd. (Group)", and states that: "Phase I refers to the negotiations between GE and Group to establish the terms of GE's involvement in the restructuring."

[231] Grenon knew that the March 3rd letter should be addressed to Group but was persuaded by Pointer to address it to Petro. The terms of the letter were not accepted or ratified by Group. In fact Group was not aware of the existence of the letter until June 29th, and consistently repudiated the suggestion that it had granted a right of first refusal to Colborne.

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[232] If Grenon and Pointer genuinely believed that Group had authorized Pointer or Petro to grant a right of first refusal agreement respecting Group's shares, one would expect the agreement (when it was prepared) to be between Colborne and Group, not Petro. The fact that it was not, and was in fact made between Colborne and Petro, and executed in secret without Group's knowledge or consent, demonstrates clearly that Grenon and Pointer knew that Group had not agreed to grant a right of first refusal and would not do so.

[233] The fact that both Pointer and Grenon knew that Pointer had no authority to have Petro enter into a right of first refusal agreement is further demonstrated in the first "Statement of Facts" which was drafted by Grenon on July 10th. Grenon and Pointer included in the statement - with respect to a proposed right of first refusal agreement - the phrase: "… I do not feel that I should execute such agreement without the approval of Group, which approval I am sure will not be forthcoming." This phrase is clear evidence that both Grenon and Pointer knew that Pointer lacked authority from Group to have Petro enter into a right of first refusal agreement, in either the March 3rd letter, or in the July document, and the deliberate removal of the phrase from the "Statement of Facts" illustrates the extent of their complicity.

[234] I am satisfied that Grenon had actual knowledge Group had not authorized Petro to grant a right of first refusal respecting Group's shares, and I reject the plaintiffs' submission, in the face of actual knowledge of lack of authority, that they can rely on an allegation of ostensible authority.

(c) *No approval by Group as required in March 3rd letter agreement*

[235] Even if it could be said that Pointer had authority to enter into the March 3rd letter, Group did not approve a Colborne restructuring plan, which was a pre-condition to Colborne attaining a right to any form of right of first refusal agreement.

(d) *The May 10th letter did not constitute approval*

[236] It is the position of the plaintiffs that Group granted such an approval when Chase executed the May 10th letter. I do not agree. In arriving at this conclusion I have considered whether Chase, when he signed the letter of May 10th, had a copy of the March 3rd letter agreement. I am satisfied that he did not.

[237] It became obvious during the course of the trial that there were differences between the evidence of Chase and Pointer on this issue. Pointer's evidence was that he provided a copy to Chase when it was prepared. Chase was positive that he did not

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receive a copy of the letter from Pointer until June 30th. The issue is significant because if Chase had the March 3rd letter in his possession and knew that it contained a provision that: "In the event Group Approval is obtained to the Restructuring plan … Colborne will be granted a right of first refusal …", one might be more inclined to consider more seriously the view that his execution of the May 10th letter constituted the approval referred to. However, if he was not aware of that provision, the contrary is true, for there is no reference in the May 10th letter agreement to the March 3rd document.

[238] Accordingly, I considered the general credibility of both Chase and Pointer, both at trial, and on the basis of the written submissions of counsel. It would be surprising if, in a matter as complex and detailed as this, a witness had perfect recall not only for every event, but for the precise date and sequence of its occurrence. Chase did not, nor would I expect him to. Nonetheless, I have sufficient confidence in the general credibility of Chase, and a sufficient lack of confidence in the general credibility of Pointer, that I prefer and accept the evidence of Chase that he did not have a copy of the March 3rd letter when he signed the May 10th letter, and that he did not have a copy until Pointer sent him one on June 30th.

[239] The route to obtaining the approval of Group to a restructuring plan, as Grenon well knew, was that Chase and Geer would first have to be satisfied that they had a proposal from Colborne that was sufficiently specific and definite to warrant taking it to the Group Board of Directors. That was a decision for Chase and Geer to make, not Pointer, not Petro and not Grenon.

[240] Chase made it perfectly clear to Grenon and Pointer both before and after the May 10th letter, that although he favoured the type of plan Colborne was trying to develop, the March 30th proposal was not detailed enough to warrant Group's committal to Colborne, and that any proposal would have to meet with the approval of the Bank of Montreal.

[241] Grenon clearly understood that the approval of the Bank of Montreal was essential. The March 30th proposal, which was drafted by Grenon, specifically contemplated that the agreement of the Bank was required. The facts are that Colborne did not make a proposal to the Bank until July 2nd, by which time the Bank was so committed to Stampeder that it had little interest in dealing with Colborne. Without the Bank, Colborne was going nowhere.

[242] Grenon's interest and effort was directed to trying to make a deal to merge Petro with Trocana in such a way that Colborne would not have to advance its own funds to the

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Bank of Montreal. The fate of the proposed Trocana transaction rested upon the consideration and approval of the Board of Directors of Petro-Canada, which was never obtained.

[243] The result was that plaintiffs never brought a proposal to Group for approval which was sufficiently definite to persuade Chase and Geer to take it to the Board of Directors of Group for consideration and approval, or to approve it themselves if they had the power to do so.

[244] I am satisfied that neither Grenon nor Pointer genuinely believed that the May 10th letter constituted Group's approval. Why otherwise would Grenon have considered it necessary on July 2nd to draft and have Pointer sign the letter (Tab 255) in which Pointer purports to have Petro declare that the May 10th letter constituted Group's approval as required by the March 3rd letter agreement? The letter, written some two months after the May 10th letter, is, in my view, a clear attempt to paper up a fatal weakness in the sequence of events upon which the plaintiffs rely. It demonstrates further the fact that Grenon and Pointer knew that Group had not approved the Colborne proposal.

(e) *Pointer's powers and duties as an officer and director of Petro*

[245] The plaintiffs have relied heavily upon the submission that Pointer, throughout, was acting in the capacity of a director of Petro, and submit that his only duty was to act in the sole interest of the corporation of which he was a director.

[246] In Alberta, the duty of care of directors and officers of a corporation is set out in s. 117 of the Alberta *Business Corporations Act*, S.A. 1981, c. B-15 ("ABCA"), as amended, which provides, in part, as follows:

> 117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> (*a*) act honestly and in good faith with a view to the best interests of the corporation.

[247] The question arises: who or what is included within the expression "interests of the corporation" in the particular circumstances of this case?

[248] Directors of a corporation must respond to a variety of interests, particularly where there are a number of shareholders, of different classes and with differing goals and objectives. The "interests of the corporation" include the obligation of a director to see to those duties imposed upon the corporation by statute, and to act honestly and in good faith, with respect to those interests which the law requires a director to watch over and protect. It is clear that one of the interests to which a director must have regard is that of

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the shareholders and other stakeholders in the corporation. Where there is but one shareholder, "the interests of the shareholders" can be readily identified.

[249] That is the case here: Petro was a private company with but one shareholder, Group, and one stakeholder, the Bank of Montreal. In my view Pointer, as an officer and director of Petro, owed a very substantial (although not exclusive) duty to act honestly and in good faith with respect to those interests, particularly as here, where the interests of the shareholder and the Bank were common, and well known. At the very least, Pointer, as an officer and a director, had an obligation not to deliberately use his powers as an officer and director, to have the corporation, without the knowledge of the sole shareholder, act in such a way as to interfere with the shareholder's rights with respect to its shares of the corporation.

[250] I am also of the view that Pointer as a director of Petro had no inherent power to do anything with respect to Group's shares. Such power could only come from Group, and I am satisfied that Group did not invest in Petro the power to grant a right of first refusal agreement with respect to its shares either in the name of Group or in the name of Petro.

[251] The plaintiffs refer to s. 97(1) of the ABCA, which provides as follows:

> 97(1) Subject to any unanimous shareholder agreement, the directors shall manage the business and affairs of a corporation.

[252] The point is, however, that the matter of granting a right of first refusal with respect to Group's shares was not "the business or affairs" of the corporation Petro; it was the business or affairs of the corporation Group, and Pointer was not a director of that company. This is not a situation where a director is dealing with the yet to be issued share capital of a company of which he is a director. Here he is purporting to have the corporation deal with the property (shares) owned by another entity.

[253] Even if it could be said that Petro had some inherent power to make arrangements with respect to Group's shares of the company (and I do not believe it did) any inherent power that Petro had as a corporation was not unrestricted. Petro was a wholly-owned subsidiary of Group, and while it had its own Board of Directors, it had no chairman of the Board and it had no president. It had two officers: Pointer, who was the chief financial officer, and Savage, who was the chief operating officer. Of the two, Savage was the most senior. As a consequence, Pointer reported not to a president of Petro, but to Chase and to Geer, the chief financial officer and president respectively of Group.

[254] No matter how Petro might be characterized in law, the facts are that it operated more as a unit or division of Group than as a separate corporation. Group placed strict

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monetary limits on Pointer's spending and contractual powers. Pointer and Savage were in constant communication with and were required to report to Chase and Geer. Pointer and Savage were required at regular intervals (as unit managers) to report to the Board of Directors of Group.

[255] The overall impression that I formed from listening to the evidence was that Pointer's relationship with Group was akin to that of an employee. He took his instructions from Group, he reported to Group, and he required Group approval for any major purchase or contract.

[256] In the reorganization of Petro's debt with the Bank of Montreal, which was completed in April 1992, Pointer had carried out his duties according to the instructions of Chase and under the leadership of Bookbinder, a director of Group. Every step of that transaction had been led by Group, monitored by Chase and Bookbinder and approved by formal resolutions of the Board of Directors of Petro and the Board of Directors of Group. Neither Pointer nor Petro exercised any independent authority.

[257] That pattern was repeated in February 1993, when the Board of Directors of Group, with the full concurrence of Pointer, passed a resolution to further Group's avowed intention to get some value for its Petro shares. The resolution stated in part: "It was further agreed that Mr. Savage and Mr. Pointer would obtain a specific proposal for review by the directors (of Group) and, at the appropriate time, the Bank of Montreal." In carrying out those instructions, Pointer was acting not so much as a director in the management of the business and affairs of the corporation Petro, but more in the capacity of an officer of a wholly-owned subsidiary of Group who had been asked to assist Group in seeking proposals which might enable Group to achieve some value for its shares.

[258] The relationship between Pointer and the shareholder Group was similar to that addressed by McBain J. in *Tongue v. Vencap Equities Alberta Ltd.* (1994), 148 A.R. 321 [17 Alta. L.R. (3d) 103, [1994] 5 W.W.R. 674] (Q.B.). After acknowledging that no general fiduciary duty arises between a director and shareholders simply because of that relationship (unless something else is present to create such a duty), the learned justice at p. 349 determined that such a duty could arise in appropriate circumstances.

[259] McBain J. illustrates at p. 349 how such a duty may arise when he quotes from *Gadsden v. Bennetto* (1913), 3 W.W.R. 1109 (Man. C.A.), as follows:

> "The position of the members of the committee in this case is very different from that of ordinary directors of a company as regards their fiduciary relations and is quite distinguishable from *Percival v. Wright* (1902), 2 Ch. 421; 71 L.J. Ch. 846. In the present case the committee were acting outside the ordinary duties of directors; they

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> were appointed for the purpose of securing and bringing in a proposal for disposing, not only of the land which was the property of the company, but the shares which were the property of individual shareholders … The members of the committee were the confidential agents of the company and the shareholders. Their concealment of Cooper's offer, which so greatly enhanced the value of the shares, with a scheme in view to buy the shares at a low price, was a breach of duty and a fraud upon the shareholders whose shares they acquired, by means of that concealment, at a price far less than their intrinsic value …"

[260] In dealing with the facts in the case before him, McBain J. states at p. 350:

> In the present case, it is clear that Negin was in charge of the disposition of Synerlogic: he was a disposition committee of one. At the June 28, 1988, Synerlogic Board meeting expressions of interest in acquiring Synerlogic were discussed and it was decided, and reflected in the minutes, that "Mr. Negin was to respond to their expressions of interest and see what steps were required next." …
>
> Minutes of the July 29, 1988, Synerlogic Board meeting also reflect the fact that Negin was in charge of the Synerlogic disposition. One need only examine these minutes, set out in full above, to discover that it was Negin that was orchestrating the whole deal with Vencap acting as his intermediary.
>
> Therefore, in my view Negin has by virtue of his function in soliciting, and arranging for, the disposition of the shares in Synerlogic owned by the shareholders, a different relationship arose between Negin and the plaintiffs. Negin occupied a position that was outside of the scope of the duties of ordinary directors, and a fiduciary relationship was created with him on the one hand and the plaintiffs and Synerlogic on the other.

[261] I am satisfied that when Pointer was assisting Group, the sole shareholder of Petro, in obtaining value for its shares, he occupied a position that was outside the scope of the duties of an ordinary director of Petro and that he owed a duty to the shareholder to deal with its shares in a trustworthy manner. There is no question in my mind that Pointer breached the duty he owed to the shareholder when he deceitfully participated with Grenon in a plan intended to defeat the shareholder's desire to sell its shares to Stampeder.

[262] In any event, I find it difficult to believe that Pointer as a director of Petro was acting in the best interests of the corporation when he participated with Grenon in a scheme to put the company in a position where it had but two alternatives: either merge with Trocana, where its physical assets would be sold off and it would disappear completely as a corporation; or be placed in a position where, if the shareholder sold its shares to Stampeder, the corporation would be indebted to Colborne for liquidated damages in the sum of $17 million.

[263] The plaintiffs submit that Petro, having put the condition in the March 3rd letter agreement requiring Group's approval, had the right to declare that the condition had been met, and purported to do so in the July 2nd letter (Tab 255). I am not prepared to give any

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credence to that submission in the circumstance of this case where the facts so clearly demonstrate that both Grenon and Pointer clearly understood that such approval could only come directly from Group itself.

[264] In the final analysis, I am satisfied that Petro did not have, nor was it granted, the right or power to enter into an agreement with Colborne, either on March 3rd, or in July, which fettered the rights of the shareholder to freely deal with its shares.

(f) *Pointer's powers with respect to 542*

[265] The plaintiffs submit that Pointer, acting as the sole director of 542, had authority to pass the 542 resolutions and to execute on behalf of 542 the unanimous shareholders agreement. My conclusion is that Pointer's conduct in purporting to sign those documents as the sole director of 542 was deceitful. Pointer well knew that the directors of 542 were the same as the directors of Petro - Chase, Savage and Pointer. Pointer had been instructed in January 1993 to see to the formalization of this, but the process of recording the names of the directors was not completed until July 26th. Pointer signed the 542 resolution and the USA agreement on July 27th. It was Grenon who persuaded Pointer to do this although they both knew the true status of the directorships of that company. This typifies the practice of both Grenon and Pointer in dealing in form rather than in substance. Much of what they did together, including the 542 resolutions and agreement, was nothing more than papering, done not to achieve the stated purpose, but to force Stampeder into making a deal with Colborne.

[266] In fact, the entire process by which Pointer found himself as sole director, officer and president of 542, to which corporation he persuaded Group to transfer its shares, was to say the least brazen, and reconfirms my apprehensions as to Pointer's motives and aspirations. It will be remembered that I stated earlier that it appeared to me that Pointer was bent on controlling the restructuring of Petro so as to maintain the corporation as an operating entity in which he would have an important role. The original plan he had devised was to insert a corporation between Group and Petro as a vehicle to carry out his initial restructuring plan. To this end he arranged to set up 542, appoint himself the sole director, officer and president, and then arranged to have Group transfer its shares to 542. The Group Board approved the share transfer on the basis that this would accomplish a substantial saving of Saskatchewan capital tax if it was done before the 1992 year end. The tax saving never materialized, and when Chase learned in late 1992 about the state of the company and that, in addition, Savage and Pointer were shown as holding 10% of the shares, he immediately ordered Pointer to retransfer the shares to Group and to establish

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a Board of Directors for 542 that would mirror Petro. This is the flimsy foundation upon which the plaintiffs assert that Pointer as sole director and president of 542 had the authority to pass the 542 resolution and to have 542 enter into a unanimous shareholders agreement with Colborne committing the company to enforce the right of first refusal agreement with respect to Group's shares. The law surely cannot be used to validate such a course of action.

(g) *The meaning of "unanimous shareholder agreement"*

[267] I am satisfied that the plaintiffs' purpose in persuading Pointer to execute the unanimous shareholders agreement between 542 and Colborne was to use the ABCA as a further means of pressuring Stampeder to do a deal with Colborne. However, I am of the view that the document which Pointer purported to have 542 execute was not a unanimous shareholder agreement as defined by s. 1(*z*) of the ABCA. The definition reads as follows:

> (*z*) "unanimous shareholder agreement" means
>
> (i) a written agreement to which all the shareholders of a corporation are or are *deemed* to be parties, whether or not any other person is also a party, or
>
> (ii) a written declaration by a person who is the beneficial owner of all the issued shares of a corporation,
>
> that provides for any of the matters enumerated in section 140(1). (emphasis mine)

[268] The definition is, with respect, awkwardly worded, especially in situations such as the one before me where there is one owner of all the issued capital of 542, and that owner (Group) is not a party to the agreement.

[269] Counsel were not able to direct me to any previous authority on the interpretation of the definition section.

[270] I am of the view that subs. (ii), not subs. (i), was intended to control the situation where there is one beneficial owner of all the issued capital. I am led to this opinion by the use of the plural terms: "shareholders", "are", and "parties", which is inappropriate language if the subsection was intended to apply to a single shareholder. Further, the fact that subs, (ii) provides an approval mechanism specifically designed for a single shareholder situation reinforces this interpretation. Further, having the single shareholder provide a declaration is a simple and practical means of ensuring that the shareholder has concurred in the subject matter of the unanimous shareholder agreement. The ABCA is intended, after all, to be a practical working code for businessmen.

[271] If subs. (i) were to apply in the case of a single shareholder corporation (and I do not believe it does) the question would then become: should it be applied in the circumstances of this case? Here, the shareholder of the corporation (Group) is not a party

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to the agreement. However, the definition refers to: "a written agreement to which all the shareholders of a corporation are *or are deemed to be* parties …"

[272] One can only assume this means, in the final analysis, deemed by the court. Ordinarily the term "deemed" is used in a context where, if certain circumstances exist, then it shall be deemed that certain consequences will follow. No such preconditions are specified in subs. (i). I should think that an important factor that would guide a court in exercising its discretion to deem a sole shareholder to be a party to an agreement would be whether or not there existed satisfactory evidence from which a court could infer knowledge of and concurrence with the overall purpose and intent of the agreement, or evidence from which a court could infer that the shareholder had provided authority to the corporation to enter into such an agreement.

[273] In this case, the sole shareholder (Group) was not a party to the agreement, and it was signed without its knowledge. There is no evidence from which I am prepared to infer that Group either concurred in or authorized the corporation to enter into the agreement. Under these circumstances I am not prepared to "deem" Group to be a party to the agreement. Hence, I conclude that the agreement is not a unanimous shareholder agreement within the meaning of s. 1(*z*) of the ABCA and cannot have the effect of that type of agreement. As the 542 agreement is not a valid unanimous shareholders agreement, it cannot operate so as to fetter Group or 542's ability to sell the shares of Petro to Stampeder.

[274] In any event, the 542 agreement is unenforceable because, at best, it represents a sham transaction by which Grenon and Pointer sought to fraudulently impose legal obligations on 542 and Petro in an effort to thwart the legitimate purchase and sale transaction between Stampeder and Group. As the agreement was created for an unlawful purpose it is not enforceable at law. See *Letkeman v. Zimmerman*, [1978] 1 S.C.R. 1097 at 1101-1104 [[1977] 6 W.W.R. 741].

(h) *Conclusion as to existence of a valid right of first refusal agreement*

[275] I conclude that there was never a valid and enforceable right of first refusal agreement in favour of the plaintiffs, either by way of the March 3rd letter, or the formal right of first refusal document, or the unanimous shareholders document or otherwise.

2. *The Plaintiffs' Claim v. Williams and Stampeder/Ricinus for Breach of Confidence*

[276] This claim is based upon the plaintiffs' allegation that Alan Ross, a tax lawyer in the firm of Bennett Jones Verchere, disclosed confidential information which he had

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received from his client, the plaintiff Grenon, to the defendant, Stampeder/Ricinus, at a meeting held at the offices of Bennett Jones Verchere on April 30th, 1993.

[277] The plaintiffs have brought their action not against Ross, who is said to have disclosed the confidential information, but against the defendant Williams, a law partner of Ross, and against the defendant Stampeder/Ricinus, whose officers and representatives were in attendance at the April 30th meeting for the purpose of obtaining tax advice from Ross.

(a) *Facts*

[278] Ross and Williams were partners in the law firm of Bennett Jones Verchere. Ross was a tax partner and Williams was a partner in the corporate-commercial field. Williams was on the executive committee of Bennett Jones Verchere.

[279] Ross began doing tax consulting work for the plaintiff, Grenon, in 1988. In February 1993, Ross was retained by Grenon to provide tax advice with respect to a proposal Grenon was preparing for the restructuring of Petro. They had several meetings on the subject in February and March of 1993.

[280] During the course of these meetings Grenon communicated to Ross information which Grenon had obtained during the course of his negotiations with Pointer, the Chief Financial Officer of Petro, concerning the corporate relationship between Group and Petro, the details of Petro's obligations to the Bank of Montreal and the details of Petro's tax attributes. In particular, on February 26th Ross had meetings with Grenon and Pointer, during which he received a detailed breakdown of Petro's tax losses and resource pools as follow:

	Before refiling	After refiling
Non-capital losses	$17 million	$50 million
Undepreciated capital cost	$19 million	$6.3 million
Canadian Oil & Gas Property Expense	$64 million	$34 million
Investment Tax Credit	$2 million	$1.8 million

[281] Ross discussed with Grenon various methods for restructuring Petro from a tax standpoint, as well as a proposal to have the Bank of Montreal reduce the face amount of its debt to the actual value of the Petro assets, and the fact that forgiveness of debt could result in the tax attributes of Petro being reduced, and how this might be avoided by attributing the debt reduction to the distress preferred shares held by the Bank. He and Grenon also discussed various ways in which Petro's tax pools could be redistributed between resource pools and non-capital losses by refiling Petro's tax returns.

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[282] The tax aspects of the plan devised by Ross and Grenon or the restructuring of Petro was a sophisticated and complex one involving the refiling of Petro's tax returns to eliminate non-capital losses and to increase the resource pools; the transfer of Petro's assets to two separate subsidiaries; the exchange of the distress preferred shares held by the Bank for a reduced debt obligation at commercial rates; the creation of a $2 million debt obligation from Petro to the plaintiffs; and other complex corporate manoeuvrings designed to use the tax losses and resource pools to advantage and to give the plaintiffs a substantial equity position, along with Group, and the Bank, in Petro.

[283] Grenon's last consultation with Ross prior to the April 30th meeting was on March 22nd. Grenon prepared a proposal for the financial restructuring of Petro which he submitted to Group on March 30th. Ross did not participate in the preparation of the proposal, but received a copy from Grenon in early April, which he scanned.

[284] The defendant Williams, who was Ross's partner at Bennett Jones Verchere, had been retained as counsel by Stampeder in October 1992, and thereafter he provided legal advice to Stampeder on a variety of matters. In January 1993, Williams was asked by Stampeder to join the company as vice president. Williams decided in late February to do so, and on April 23rd announced his intention to his partners at Bennett Jones Verchere. Ross did not become aware of this until after the April 30th meeting. Williams remained as a partner of Bennett Jones Verchere until June 3rd 1993, when he joined Stampeder as senior vice president.

[285] In late February or early March 1993, while he was still a partner at Bennett Jones Verchere, Williams was asked by Stampeder to provide legal advice in connection with three possible acquisitions, one of which was Petro. Some time in March, Williams became aware of the fact that Ross was doing work for Grenon in connection with Petro, and he discussed with Ross their respective clients' involvement with the company. Williams told Ross that if Stampeder was successful in acquiring Petro he hoped Ross would be Stampeder's general tax counsel and that Ross would provide tax advice in the completion of Stampeder's transaction. Ross told Williams he would clear the way and that he looked forward to working for Stampeder. Both Ross and Williams knew that because Ross had provided advice to Grenon relative to Petro, there was a conflict of interest that would have to be addressed before Ross undertook any work for Stampeder relative to that company.

[286] On March 2nd, 1993, Stampeder made a detailed written offer to Group to purchase all of the shares of Petro in exchange for 750,000 shares of Stampeder stock.

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When Group indicated it preferred a cash offer, Stampeder, on March 15th, sent a new written offer to Group to purchase the shares of Petro for $2.5 million and referred to its discussions with the Bank to take over Petro's debt of $43 million to the Bank for approximately $30 million and indicated, in general terms, how it planned to use Petro's tax losses. The offer was conditional upon the Bank accepting Stampeder's offer. On April 7th the Bank informed Stampeder that, subject to the approval of its credit committee and an independent valuation, it would accept $28 million for the Bank's position in Petro. On the same day Stampeder made an unconditional offer to Group to purchase the shares of Petro for $2 million, which was the maximum amount the Bank would allow Group to receive for its shares, which the Bank considered to be virtually worthless. On April 8th Stampeder made a formal written offer to purchase the Bank's position in Petro for $28 million. The Bank accepted Stampeder's offer by a letter dated April 27th.

[287] Williams' involvement as counsel for Stampeder in connection with its acquisition of Petro intensified when Tonken advised Williams of the Bank's acceptance of Stampeder's offer and gave him a copy of the Bank's letter of acceptance.

[288] Williams showed Ross a copy of the April 27th letter from the Bank, and told him, "We just got the deal". Williams asked Ross if he could attend a meeting to provide advice to Stampeder as to whether there were any tax issues or complications which Stampeder should consider, arising from the way Stampeder had structured its acquisition of Petro and to ascertain whether the structure Stampeder was proposing "was doable from a tax perspective". Ross agreed.

[289] The meeting was scheduled for April 30th. A short time before the meeting began, Williams went to Ross to confirm that Ross had cleared away the conflict with Ross's client Grenon. Ross told him he had not. Ross and Williams decided to proceed with the meeting in any event and agreed that before any meaningful work was undertaken the conflict would be cleared away. Ross understood his role was simply to provide general tax information and advice to Stampeder in respect to its plans to acquire the shares of Petro from Group and to acquire the debt interest from the Bank. Before the meeting Ross went to Grenon's file and jotted down the amount of Petro's non-capital losses, resource pools, undepreciated capital cost and investment tax credit both before and after refiling, so that he could have this information at his fingertips. At the outset of the meeting, Williams asked, "Did you get clearance to speak to us?" Ross answered, "No." Williams asked, "Could you just tell us general information then?" To which Ross replied in the affirmative.

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[290] Ross attended the April 30th meeting in the capacity of a tax advisor engaged by Stampeder to provide legal advice. He opened a file in Stampeder's name and charged Stampeder $585 for his services. Those in attendance at the April 30th meeting were Tonken (the president of Stampeder); Surbey (a lawyer from the firm of Howard Mackie representing Stampeder); Brockway (a C.A. and tax consultant to Stampeder); and the two Bennett Jones Verchere lawyers, Williams and Ross, both of whom were present in their capacity as counsel to Stampeder.

[291] When the meeting opened Tonken explained to Ross the agreement Stampeder had reached with the Bank and showed him the Bank's letter of acceptance. Tonken also explained to Ross the offer Stampeder had made to Group to purchase shares of Petro. During the course of the meeting, Ross reviewed the corporate ownership structure that existed between Group, Petro and the numbered company, and reviewed Petro's debt arrangements with the Bank of Montreal. More importantly, he reviewed Petro's tax attributes, and in doing so disclosed to Stampeder the detailed amounts of Petro's non-capital losses, undepreciated capital cost, resource pools and investment tax credits, both before and after refiling, which he had obtained from Grenon's file. He advised that the distribution of the tax losses and resource pools could be altered by refiling, and that refiling could take place after a change of control. He discussed the fact that any forgiveness of debt by the Bank could reduce the tax pools and he advised how Stampeder might allocate the purchase price for the Bank's interests to the distress preferred shares held by the Bank rather than to the debt obligation so as to avoid debt forgiveness and the consequent reduction of the tax pools. He informed Stampeder that Petro had received a tax ruling at the time of the issuance of the distress preferred shares and that the creation of the shares did not constitute a debt forgiveness by the Bank. He advised that non-arm's length debt was not an exception to the rule that forgiveness of debt reduces tax losses and therefore that the intercorporate debt between Petro and its subsidiary should not be written off.

[292] Ross did not reveal to the meeting who his other client was nor did he disclose to the meeting any part of the plans, structures or proposals which he and Grenon had devised. What he did was to advise Stampeder, as a tax lawyer to whom they had come for advice, of some of the tax ramifications of the transactions which Stampeder already had underway, and advise Stampeder, in a general way, and within the confines of those transactions, how the value of the tax attributes of the company they expected to purchase might best be preserved. Ross's advice, in essence, was that Stampeder should ensure that when the transaction was done there was no forgiveness of debt.

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[293] In the course of the meeting Ross did, however, disclose the precise tax pool numbers that he had received from Grenon/Pointer on February 26th. His explanation for this is that when he received the information in February he did not consider it to be confidential because Petro had been for sale for some time and the information was generally known. His recollection is that all of the people at the meeting, and in particular Mr. Brockway, the chartered accountant, and Mr. Tonken, the president of Stampeder, were familiar with the tax attributes of the company and he did not think that he was discussing anything that they did not already know. In my view, however, the precise details of the non-capital losses, undepreciated capital cost, Canadian oil and gas property expense and investment tax credit were confidential information which Ross had received from his client Grenon.

(b) *Analysis of breach of confidence claim*

[294] The legal positions of the defendant Williams, and the defendant Stampeder, with respect to the April 30th meeting, are quite different.

[295] The analysis would be straightforward if the plaintiff had named Ross as defendant. There can be no doubt that Ross owed a duty to his client Grenon to keep confidential the information about the detailed breakdown of the resource pools which he received from Grenon in a solicitor/client relationship, unless that information was so well known to the public as to be notorious.

(i) A lawyer's duty to his client

[296] It is settled law that a lawyer must not voluntarily disclose confidential information which he or she receives in a professional capacity without the consent of the client or a direction of the court.

[297] McEachern C.J.S.C. (as he then was) in *Ott v. Fleishman*, [1983] 5 W.W.R. 721 (B.C.S.C.), states the proposition and its limits clearly at p. 722:

> Apart from an indication of future unlawful conduct I regard it as settled law that any confidential information communicated to a lawyer and received by him in his professional capacity must not voluntarily be disclosed without either the consent of his client or a direction from the court. This is made apparent in the canons of the legal ethics which require a lawyer "scrupulously" to guard and not divulge his client's secrets or confidences (Canon 3[7]). But not all information received by a lawyer is privileged: *Zielinski v. Gordon*, [1983] 1 W.W.R. 414, 40 B.C.L.R. 165 (S.C.).

[298] While the court's primary duty is to resolve issues between parties, a secondary and very important concern is to maintain the high standards of the legal profession and the integrity of our system of justice. An important statement of public policy concerning

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the conduct of a barrister and solicitor is contained in the professional code of ethics of the governing bodies of the profession.

[299] In Alberta, the *Law Society Code of Professional Conduct* provides: Chapter 7, p. 67:

> A lawyer has a duty to keep confidential all information concerning a client's business, interests and affairs acquired in the course of the professional relationship.

[300] While the courts are not bound to apply a code of ethics, nonetheless, an expression of a professional standard in such a code relating to a matter before the court is an important factor to be taken into account in establishing public policy. (See: *Gainers Inc. v. Pocklington* (Alta. C.A., 9 May, 1995, as yet unreported [reported 29 Alta. L.R. (3d) 323])

[301] In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1245-46 [[1991] 1 W.W.R. 705], Sopinka J. for the majority discusses the appropriate standard to be applied in determining whether a lawyer who has acted for a client is disqualified from acting for another client by reason of conflict of interest. Sopinka begins his analysis with the statement, at p. 1244:

> The legal profession has historically struggled to maintain the respect of the public. This has been so notwithstanding the high standards that, generally, have been maintained. When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client.

[302] It is certain that when a lawyer receives confidential information attributable to a solicitor/client relationship, that information should be kept confidential and it should not be misused to the prejudice of the client from whom the information was received.

[303] While these statements have direct application to the question of when a lawyer must disqualify himself (or be disqualified by the Court) from acting in civil litigation, I am satisfied that they are equally applicable to situations where a lawyer puts himself in a position of conflict of interest and uses confidential information which he has received from one client as a basis upon which to advise another client, on a matter in which the clients are in conflict or competition, without the consent of the client from whom the confidential information was received.

[304] Sopinka J. in *MacDonald Estate* (supra) considers a lawyer's position in a conflict of interest situation and concludes at p. 1261:

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> A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic.

(ii) Was the detailed information as to Petro's tax losses and resource pools "notorious"?

[305] There is a further matter I must consider and that is whether the information that Ross received from his client was so notorious as not to be confidential information.

[306] It is true that Petro had been on the market for a considerable period of time and that persons or corporations considering the acquisition of the company had received information about its tax attributes and without the imposition of a confidentiality agreement. However, I am unable to conclude that the detailed information about Petro's tax losses and resource pools, which Ross retrieved from his client Grenon's file and disclosed at the April 30th meeting, should be regarded as notorious information. It was detailed and up-to-date information recently assembled from Petro's tax records and communicated by Grenon to his lawyer Ross so that Ross might provide him with specific tax advice based upon that information. The fact that some aspects of the information may have been provided by Petro to other suitors does not render the information so notorious as to enable Ross to disclose that information to his client's competitor, Stampeder, without Grenon's consent. The burden of showing that the information was not confidential rests with the lawyer and that burden has not been discharged.

[307] In the circumstances here, the nature of the information itself; and the circumstances under which it was received by Ross; and the circumstances under which it was subsequently disclosed; satisfy me that the detailed tax loss and resource pool information was confidential in the hands of Ross and that Ross was in breach of his duty to the plaintiffs when he disclosed that information to his client's competitor, Stampeder.

(iii) The position of the defendant Williams as a partner of the plaintiffs' lawyer

[308] The foregoing concerns the duties of Ross, who is not a defendant. It is, however, relevant because I have concluded that the defendant Williams was subject to the same duty as his partner Ross, to keep the detailed tax information confidential. Instead, he participated in the disclosure of the confidential information to Stampeder when he knew there was a conflict of interest and that it had not been resolved.

[309] Turning again to *MacDonald Estate v. Martin* (supra), Sopinka J. discusses the question of imputed knowledge between members of a law firm at p. 1262:

> There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the

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"tainted" lawyer to the member or members of the firm who are engaged against the former client.

[310] In the circumstances here the defendant Williams is unable to escape the inference referred to. He had discussed with Ross their various involvements with Petro, and he knew there was a conflict of interest which had not been resolved when Ross began to provide tax information and legal advice to Stampeder at the April 30th meeting.

[311] In *Michel v. Lafrentz* (1992), 85 Alta. L.R. (2d) 1 (C.A.), the Court, per curiam, held at p. 4:

> A partnership is not a separate legal person, so each partner in Ogilvie & Company is the lawyer for each client of that firm. The plaintiff company is one of those clients. The reported cases always identify law partners for purposes of conflict of interest and disqualification. The *Canadian Bar Association Code of Professional Conduct* says that a client is a client of all the lawyers in a law firm, whether or not the individuals handle the client's work, as Cory, J. emphasizes: *MacDonald Estate v. Martin*, at p. 730. Alberta has largely adopted that Code.

[312] The knowledge of Ross is, in my view, imputed to Williams, who had an equal duty to see that confidential information which Ross had received from the plaintiffs was kept confidential. They both knew there was a conflict of interest and in failing to deal with it, and proceeding with the April 30th meeting where confidential information was disclosed, Williams failed, as well as Ross, in the discharge of the duty of confidentiality.

(iv) Was a duty of confidentiality cast upon Stampeder by the events of the April 30 meeting?

[313] While Ross and the defendant Williams owed a duty to the plaintiff arising out of the relationship of solicitor and client, no such relationship existed between the defendant Stampeder and the plaintiffs.

[314] Nonetheless, the plaintiffs seek to establish the proposition that the defendant Stampeder received confidential information from Ross, and misused it.

[315] The test for whether there has been a breach of confidence involves establishing three elements:

(1) that the information conveyed was confidential;

(2) that it was communicated in confidence; and

(3) that it was misused by the party to whom it was communicated.

See: *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 at 635.

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[316] The question is: did Stampeder receive information on a confidential basis, and then misuse that information? I do not think so.

[317] The facts as I find them to be are that Stampeder retained Ross as its lawyer to provide tax advice with respect to the proposal it had developed for the acquisition of Petro. There was, in my mind, nothing out of the ordinary in Stampeder engaging Ross to provide such advice. Ross was Williams' partner and as Stampeder had retained Williams to provide corporate commercial advice with respect to the acquisition of the Petro shares, there was nothing sinister or unusual in Stampeder looking to the tax partner of Bennett Jones Verchere to provide tax advice on the very transaction on which the partner Williams was already retained.

[318] It is true that Stampeder was aware of the fact that Ross, through work he had done for other clients, was familiar with the affairs of Petro. There was nothing surprising about that. Petro had been on the market for years and its principal attraction was its tax losses. Tonken and Dixon had, in fact, met with Pointer, the chief financial officer of Petro, on February 26th (five weeks prior to the April 30th meeting) for the specific purpose of obtaining from Pointer the information it needed to consider the acquisition of Petro from Group and the Bank. Pointer gave Tonken a breakdown of what the tax pools and losses were, and told him that Petro had a tax ruling that confirmed the fact that the issuance of the distress preferred shares and the re-organization of the Bank debt had not eliminated or reduced the tax losses or resource pools. The details of the tax losses and tax pools that Pointer gave Tonken on that occasion may not have been quite as specific as that disclosed by Ross at the April 30th meeting, but at the very least, Pointer advised Tonken that there were $95 to $100 million in tax attributes divided about equally between noncapital losses and tax pools/UCC and COGPE, which was the extent of the tax information Stampeder required for the purposes of determining whether to continue with its efforts to purchase the Petro interests from the Bank and from Group.

[319] From the perspective of a reasonable and objective observer, Stampeder attended at the offices of its lawyers, Bennett Jones Verchere, to meet with a tax partner who they retained to advise them on the tax implications of transactions to acquire the shares of Petro from Group, according to plans which they had already devised. Stampeder was aware of the fact that Ross would be acquainted with Petro's affairs through consulting with other clients who had an interest in acquiring Petro. The discussion as to whether Ross had obtained clearance from his other client - even to a sophisticated client like Stampeder - would be regarded as an internal matter for Bennett

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Jones Verchere to sort out. The meeting proceeded on the basis that Ross would provide general tax information and advice. Stampeder had a right to expect that two partners of a major law firm would know what they were doing in this respect, and that they could proceed in confidence to obtain from Ross, the lawyer who it had retained, the general tax information and advice it was seeking.

[320] Would a reasonable man standing in the shoes of Stampeder have realized upon reasonable grounds that he was receiving confidential information and that it was being given to him in confidence? I think not.

[321] In my view there was no duty owed by Stampeder to the plaintiffs, and there was no information communicated to Stampeder in circumstances giving rise to an obligation of confidence. Accordingly the action against the defendant Stampeder on that ground must fail.

(v) Are the plaintiffs entitled to a remedy against the defendant Williams?

[322] I have concluded that although the defendant Williams was in breach of the duty owed by a solicitor to a client, the plaintiff has not established a right to a remedy. There was no unauthorized use of the information to the detriment of the plaintiffs.

[323] The plaintiffs' actions in singling out Williams as the defendant, rather than Ross (their lawyer and the principal author of the disclosure), casts some doubt upon the bona fides of the plaintiffs' claim against Williams, and detracts from the strength of the plaintiffs' claims to have suffered a loss as a result of the disclosure of information at the April 30th meeting. I can find no causal link between the disclosure of the details of Petro's tax losses and resource pools, and the loss alleged to have been sustained by the plaintiffs, nor Stampeder's successful acquisition of Petro.

[324] La Forest J. in *LAC Minerals* (supra) sets out the statement of the majority, as to breach of confidence at p. 635 (S.C.R.) as follows:

> *Breach of Confidence*
>
> I can deal quite briefly with the breach of confidence issue. I have already indicated that Lac breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows at p. 47:
>
> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must 'have the necessary

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> quality of confidence about it.' Secondly, that information must have been imparted in circumstances imparting an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.…"
>
> This is the test applied by both the trial judge and the Court of Appeal. Neither party contends that it is the wrong test. Lac, however, forcefully argued that the courts below erred in their application of the test. Lac submitted that "The real issue is whether Corona proved that LAC received confidential information from it and [whether] it should have known such information was confidential."

[325] I am satisfied that a breach of a duty of confidentiality, whether it arises in contract or in tort, cannot produce a remedy for the plaintiff against the confidant (here Williams), unless it is shown by the plaintiff that the confidential information was used by the confidant himself or that it was, as a result of some action by the confidant, used by a third party *to the detriment of the confider.* There must be an unauthorized use of that information to the detriment of the party communicating it before there can be a remedy.

[326] La Forest J. at p. 636 (S.C.R.) in referring to the third element set out above says:

> (3) Lac made use of the information in obtaining the Williams property and was not authorized by Corona to bid on that property.

[327] La Forest J. in his reasons in *LAC* makes frequent references to the need to establish as a factual underpinning, that the recipient of the confidential information misused it to the detriment of the confider. A further example is found at pp. 638-39:

> If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. If the information is used for such a purpose, *and detriment to the confider results*, the confider will be entitled to a remedy. [My emphasis.]

[328] The plaintiff has not established to my satisfaction that the confidential information disclosed at the April 30th meeting was used to the detriment of the plaintiff.

[329] I have previously outlined the way in which Stampeder came to be interested in acquiring Petro, and the extended negotiation which had taken place with both the Bank and Group prior to the April 30th meeting. I am satisfied that any disclosure of information made to Stampeder at the April 30th meeting had no effect on Stampeder's plans to acquire the shares of Petro from Group and the Petro debt from the Bank. Stampeder was bent on that specific course of action well prior to the April 30th meeting and it did not alter or change its plans following the meeting, nor take any action as a result of the information received at the meeting that it had not already decided upon.

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[330] The information it received at the April 30th meeting did not serve Stampeder as a springboard leading to the acquisition of the shares and the Bank debt, nor did it give Stampeder a head start or any advantage over the plaintiff. There was, in my view, no misuse of confidential information to the detriment of the plaintiffs and for that reason, and despite the breach, the plaintiffs' action against the defendant Williams must fail. The confidential information was not used to the disadvantage of the plaintiffs.

[331] In the result, the plaintiffs' claim against both Williams and Stampeder, based upon breach of confidentiality, is dismissed.

3. *The Plaintiffs' Claim against Group, 542, Stampeder and Ricinus for Interference with Contractual Relations*

[332] In *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1994] 5 W.W.R. 473 [17 Alta. L.R. (3d) 251] (Alta. Q.B.), Berger J. [at p. 540] approves as a correct statement of the law with respect to the tort of interference with contractual relations the following passage from Fleming, *The Law of Torts*, 7th ed. (1987), at p. 653:

> "Liability will attach if the intervenor, with knowledge of the contract and intent to prevent or hinder its performance, either (i) persuades, induces or procures one of the contracting parties not to perform his obligations, or (ii) commits some act, wrongful in itself, to prevent such performance. The first is usually described as 'direct', the second as 'indirect' interference; the first involving immediate pressure on one of the contracting parties, while in the second the intervenor acts 'at one remove' …"

[333] In one of the leading Canadian cases, *Posluns v. Toronto Stock Exchange*, [1964] 2 O.R. 547 (H.C.), Gale J. stated [p. 598]:

> Thus, if a person without lawful justification knowingly and intentionally procures the breach by a party to a contract which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong.

[334] It is clear from this and the other authorities referred to by Justice Berger, that it is essential that the plaintiff prove the existence of a valid and enforceable contract as the first of the several elements required to establish the tort of interference with contractual relations.

[335] The plaintiffs having failed to prove the existence of a valid and enforceable contract with Group, 542, or Petro, they are not entitled to succeed on this aspect of their claim.

4. *The Claim against Group, 542, Stampeder and Ricinus for Interference with the Plaintiffs' Economic Interest*

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[336] Unlawful interference with another's economic interests is still an emerging tort in Canada. Lewis N. Klar, in *Tort Law*, 1991, at p. 454 discusses the topic under the heading "Interference with economic interests by unlawful means" and has this to say:

> The above discussion illustrates that when defendants engage in unlawful acts, with the intention of damaging another party's economic interests, and damage does result, this will, in some circumstances, constitute a tort. As we have seen, to threaten a person with unlawful acts constitutes the tort of intimidation. To conspire with others in the use of unlawful means constitutes the tort of conspiracy, and to use unlawful means to indirectly interfere with contractual relations is also tortious. The question has been raised whether there exists a general principle of tort liability which subsumes these nominate torts, whereby any use of unlawful means by an individual with the intention of causing injury to another, without justification, can be considered to be tortious. Is there a tort of interference with economic interests by unlawful means?
>
> *Dicta* in a few Canadian and Commonwealth cases suggest that such a tort is emerging…

[337] Berger J. in *Ed Miller Sales & Rentals* (supra) accepts the proposition that there is now, in Canada, a recognized tort of unlawful interference with economic interests short of an actual contract, and, with respect, I concur.

[338] I adopt the view of Professor Klar that the tort is founded upon proof of unlawful conduct. In *I.B. of T.C.W. & H. of A. v. Therien* (1960), 22 D.L.R. (2d) 1 (S.C.C.), Locke J. speaking for the majority stated at p. 13:

> … you are not entitled to interfere with another man's method of gaining his living by illegal means.

[339] I am of the view that this is an area where the courts should proceed with caution so as to leave room for a clear distinction between the tort of interfering with economic interests and what should be regarded as fair competition in a free enterprise economy. What will constitute unlawful means and what will constitute a valid economic interest are subjects that will be delineated by the courts over time, on a case by case basis, and will, I believe, be fact specific.

[340] What kind of "economic interest" will the courts protect? The plaintiffs cite a number of cases where the court found an interference with an economic interest.

[341] In *Mintuck v. Valley River Band No. 63A*, [1977] 2 W.W.R. 309 (Man. C.A.), the plaintiff, a lessee of Crown lands, was harassed by an Indian Band with intent to interfere with his ability to carry on farming on the lands. There the plaintiff had an established economic right, the right to farm under the lease.

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[342] In *J.T. Stratford & Son Ltd. v. Lindley*, [1964] 2 All E.R. 209 (C.A.), it was held that "… the respondent's action made it impossible to do any new business with the barge hirers." There, the appellant had a right to carry on his transport business.

[343] In *I.B. of T.C.W. & H. of A. v. Therien* (1960), 22 D.L.R. (2d) 1 (S.C.C.), Justice Locke stated at p. 13: "… you are not entitled to interfere with another man's method of gaining his living by illegal means." There, the plaintiff had a right to carry on his trucking business.

[344] In *Spicer v. Volkswagen Canada Ltd.* (1978), 91 D.L.R. (3d) 42 (N.S.C.A.), the interference was with the plaintiff's right to cash his cheques.

[345] In *Dufferin Real Estate Ltd. v. Giralico*, [1989] OJ. 1525 (H.C.); affirmed [1992] OJ. 947 (C.A.), the interference was with the right to sell property under a listing agreement.

[346] I refer to these cases to illustrate the kind of economic interest that will be protected by the court, through the mechanism of the tort of unlawful interference with economic interests. I conclude that what is referred to as an economic interest in the context of this tort is an inherent right to carry out some type of economic activity, which is so entrenched in the Canadian economic community that it will be recognized and protected by the courts.

[347] I have considerable difficulty in this case in satisfying myself that the plaintiffs had any valid economic interests or business right that was interfered with. I have already held that they had no valid contractual right, and beyond that, it seems to me, their only economic right or interest was to be free to negotiate, in an open market, with Group and with the Bank, for the right to acquire an equity interest in Petro. What happened here is that Colborne, despite being given every opportunity to do so, was simply unable to gain the approval of Group, or to make an arrangement with the Bank. In a competitive situation they simply lost the game.

[348] If it could be said that the plaintiffs had, by proper means, elevated their position to a valid economic interest which the court would protect, I am satisfied that there was no act of unlawful interference by the defendants. The unlawful act suggested by the plaintiffs is that the defendants Group and Stampeder conspired together to defeat the plaintiffs' economic interests in restructuring Petro. The facts lead me to the opposite conclusion. Group used its best efforts to encourage the plaintiffs to present a definitive proposal that would be acceptable to the Bank of Montreal and to the Group Board of Directors. The plaintiffs were unable to do so. It was only when it was abundantly apparent to Group that

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the plaintiffs would be unable to obtain the essential co-operation of the Bank, that Group proceeded to complete negotiations to sell its shares to Stampeder. Insofar as Stampeder is concerned, it entered the competition to acquire Group's shares at the same time as the plaintiffs, but Stampeder was quickly able to obtain a commitment from the Bank of Montreal to sell its interests in Petro to Stampeder, which proved to be the key to success.

[349] It is true that before the Stampeder transaction was closed both Group and Stampeder knew that Colborne was claiming a right of first refusal based upon the March 3rd and May 10th letters. However, Stampeder took all reasonable steps to determine whether the plaintiffs had a valid claim. Even in this they were frustrated by the plaintiffs' refusal to reveal the documents upon which it claimed to have rights. Stampeder continued to negotiate with Group and purchased Group's shares only after receiving assurances from Group that no rights existed in favour of the plaintiffs and after receiving the opinion of its own and Group's lawyers to that effect, an opinion which I have now held to be correct.

[350] I find nothing sinister in the Group transactions being closed on August 3rd, without a period of due diligence. It was a straightforward shares for cash arrangement. Stampeder had, during the several months preceding the sale, done a thorough search and analysis of Petro's affairs with the full co-operation of Group and Petro. In addition Chase, the chief financial officer of Group, provided an officer's certification. There was a valid reason for such a closing: there had been difficult negotiations which were resolved by closing the Bank/Stampeder transaction, the Group/Stampeder transaction, and the Bank/Group transaction (re: the Preferred C shares) at the same time and without conditions. In any event, the Group/Stampeder sale for $2 million was relatively insignificant in comparison to the Bank/Stampeder sale for $28 million, and Stampeder had a due diligence period following the closing of the purchase of the Bank's interest in Petro.

[351] In the certificate provided to Stampeder by Chase as senior vice-president and chief financial officer of Group, Chase certified, among other things, that:

1. Group had not approved (within the meaning of the March 3rd letter) any restructuring proposal submitted to it by Colborne;

2. At the time of signing the letter dated May 10th, 1993, Group was not aware of the March 3rd letter; and

3. Petro did not have outstanding any rights to acquire its shares other than to the Bank of Montreal (the 49.9% option).

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[352] The Certificate containing those assurances was reviewed by Pointer, Savage and Chase on August 3rd, the day the Group/Stampeder transaction was to close. Pointer took no exception to the Certificate, nor did he mention to Chase or anyone else on that day the existence of the secret right of first refusal and the unanimous shareholder documents, despite the fact that he knew the sale to Stampeder was about to close, and that Chase was certifying that no rights of first refusal existed.

[353] Neither Group, Stampeder nor the Bank were aware of the existence of the right of first refusal and unanimous shareholder agreements when the transactions closed on August 3rd. Their very existence was kept secret from them by the plaintiffs and Pointer.

[354] The plaintiffs have not satisfied me that the defendants engaged in unlawful conduct with the intention of damaging any valid economic interest of Colborne, and the plaintiffs' claim on that count fails.

[355] In the final result, I am satisfied that the plaintiffs have no claim, on any basis, against any of the defendants, and their action is dismissed.

5. *The Counterclaim of Stampeder/Ricinus v. Colborne, Edwards, Grenon and Pointer*

[356] Stampeder claims that Colborne's actions unlawfully interfered with Stampeder's right to market its share warrants at the most advantageous price, and constitutes a tort, for which Stampeder is entitled to recover pecuniary, exemplary and punitive damages.

[357] The law recognizes a class of wrongful acts arising out of unfair business conduct, most aptly described as business torts. Included in this general classification are: Deceit, Interference with Contractual Relations, Intimidation, Conspiracy, Interference with Economic Interests, and Abuse of Process. These separate torts are still developing and their elements overlap, so that it is sometimes difficult to say whether a particular set of circumstances falls within the one or another, or more than one. Together, however, they provide the court with a means of dealing with business behaviour which is so inappropriate that, even in a robust free enterprise environment, it exceeds the bounds of business morality to the extent that a court will intervene, and provide an appropriate remedy.

[358] I am satisfied that however one may classify the conduct of the defendants by counterclaim, it exceeded the bounds I have referred to, and caused damage to Stampeder, constituting a tort for which Stampeder is entitled to be compensated.

[359] Following the June 29th meetings, when Colborne became aware that Stampeder had reached a business deal with Group and the Bank that would allow

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Stampeder to acquire the shares of Petro, Colborne and Pointer conspired to defraud and cause serious economic injury to Stampeder. Their scheme involved creating secret agreements and then encouraging Stampeder to close and publicly announce the Petro acquisition. Colborne then issued its own press release and commenced this action based upon the false documents it had created, with the expectation and intent that when the allegations were made known to the investment community, Stampeder would be unable to raise the necessary financing to complete its deal with the Bank and would therefore be forced into a deal with Colborne (on Colborne's terms) so that Colborne would obtain Petro's tax attributes and Stampeder would be left with the bulk of the oil and gas properties.

[360] Colborne planned to use the funds paid by Stampeder for the oil and gas properties to pay the Bank. Trocana would then acquire the tax attributes, and Colborne would reap a significant windfall without risking any money. Petro would not be rejuvenated, and Stampeder would be harmed, but Colborne would have its profit.

[361] Colborne's intention is clearly revealed in a letter Grenon wrote to Chase on July 2nd (Tab 253):

> To the extent anyone attempts to conclude a restructing [sic] without regard to our right of first refusal, we will be seeking an injunction, launching a lawsuit, etc. I can only speculate how the Bank and the potential money raisers for Stampeder might react to this. Even a relatively short delay, which is about the worst we can expect to achieve, may see the currently overheated equity markets cool to the extent that Stampeder can't raise the money it needs.

[362] Colborne thereafter did its best to see that this threat was carried into effect. Grenon first had Pointer sign the July 2nd letter (Tab 255), purporting to confirm that Group had approved a Colborne restructuring plan, and with that in hand (and after writing Group to confirm his withdrawal of the suggestion that Colborne had a right of first refusal), Colborne began to build what later would be described by Grenon and Libin as the "arsenal" of "nuclear weapons" which included the several versions of Pointer's "Statement of Facts" (amended to take out the offending reference to the need to obtain Group's approval) and the secret right of first refusal and unanimous shareholder agreements. The plaintiffs' stated intention was to "screw the Stampeder deal." The tactics were to "build the arsenal, then negotiate."

[363] The scheme of the defendants by counterclaim to get Stampeder "in the snare" and then spring the documents was in fact carried out. Grenon had Pointer and Libin keep the documents secret, encouraged Stampeder to close its acquisition from Group by his letter of July 30th, and then, after Stampeder had entered into the transactions, but before

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it could go to the market for financing, sprung the agreements, issued a Statement of Claim, and issued a press release directed to the investment community announcing its intention to set aside Stampeder's acquisition and to seek damages of $30 million, in the expectation that these actions would prevent Stampeder from getting the funds required to complete the acquisition, and by this means force Stampeder into a position where it would have to make a deal with Colborne.

[364] The final step in the execution of the Grenon/Pointer scheme was Libin's phone call to his former law partner Williams, by now vice-president of Stampeder. Libin stated that Stampeder should not be put off by the statement of claim as "litigators exaggerate" and there was a business deal to be done. When Williams told him that the agreements would never stand up in court Libin responded to the effect that although that might be so, could Williams afford to have the court make that decision for him, and again suggested that Williams make a deal with Colborne, to which Williams properly responded that the plaintiffs' conduct "reeked of devious action."

Legal Analysis

(a) *Fraud*

[365] Fraud and deceit are related actions. Fraud is so infinite in its varieties that courts have not attempted to define it with precision. McDonnell, Monroe, *Kerr on the Law of Fraud and Mistake*, 7th ed. (London: Sweet & Maxwell Limited, 1952), at p. 1 states:

> It is not easy to give a definition of what constitutes fraud in the extensive signification in which that term is understood by Civil Courts of Justice. The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety. The fertility of man's invention in devising new schemes of fraud is so great, that the Courts have always declined to define it … Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud. Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to.

[366] The legal elements of fraud at law are: (1) dishonest conduct; (2) an intention to deceive; and (3) damages suffered by the innocent party. To determine if conduct is dishonest, an objective standard is applied. It is conduct which a reasonable, decent person would consider dishonest.

[367] The intention element of fraud is established by proof of subjective knowledge of the prohibited act, and subjective knowledge that the act could have as a consequence

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deprivation, in the sense of causing another to lose its pecuniary interest in certain property or in placing that interest at risk. There is no requirement that the accused subjectively appreciate the dishonesty of his acts. Generally, the primary objective of fraudsmen is to advantage themselves:

R. v. Théroux, [1993] 2 S.C.R. 5;

R. v. Olan, [1978] 2 S.C.R. 1175.

[368] I am satisfied that the actions of Grenon and Pointer constitute fraud. They wilfully conspired to deprive Stampeder by inequitable means of its right to complete its financing on the public market. Any reasonable, decent and objective business person, fully acquainted with the facts would consider their conduct dishonest and fraudulent.

(b) *Conspiracy to cause economic harm*

[369] A thorough discussion of the tort of conspiracy is found in Justice Berger's reasons for judgment in *Ed Miller Sales & Rentals Ltd.* (supra) [p. 501]:

> "The leading Canadian authority on the tort of civil conspiracy is Canada Cement LaFarge Ltd. et al v. British Columbia Lightweight Aggregate Ltd. et al., [1983] 1 S.C.R. 452; 47 N.R. 191. At pp. 471-472, Estey, J., dealt with the requisite elements in a conspiracy action:
>
> " 'Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> " '(1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or
>
> " '(2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> " 'In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.' "

[370] The key to the recognition of the tort of conspiracy is to determine the purpose or object in the minds of the alleged conspirators when they acted as they did. I am satisfied that the predominant purpose of the actions of Grenon, Edwards and Pointer, working together, was to injure Stampeder by interfering with its ability to raise capital on the public market, and thereby force Stampeder to make a deal with Colborne.

[371] The tort of conspiracy to cause economic harm has, I find, been made out.

(c) *Interference with economic interests by unlawful means*

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[372] I have described this tort as the unlawful interference with a valid business interest, using unlawful means, with the object and effect of causing damage to another.

[373] I have described Colborne's actions in creating what I have described as the false right of first refusal and unanimous shareholder agreements, and their actions in luring Stampeder into completing the purchase of Group's shares and the Bank interest, without revealing the agreements. Once Stampeder had committed itself to the $30 million acquisition, and, to the knowledge of Colborne, was about to go to the public market with a share warrant issue, Colborne published a press release to the investment community (Tab 398) stating:

> Colborne Capital Corporation ("Colborne") announces that it is in the process of filing a lawsuit against Stampeder Exploration Ltd. ("Stampeder") seeking to terminate the transaction recently announced by Stampeder concerning the acquisition of an unnamed private company or seeking damages in the alternative.

[374] I am satisfied that the only purpose for which this press release was published by Colborne was to interfere with Stampeder's ability to raise the funds it required on the open market.

[375] The defendants by counterclaim intentionally sought to injure Stampeder's valid economic interest: the right to raise funds on the public market. The means employed were fraudulent and unlawful, and caused Stampeder damage.

[376] The tort of interference with economic interests by unlawful means has, I find, been made out.

(d) *Abuse of Process*

[377] Fleming, in his text *The Law of Torts*, 1992, 8th ed., provides a helpful description of what constitutes abuse of process where, at p. 622, he says the tort occurs:

> … where a legal process, not itself devoid of foundation, has been perverted for some extraneous purpose …
>
> … the misuse of process, no matter how properly obtained, for any purpose other than that to which it was designed to serve. It involves the notion that the proceedings were "merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate". It is therefore immaterial whether the suit thus commenced was founded on reasonable cause or even terminated in favour of the instigator: the improper purpose is the gravamen of liability.
>
> In addition to the improper purpose, there must be some overt act or threat, distinct from the proceedings themselves, in furtherance of that purpose…

[378] A helpful discussion on abuse of process is to be found in the Reasons for Judgment of Madam Justice Fruman in *Rocky Mountain Rail Society v. H & D Hobby*

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Distributing Ltd. (Alta. Q.B.), dated 2 March 1995 (as yet unreported) [reported 27 Alta. L.R. (3d) 424].

[379] I have concluded that the statement of claim herein was issued by Colborne as part of an overall scheme to force Stampeder into making a deal with Colborne to part with the tax attributes of Petro. The issuance of statement of claim; the publication of the press release; the releasing of the secret documents to Stampeder; the phone calls to Williams and Surbey to advise that "a deal could be made" (meaning a deal to transfer the tax attributes to Colborne); and the timing of all these events; taken together with Grenon's previous statement forecasting such a course of action for the purpose of interfering with Stampeder's ability to raise the required funds on the capital markets, all satisfy me both with respect to the requirement of improper purpose, and the requirement that there be proof of definite actions in furtherance of such a purpose. What Colborne was attempting to obtain by issuing the statement of claim in combination with its other action was totally outside the scope of the action itself. Colborne was trying to use the action to obtain something that it could not obtain by way of the action itself. In my view, the issuance of a court process to further such an unlawful scheme constitutes an abuse of the court's process. The scheme, and the steps taken to implement it, constitute the overt action required for the establishment of the tort. Stampeder is not required to prove that Colborne lacked reasonable and probable grounds for initiating the action.

[380] I am satisfied that claim tort of abuse of process has been established.

6. *Damages*

(a) *Pecuniary loss*

[381] Stampeder's plan, from the outset, had been to go to the public market to raise the funds required for its acquisition of Petro. The company had been particularly successful in 1992, and again in 1993 in acquiring oil and gas properties which fit well with Stampeder's existing holdings, and thereby increasing its production of oil and gas, and its cash flow per share, and ultimately the value of its shares as a publicly traded junior oil and gas company, listed on the TSE. The market for oil and gas stocks was particularly "hot" during the first nine months of 1993. Tonken, Stampeder's president, knew this and planned the acquisition of Petro in the justifiable expectation that such a favourable acquisition would not only allow him to raise the required funds on the market but would result in a continuance of the rather dramatic increase in the price of Stampeder stock.

[382] Through previous public financings, Stampeder, and its president Tonken, had carefully built a reputation with blocks of investors in eastern Canada with whom he had

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acquired a trustworthy reputation based on his proven ability to carry out the plans for Stampeder that he described to institutional investors, in visits to Toronto and Montreal. The company had also established a record of successful performance with the leading underwriters in Calgary, and in particular Peters & Co. which specialized in energy stocks.

[383] Tonken had, from time to time, kept his group of institutional investors and underwriters informed as to his expectations with respect to the Petro acquisition.

[384] Stampeder stock consistently outperformed all relevant stock price indices, hitting a high of $7 5/8 near the end of June 1993. I am satisfied on the evidence that the market, in June, was anticipating a further acquisition by Stampeder and that this acquisition was reflected in the trading value of the stock. In July, the Stampeder stock fell with the rest of the oil and gas market to a closing price of $5.50. By August 3rd, the date Stampeder's acquisition of Petro closed, the stock had risen to $6.12. In August, 1993, after Stampeder closed its purchase of Petro, the oil and gas market continued to rise steadily to an all time high reached on September 3rd. However, notwithstanding the fact that Stampeder stock had consistently outperformed the various oil and gas indices in 1993, Stampeder stock remained flat in August, and did not participate in the rally. I am satisfied that the reason for this was the allegations made in the statement of claim issued by Colborne on August 6th, and the press release which Colborne caused to be published on the same day, both of which were designed to convince the investing community that Colborne was in a position to set aside Stampeder's acquisition.

[385] Furthermore, sometime between August 3rd and August 6th, Grenon telephoned Michael Timms, the president of Peters & Co. (who he knew to be the normal lead underwriter for Stampeder at that time), referred to Stampeder's acquisition of Petro, and told Timms that Colborne intended to assert a prior right to acquire that company, and said to Timms, "Presumably no underwriter would finance this deal with this kind of cloud hanging over it." I am satisfied that the purpose to this call was to interfere with Stampeder's right to go to the public market for funds.

[386] The defendant by counterclaim, Murray Edwards, also had a number of telephone conversations with Timms. On August 8th, Edwards "reminded" Timms that Peters & Co. had a business relationship with Colborne and with Edwards and Grenon personally. Timms replied: "Yes, but we also have an obligation to Stampeder in this circumstance and at the end of the day we have to do what's right." I am satisfied that Edwards' call was intended to interfere with Stampeder's financing.

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[387] The evidence is clear that Colborne's allegations caused uncertainty in the investing community generally, and especially Stampeder's group of institutional investors, and to Peters & Co., who Stampeder had selected as the lead underwriter for its impending stock warrant issue.

[388] I was particularly impressed with the evidence of William Gobert, a securities analyst doing investment research with Peters & Co. for sixteen years. Gobert majored in mathematics and holds a Masters degree in business administration with a major in finance, and is a Chartered financial analyst. I accept his evidence - that the expectation on August 3rd would be that Stampeder stock would perform in the relative order of magnitude of the Peters Picks index - as the best evidence available as to what would have been the performance of Stampeder stock during the period immediately following August 3rd, but for the actions of Colborne. I am satisfied that the probabilities are that it would have performed as expected: generally in the same magnitude as the index referred to, which reached an all time high on September 3rd. Had Stampeder stock followed that pattern it would have reached a price of $7.08 on that day; instead, it remained flat at $5.50.

[389] Stampeder had planned to raise the funds necessary for the Petro acquisition by a public issue of $5.5 million stock warrants. The matter of fixing the price for each warrant was left to be determined by agreement between Stampeder and its lead broker, Peters & Co., on the day of the actual issue. The warrants were issued on August 13th, and the price was fixed at $5.50, the price for the stock on that day. Counsel for Stampeder submits that this date was forced upon Stampeder by the events culminating on August 6th, but the evidence does not satisfy me that this is the case. Stampeder was anxious to proceed with the issue while the market was hot and I am not satisfied that it would have waited until later in the month of August to issue the warrants (when the index was higher) but for the actions of the plaintiff. I am, however, satisfied that Colborne's actions caused the price fixed for the issue on August 13th (that day's market price) to be lower than it would otherwise have been, because of Colborne's unwarranted interference which caused the market price of Stampeder stock to remain flat after August 3rd, rather than rise as the rest of the equivalent market did.

[390] Had Stampeder's stock performed as the witness Gobert reasonably expected, the warrants would have issued at $6.16 per share, the calculated market price for August 13th. I consider this to be a conservative approach to the determination of what the shares would have brought but for the interference by the defendants by counterclaim, because in

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using averages of the prices actually attained by similar stock, to establish the probable price, I have not taken into account the fact that Stampeder was bringing "an excellent acquisition to a red hot market."

[391] I also consider this approach valid because it does not represent an attempt to predict what a stock would do in the future but what the stock most probably would have done based, by hindsight not foresight, on what other stocks in an equivalent category actually did.

[392] In *McGregor on Damages*, 15th ed., para. 1725, the author, in dealing with the value to be placed on shares when assessing damages in tort, warns that: "… care must be taken not to assess the value of the shares at the price at which they stand in the market, since such a price may be a false and artificial one induced by the very deceit of which the plaintiff is complaining." And he concludes that [para. 1726]: "The actual value is, therefore, the price the shares would fetch in the market if the truth was revealed and all the facts were known."

[393] The loss to Stampeder, calculated as the difference between $6.16 per share (the probable share price on August 13th) and the actual issue price of $5.50, multiplied by 5.5 M, being the total number of shares issued, is $3,630,000, and I award that sum as the pecuniary damage caused to Stampeder by Colborne's wrongful interference.

(b) *General damages*

[394] Stampeder seeks an award for damages at large, for loss of reputation and expense in defending the lawsuit. I do not intend to embark upon a discussion of this developing area of the law. In my view, there is no evidence to support a conclusion that Stampeder sustained any permanent material loss to its business reputation or interests sufficient to warrant a consideration of damages under this head.

(c) *Exemplary or punitive damages*

[395] I am of the view that this is an appropriate case in which to consider the imposition of exemplary or punitive damages.

[396] The conduct of the defendants by counterclaim has been motivated by jealousy and greed. It has encompassed the torts of conspiracy and abuse of process. The conduct has so far exceeded the bounds of ordinary corporate morality as to warrant an award of punitive damages designed to make a statement to the business community that the courts of civil law will not condone excessive conduct of this kind nor tolerate an abuse of court process.

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[397] In considering what is an appropriate amount for such an award, I have in mind that Colborne sought to employ a devious and tortious scheme, and to abuse the process of the court, to gain a profit which Grenon predicted, at one point, to be in the vicinity of $15 million.

[398] Counsel for Stampeder seeks an award of $5 million in punitive damages, but in my view, even given the means employed and the amounts involved, an award of $1 million is sufficient to convey the message the court wishes to convey.

7. *Costs*

[399] Stampeder, having succeeded in its defence to the action brought against it and also on its counterclaim, is entitled to the costs of both the action and the counterclaim. I invite counsel to address the details of the costs award in my private chambers or otherwise as may be arranged. However, it is my intention that should be assessed, not on the usual party and party basis, but on a solicitor/client basis, to be taxed, if necessary, by the taxing officer of the court.

[400] My reason for awarding costs on a solicitor/client basis is that the plaintiffs' actions were intended to be used as a lever to intimidate Stampeder into making a deal with the plaintiffs, and constituted an abuse of process. Stampeder should not be required to fund such a lawsuit in any way.

8. *Interest*

[401] Stampeder is entitled to recover interest from the defendants by counterclaim, pursuant to the provisions of the *Judgment Interest Act* of Alberta.

9. *The Claims of Pointer v. Group and Petro*

(a) *Pointer's claim to an equity interest*

[402] It will be recalled that on April 30th, 1992 Group completed an arrangement with the Bank of Montreal to restructure Petro's debt with the Bank. The Bank and Group agreed at that time that Group should arrange for an incentive for Petro management, the cost of which would be borne equally by the Bank (which held a 49.9% option on the shares of Petro) and Group. The purpose was to ensure that management, Group and the Bank had the same objectives for Group's shares. Pointer knew this was the purpose of the equity incentive plan. The general arrangement with the Bank was that Group was to have the right to issue up to 10% of the stock of Group to the management of Petro. How this was to be done was left with Group to work out. Pointer was anxious to get something documented to record this understanding.

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[403] It will be recalled that by October 1992, at the initiative of Group, Pointer and Grenon (who was still with Peters & Co.), and Petro's solicitor Tom Olson, had worked out a tentative plan for a further restructuring of Petro's debt and shareholdings which involved the insertion of a new company between Group and Petro.

[404] In November 1992, Pointer instructed John Reid, a partner of Olson, to incorporate a company to be inserted between Group and Petro, which would be wholly-owned by Group and would hold Group's shares of Petro.

[405] Reid incorporated 542775 Alberta Ltd. (542) and, on Pointer's instructions, the shares of 542 were issued to Pointer and Savage, each as to 50%. Pointer was initially shown as the sole director and president of the Co., although Pointer told Reid that the directors of 542 were to be the same as the directors of Petro.

[406] Pointer then had Reid prepare a set of documents which purported to be a stock option agreement from 542 to Pointer and Savage, and an exercise of that stock option, and a unanimous shareholders agreement of 542, the effect of which was that, by this purely internal means, the shareholders of 542 (the company which was to hold all of Group's shares of Petro) were shown to be Pointer and Savage as to 10% and Group as to 90%. None of this was known to nor approved by Group.

[407] Pointer's next step was to have the Petro Board of Directors approve, subject to the approval of the Group Board, the plan to have a new company inserted between Group and Petro and to agree to a 10% participation to be split between Pointer and Savage, subject to documentation being finalized and "presented to" the Group Board.

[408] Pointer's next step was to attend a meeting of the Group Board of Directors on December 10th, 1992. I accept the evidence of David Bookbinder and Geer as to what transpired at this meeting from the perspective of the directors of Group. Pointer presented the stock option plan. Geer and other directors were dismayed to find that 542 was not 100% owned by Group and that Pointer and Savage were minority shareholders. As a result, the question of an equity participation for Pointer and Savage was deferred, to be considered at the next meeting of the Group Board to be held in February 1993. However, the Board was persuaded by Pointer that if Group transferred its shares to the new holding company (542) before the end of the year, this would accomplish a saving of $300,000 in Saskatchewan capital tax. The Board agreed to this on the basis that 542 would simply be a shell company and that Group would continue to be the beneficial owner of 100% of the shares of Petro.

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[409] In fact, when the share transfer took place in late December 1992, it was to a company (542), 10% of the shares of which company were shown to be held by Pointer and Savage. As I have earlier stated, the $300,000 tax saving never materialized.

[410] The result was that in early January 1993, the shares of Group were held by 542, a company in which Pointer and Savage held 10% of the shares, and the president and sole director of which was Pointer.

[411] When Chase and Geer discovered this state of affairs in early January 1993, Pointer was given instructions to transfer the shares back into the name of Group, but did not do so until Chase told him that if it was not done by the February Board meeting of Group, Pointer would (in effect) be without a job. However, despite the clear understanding that the directors of 542 were to be identical to the directors of Petro, this was not formalized by Pointer until July 27th.

[412] The result was that during the critical events that took place from February to July 1993, Pointer was in a position where he was improperly shown to be the sole director and president of 542. As we have seen, he proceeded to use that paper position for the purpose of signing resolutions and the unanimous shareholders agreement with Colborne as the sole director and officer of 542, in a fraudulent attempt to defeat the interests of Group, the shareholder of 542.

[413] Returning to the sequence of events with respect to the management incentive agreement, the Board of Group, at its February 24th meeting, agreed in principle to provide Pointer and Savage with a 10% equity participation, the details of which were to be agreed upon. This ultimately took the form of an agreement that out of the $2 million to be received from the sale of Group's shares to Stampeder, Pointer and Savage would receive 10% or $100,000 each.

[414] No written agreement was prepared, other than a Release which Pointer drafted, signed and delivered to Group on August 6th. The release (Tab 391) recited the efforts of Pointer in creating equity value in Petro, the sale of the shares to Stampeder (Ricinus) and the fact that Group, on behalf of 542 and Petro, had agreed to compensate Pointer in lieu of documenting the equity option, and provided for the payment by Group to Pointer in the amount of $100,000, in satisfaction of all claims. Pointer sent the release to Group on the morning of August 6th, and on receipt Chase, as arranged with Pointer, immediately drew a cheque for $100,000 to be couriered to Pointer that day.

[415] It will be remembered that Grenon had agreed with Pointer that the right of first refusal and unanimous shareholder documents would not be revealed until that day

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(August 6th). There is no doubt in my mind that this arrangement was made to enable Pointer to get his money before Group discovered the existence of the secret documents.

[416] When the statement of claim was served on Stampeder alleging the existence of a right of first refusal and a unanimous shareholder agreement, Tonken immediately called Chase and Geer in Vancouver. When Chase learned of the secret agreements he went to the mail which had been set out for the courier pick up, retrieved the letter and the cheque to Pointer for $100,000, which he cancelled forthwith.

[417] I am satisfied that Pointer, by his conduct, has forfeited his right to be compensated by Group for the incentive option.

[418] The very basis for the participation incentive was to ensure that management's objectives were attuned to the stakeholders' objectives (Group and the Bank) in dealing with matters concerning Group's shares. Instead of working with Group and the Bank, Pointer sought to defeat their objectives.

[419] Altogether apart from the duty which Pointer assumed by entering into the incentive agreement, I have already stated my conclusion - based upon the decision of this court in *Tongue v. Vencap Equities Alberta Ltd.* (supra) - that in matters concerning Group's shares, Pointer was acting outside the ordinary duties of a director of Petro, and in the capacity as an agent of Group, and that he owed a duty to Group arising out of that relationship. See also: *Martin v. Gibson* (1907), 15 O.L.R. 623 at 631-32 (H.C.), where a resolution that shares be at the disposal of the directors constituted the directors trustees for the shareholders.

[420] Counsel for Pointer submits that Pointer, as a director of Petro, was acting in the best interests of the corporation. I have already expressed the views of the court on that subject and they are equally applicable here.

[421] In the circumstances I have described, Pointer's primary duty, insofar as Group's shares were concerned, was to advance the interests of the sole shareholder, the major stakeholder, and those who held the pledge of the shares, all of whom were in agreement as to the course of action to be followed with respect to those shares. I am unable to identify any other interests to which Pointer owed a duty as a director in dealing with those shares, and certainly none that would allow him not only to ignore those interests, but to work secretly to frustrate them.

[422] The observations of Berger J. in *Teck Corp. v. Millar* (1972), 33 D.L.R. (3d) 288 [[1973] 2 W.W.R. 385] (B.C.S.C.), are pertinent (p. 315):

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> It would be altogether a mistake if the law, in seeking to adapt itself to the reality of corporate struggles, were to allow the directors any opportunity of achieving an advantage for themselves at the expense of the shareholders. The thrust of companies legislation has brought us a long way since *Percival v. Wright*, [1902] 2 Ch. 421.
>
> If the directors have the right to consider the consequences of a takeover, and to exercise their powers to meet it, if they do so *bona fide* in the interests of the company, how is the Court to determine their purpose? In every case the directors will insist their whole purpose was to serve the company's interest. And no doubt in most cases it will not be difficult for the directors to persuade themselves that it is in the company's best interests that they should remain in office. Something more than a mere assertion of good faith is required.
>
> How can the Court go about determining whether the directors have abused their powers in a given case? How are the Courts to know, in an appropriate case, that the directors were genuinely concerned about the company and not merely pursuing their own selfish interests? Well, a similar task has been attempted in cases of conspiracy to injure. There the question is whether the primary object of those alleged to have acted in combination is to promote their own interests or to damage the interests of others: *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435.

[423] The evidence satisfies me that Pointer was acting in the advancement of his own interests in behaving the way he did. The Grenon plan at first offered the revitalization of Petro and, hence, continued employment for Pointer. When the Grenon plan changed to a merger with Trocana and the consequent disappearance of Petro as a separate company, I believe Pointer came to be motivated by the lure of personal profit to be gained from a 5% interest in a new corporation, an interest which, on the basis of Grenon's toutings, could have been worth (to Pointer) anywhere from $650,000 to a million and a half dollars.

[424] Returning then to Pointer's claim to be entitled to enforce the incentive agreement and to recover from Group the sum of $100,000, I am satisfied that Pointer:

(a) breached the conditions upon which the agreement was based;

(b) failed in his duty as an agent of Group in dealing with Group's shares;

(c) failed in his general duty as a director of the corporation by working secretly to frustrate the wishes of the sole shareholder, the Bank which was major stakeholder, and the Group lenders to whom the shares of the corporation were pledged, all of whom agreed that the shares be sold to Stampeder;

(d) failed in his duty to act honestly and fairly in dealing with other directors and the shareholder of Petro and to provide full, complete and timely information to them on essential matters;

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(e) fraudulently conspired with Grenon to enter into a right of first refusal agreement intended to defeat the interests of the shareholder of Group;

(f) fraudulently abused his false position as sole director and president of 542 to make agreements purporting to affect the shares of 542 when he knew 542 was merely a trustee of the shares for Group;

(g) failed to act with candour and openness as a director of Petro;

(h) conspired to keep secret documents executed by him which he knew would be damaging to both Group and the Bank, in the expectation that he would receive payment under the agreement before the existence of the documents was discovered;

(i) falsely purported to act in the best interests of the company by putting Petro in a position where it would either be merged and disappear, or find itself with an obligation in liquidated damages in the sum of $17 million.

[425] By his actions, Pointer has violated the spirit and terms of the arrangement under which he was to receive an incentive and has put himself in a position where he is not entitled to benefit from the incentive agreement. His claim against Group, 542 and Petro under that agreement is dismissed.

(b) *Pointer's claim for the balance due under the terms of his severance agreement with Petro*

[426] During the course of the negotiations which eventually culminated in the sale of Group's shares to Stampeder, Chase and Pointer discussed the fact that if the negotiations with respect to Group's shares should result in the termination of Pointer's employment he should be entitled to severance compensation.

[427] These discussions came to a head on July 27th, when, after a detailed review with Pointer, Chase recommended to Geer that Savage should receive a severance payment in the sum of $225,000, and Pointer the sum of $175,000. Both Pointer and Savage agreed, in writing, that the severance arrangement should be unique to the Stampeder deal, and if the Stampeder deal did not close the agreement would be null and void. The arrangement was approved by Geer, and on July 28th, a severance agreement (Tab 328) between Pointer and Petro, which Pointer had drafted, was signed by him, faxed to Vancouver and signed by Chase for Petro, on the same day.

[428] It will be remembered that it was just at this time that Pointer was signing the unanimous shareholder agreement between 542 and Colborne, and the revised versions of the right of first refusal agreement, and was conspiring with Grenon to keep these

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documents secret until after Stampeder closed its purchase of Group's shares. Pointer revealed none of this to Chase during the final negotiations for and the execution of the severance agreement. In fact, Pointer arranged with Grenon that the documents would not be revealed until after he had received his payment on the equity and severance agreements.

[429] When the Group/Stampeder transaction closed on August 3rd, Pointer endeavoured to obtain payment - on that day - of the entire sum payable under the severance agreement; however, Stampeder (Petro) paid him one half, being $87,500, on August 3rd, and exercised its right to pay the balance in 30 days time, expecting that it would employ Pointer during that transition period. Pointer accepted the payment, and agreed to continue in Petro's employment as required, but continued to conceal the existence of the documents from Stampeder and Petro, having removed them from the Petro office before the turn over. When Stampeder discovered, on August 6th, the truth as to Pointer's conduct, his employment was terminated and payment of the balance due under the severance was withheld. Pointer sued Petro, Group and 542, for the balance due under the severance, and Petro counterclaimed against Pointer for the return of the monies paid.

[430] Pointer acted fraudulently in inducing Chase to enter into the severance agreement under the circumstances I have described. He obtained the Chase agreement and his execution of the document as a director of Petro, by deceiving him as to the true role he was playing in the final stages of the negotiations with Stampeder. The representation was that he, as a director of Petro, was assisting Group in its intention to sell its shares to Stampeder when the true facts were that he was, at that very time, conspiring with Grenon to prevent the completion of the transaction or if the transaction did close to have Petro in a position where it would owe millions of dollars to Colborne in liquidated damages. The severance agreement was induced by this fraudulent misrepresentation as to the true state of affairs. The misrepresentation was material in that it went to the factual foundation upon which the parties entered into contract. In these circumstance es the party deceived is entitled to damages and rescission.

[431] The contract is rescinded and Petro is entitled to judgment against Pointer for the amount paid under the contract. Pointer's claim against Petro, 542 and Group is dismissed, and Petro's counterclaim is allowed in the sum of $87,500, in both cases with costs on a party and party basis.

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[432] While dealing with the Pointer action, I should say as well that: as I have dismissed the claim of the plaintiffs Grenon, Edwards and Colborne, against all defendants, it is not necessary for me to make any formal disposition of the third party notice against Pointer. However, I will hear submissions from counsel as to costs in the Pointer action, and also with respect to the third party proceedings against Pointer, in private chambers or as may be arranged, recognizing that a significant portion of the 97 days occupied in hearing the evidence on this trial (apart altogether from the time spent in dealing with argument) was attributable to the third party proceedings against Pointer and the Pointer action itself.

IV. Summary of Conclusions

Action No. 9301-12382

(a) The claims of the plaintiffs Colborne Capital Corporation, James T. Grenon and Murray Edwards are dismissed;

(b) The counterclaim of Westar Petro Ltd., Stampeder Exploration Ltd. and Ricinus Holdings Ltd. against Colborne, Grenon, Edwards and Pointer is allowed in the sum of:

(i)	Pecuniary damages	$3,630,000;
(ii)	Punitive damages	$1,000,000;
	Total	$4,630,000

(c) Interest is allowed under the terms of the *Judgment Interest Act.*

Action No. 9301-13674

(d) The claim of Pointer is dismissed;

(e) The counterclaim of Petro against Pointer is allowed in the sum of $85,000;

(f) Interest is allowed under the terms of the *Judgment Interest Act.*

(g) Costs in both actions have been dealt with in a general way but counsel are invited to attend in private chambers or as arranged, within thirty days, to resolve cost issues if required.

[433] The able assistance of all counsel has been greatly appreciated by the court.

Actions dismissed; counterclaims allowed.

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TAB 30

Colborne Capital Corporation v. 542775 Alberta Ltd., 1999 ABCA 14

Date: 19990114
Docket: 95-15953, 95-15954, 95-15955

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE McCLUNG
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MR. JUSTICE SULATYCKY

BETWEEN:

COLBORNE CAPITAL CORPORATION and
JAMES T. GRENON and MURRAY EDWARDS

Plaintiffs/Defendants by Counterclaim
(Appellants/Respondents by Cross-Appeal)

- and -

542775 ALBERTA LTD., WESTAR PETROLEUM LTD.,
WESTAR GROUP LTD., STAMPEDER
EXPLORATION LTD., RICINUS HOLDINGS LTD.
and
PETER ATLEE WILLIAMS (Not a Party to the Appeal)

Defendants/Plaintiffs by Counterclaim
(Respondents/Appellants by Cross-Appeal)

- and -

THOMAS POINTER

Defendant by Counterclaim/Third Party
(Appellant/Respondent by Cross-Appeal)

1999 ABCA 14 (CanLII)

AND BETWEEN:

THOMAS H. POINTER

Plaintiff/Defendant by Counterclaim
(Appellant)

- and -

WESTAR PETROLEUM LTD. and WESTAR GROUP LTD.

Defendants/Plaintiffs by Counterclaim
(Respondents)

APPEAL FROM THE JUDGMENT OF THE
HONOURABLE MR. JUSTICE C. G. VIRTUE
DATED THE 31ST DAY OF MAY, A.D. 1995
FILED THE 30TH DAY OF JUNE, A.D. 1995

REASONS FOR JUDGMENT RESERVED

1999 ABCA 14 (CanLII)

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REASONS FOR JUDGMENT RESERVED

PER CURIAM:

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[1] This appeal raises issues concerning the scope of the powers of a director of a single shareholder company and the standard of conduct governing competitors for the control of a corporation.

I. INTRODUCTION

[2] It will be useful to commence with a brief description of the parties and the history of this matter.

A. Parties

[3] **Westar Group Ltd.** ("Group") is a private holding corporation with offices in Vancouver, British Columbia. Originally it held, among other interests, all the issued shares of Westar Petroleum Ltd. (“Petroleum”). Most of Group’s subsidiaries performed poorly after a drop in world commodity prices in 1984. One of them, Westar Mining Ltd. went into bankruptcy leaving a large unpaid debt to the Bank of Montreal (“th Bank”), one of Group’s bankers. Thereafter, relations between Group and that bank were strained. Group’s shares in Petroleum had been pledged to a consortium of bankers as security for Group’s debt of $300 million. In 1988, Group began to search for opportunities to sell its shares of Petroleum or to restructure the company to obtain some return on its investment.

[4] **Westar Petroleum Ltd.** ("Petroleum") was an oil and gas corporation wholly owned by Group. In early 1993, its assets were roughly $30 million. But it owed about $43 million to the Bank of Montreal. The debt was converted into $24.4 million in distress preferred shares and an oil bond for the remaining $18.4 million. As well, the Bank took security on all of Petroleum’s assets and an option on 49.9% of Group’s shares in Petroleum. The Bank also did a monthly cash

sweep leaving Petroleum only enough cash for operations but none for exploration or development. Between Group and the Bank of Montreal, the latter had as much or more control over any plan affecting the restructuring of Petroleum or the sale of Group's shares in that company. Group had written down the value of its shares in Petroleum to a nominal amount. However, Petroleum was not entirely without value. It had on its books losses of about $100 million which, as tax attributes, were potentially valuable to third parties.

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[5] **Thomas Pointer** ("Pointer") was a director, Chief Financial Officer and Secretary of Petroleum at all relevant times. He began his employment with Petroleum in 1985, and in May 1991, became an officer and director of the company. He was also a director and officer (President) of 542775 Alberta Ltd. at the relevant times. One of his responsibilities was to propose, for Group's consideration, a method to use Petroleum's accumulated tax losses and resource pools and thereby create some value in Petroleum for Group.

[6] **542775 Alberta Ltd.** ("542") was a company controlled by Group. Incorporated in September 1992 at the instigation of Pointer, 542 was to help facilitate a tentative plan of re-organization proposed to the Group board of directors by James Grenon and Pointer. In December 1992, Group transferred its shares of Petroleum to 542.

[7] **James Grenon** ("Grenon") is a "merchant banker" (so described by the trial judge), a lawyer and a broker formerly employed by Peters & Co., a Calgary brokerage house. He and Murray Edwards are the principals of Colborne Capital Corporation.

[8] M**urray Edwards** ("Edwards") is also a "merchant banker", a lawyer and a broker formerly employed by Peters & Co. Edwards and Grenon, through Colborne, were active and successful in revitalizing companies by re-organization and financial restructuring.

[9] **Colborne Capital Corporation ("Colborne")** is a private Alberta corporation, controlled by Grenon and Edwards. In their activities leading to this litigation they sometimes

referred to themselves as “GE”. For simplicity, where the context permits, Colborne, Grenon and Edwards will be referred to as “GE”.

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[10] **Stampeder Exploration Ltd.** ("Stampeder") was a public "junior" oil and gas company with offices in Calgary, Alberta. It had properties in the area of Kindersley, Saskatchewan which were intermingled with Petroleum’s properties. The operations of the two companies were similar. As a consequence of acquiring another company with interests in the same area, Stampeder’s shares, listed on the Toronto Stock Exchange, rose substantially. In January 1993, it was looking for another acquisition. Stampeder banked at the Bank of Montreal. Early in 1993, a senior Bank employee informed Jeff Tonken, President of Stampeder (“Tonken”), that the Bank was considering selling its interest in Petroleum. Tonken met with other Bank officials and obtained more particulars. It was evident to him that Stampeder would have to buy the Bank’s debt and share option and then would have to buy the shares of Petroleum from Group since the Bank did not actually own any of them. Tonken made a “soft” offer of $28 million to the Bank for its interests which he believed the Bank would accept. He then communicated with Robert Chase, Chief Financial Officer of Group and a director of Petroleum (“Chase”), to advise of Stampeder’s interest in buying Group’s shares of Petroleum. Stampeder ultimately purchased the Bank of Montreal's debt and security position in Petroleum for $28 million.

[11] **Ricinus Holdings Ltd.** ("Ricinus") is a subsidiary of Stampeder which purchased all the outstanding shares of Petroleum for $2 million on August 3, 1993.

B. History

[12] Colborne, Grenon and Edwards (“GE”) claimed their rights of first refusal were violated when Stampeder and Ricinus acquired Petroleum. They also alleged breach of a unanimous shareholders agreement, intentional interference with contractual relations, and unlawful interference with economic interests. This litigation is essentially an inquiry into the validity of the interests claimed by GE.

[13] Some events in the history of this matter are interpreted differently by the various parties. The trial judge generally rejected the interpretations advanced by GE. Those trial findingsweare the subject of vigorous attack on this appeal. The disputed findings will be dealt with when discussing the trial judgment. But there are many undisputed facts which provide the superstructure of this matter.

[14] One of the key background facts was the relationship between Group and the Bank of Montreal. Group's debt of $27 million to the Bank of Montreal and its $300 million debt to the Group lenders greatly exceeded the value of its assets. As security for the indebtedness of Group, the Bank of Montreal held preferred C shares of Westshore Industries Ltd. (“the Westshore shares”), a subsidiary of Group. The Bank, as well as Group, regarded those shares as having little or no intrinsic value. However, the directors of Group, hoping to be able to restructure and refinance Group, regarded the acquisition of those shares from the Bank, and their cancellation, as fundamentally necessary to that plan. Because of the strained relationship between Group and the Bank of Montreal referred to earlier, the Bank was not prepared to readily give up the shares despite their insignificant worth.

[15] Group considered that the Bank of Montreal could not succeed in its desire to sell its debt and security interest in Petroleum without Group’s co-operation. Initially, the Bank was not prepared to tie the transfer of the Westshore shares with any sale of its interests in Petroleum. On

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April 27, 1993, the Bank of Montreal accepted Stampeder's offer for the Bank's interest in Petroleum, but that sale was conditional on Stampeder acquiring the Petroleum shares controlled by Group. Group withheld making any deal with Stampeder until the Bank agreed to sell the Westshore shares back to it. Eventually, the Bank agreed to do so for $500,000 and Group arranged for the sale of Petroleum shares to Stampeder.

[16] The involvement of GE with Group and Petroleum began in 1989 when Edwards, then associated with Peters & Co., was approached by Pointer about a transaction involving Group's shares of Petroleum. Nothing concrete developed from that.

[17] On July 11, 1991, Group engaged Peters & Co., where Edwards and Grenon were associated, to provide financial assistance in raising capital by using Petroleum's tax losses. Action on this was deferred because the demands of the Bank of Montreal became the more pressing problem.

[18] After the completion of the debt restructuring with the Bank of Montreal in 1992, Group returned to Peters & Co. On June 9, 1992, Pointer signed a letter agreement engaging Peters & Co. Capital Limited, a joint venture between Grenon, Edwards and Peters & Co., as a financial advisor. Peters & Co. Capital Limited intended that the engagement be with Group. But Pointer told Grenon to have the engagement letter addressed to Petroleum rather than Group since he was not authorised to sign for Group. Pointer said that eventually he would arrange to transfer the obligation to Group.

[19] By late October 1992, Grenon with input from Pointer and Petroleum's tax lawyer had developed a plan for restructuring Petroleum. It involved the transfer of Group's shares in Petroleum to a new company. Chase obtained approval from Group's lenders to whom the shares were pledged.

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[20] On December 10, 1992, the Group board approved the proposal to transfer the Petroleum shares to 542 which was to be wholly owned by Group. Pointer advised the Board that if the transfer was completed before the year end, a saving of $300,000 in Saskatchewan capital tax would result.

[21] Pointer set up the incorporation of 542. Initially, Pointer had arranged that he and David Savage, another Petroleum director and its chief operating officer ("Savage"), owned a 10% interest in 542 with the remaining shares held by Group. This was in anticipation of obtaining the approval of Group's board for a share option plan. That approval was delayed and Pointer was ordered by Chase to transfer the 10% to Group so that Group would hold 100% of the 542 shares. Pointer did so in early 1993.

[22] Pointer also knew that the board of directors of 542 was to mirror that of Petroleum, but he took no steps to effect the necessary changes with the result that he remained the sole director and officer of the company during the most critical events leading to this litigation.

[23] On January 18, 1993, Grenon advised Pointer that he and Edwards had severed their connection with Peters & Co. Grenon proposed that GE should participate in the restructuring of Petroleum by the introduction of capital in exchange for an equity position. This way they would be involved as principals, rather than agents.

[24] Grenon planned that Colborne would buy the Bank's debt and security position at a substantial discount to its face value, acquire one-half of the Bank's 49.9% option on Group's shares of Petroleum for a nominal amount and then, inject capital into Petroleum to enhance the Bank's security. He planned further to have Group transfer one half of its share in Petroleum to Colborne for a nominal amount so that Colborne would have a 50% equity in the company. Thereafter, Colborne would use its expertise to restructure the company in order to obtain value for Petroleum's $100 million tax attributes. The plan was to take the company public through a

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corporation owned by Colborne, Group, the Bank of Montreal and the management team of Pointer and Savage.

[25] On February 9, 1993, Grenon and Pointer met with Bank of Montreal officials who expressed conditional interest in the general proposal. They made it clear that they would not look at the matter until GE had obtained the approval of Group and until there was a specific proposal. The Bank did not hear from GE again until July 2, 1993. But its interest in obtaining cash for its Petroleum assets had been stimulated and coincided with the interest of Stampeder in Petroleum's properties.

[26] Following the February 9 meeting, Grenon expressed concern to Pointer that GE might work on a restructuring but be excluded from participation in it. In a February 18 letter to Pointer, he said that GE wished to be protected against the risk of investing effort on a resolution only to find themselves "on the outside looking in".

[27] The Group board met on February 24, 1993. For that meeting, Pointer prepared a document entitled "Westar Petro Ltd. Corporate Strategy. New Equity Investment." It incorporated a tentative plan developed by Grenon with input from Pointer and tax advice from Grenon's lawyer.

[28] The day prior to the Group board meeting, Pointer reviewed the tentative proposal with Group's management committee. Peter Geer, the new president and chairman of the board ("Geer") was present. Pointer knew that there had been a power shift making Geer the key player. The committee was generally interested in the proposal, but Geer made it clear that he was not interested in a period of exclusivity for GE as requested unless he had a more detailed plan from GE which met his approval.

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[29] Pointer and Chase presented the tentative GE restructuring plan to the Group board. The board wanted the credentials of Grenon and Edwards verified and a more detailed proposal to be put together before further consideration. It is not clear whether the board dismissed any potential of a period of exclusivity or right of first refusal at that time. But if not clearly dismissed, it was accepted that Group should remain free to deal with any third parties who came forward on their own initiative.

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[30] The minutes of the board meeting record that:

> It was agreed that Mr. Geer, Mr. Bookbinder and Mr. Chase would review and confirm the estimated currant (sic) value of Westar Petro Ltd. and that inquiries would be made to verify the credibility and reputation of the proposed investor. It was further agreed that Mr. Savage and Mr. Pointer would obtain a specific proposal for review by the Directors and, at the appropriate time, the Bank of Montreal.
>
> [David Bookbinder was a director of Group.]

[31] After the meeting, Chase advised Pointer that if a period of exclusivity was necessary to keep GE interested, it should be on terms allowing Group to deal with others who came forward on their own initiative. Pointer was advised that one such party was Tonken of Stampeder and was told to contact Tonken. Chase also called Tonken and told him to meet with Pointer. As a result of that meeting and detailed information received by him, Tonken concluded that the acquisition of Petroleum would be very advantageous to Stampeder.

[32] On March 2, 1993, Stampeder offered Group a share exchange for the Petroleum shares. Geer advised Tonken that was unacceptable. On March 15, Stampeder made a cash offer. Tonken contacted Chase frequently for a response but was told that Group was considering a number of options.

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[33] Grenon learned the results of the February 24 Group board meeting from Pointer. The two met frequently thereafter while Grenon struggled to put in writing something to provide GE with a period of exclusivity. The result was a letter agreement (“the March 3 letter”) between GE and Petroleum rather than Group. It was dated March 3 and signed by Grenon for GE and Pointer for Petroleum. It provided generally that Petroleum and GE would attempt to develop a restructuring plan for approval by Group. Concerning “exclusivity”, it provided that prior to Group approval of any GE plan, Petroleum would be free to meet other parties to respond to restructuring enquiries; once Group approval was obtained, GE would have a one-month exclusive period in which to attempt to obtain Bank of Montreal approval and GE would also be "granted a right of first refusal to match any offer or agreement in principal contemplating a Restructuring ..."

[34] The March 3 letter was not provided to Group until June 29 by which time all substantial impediments to a deal with Stampeder, save for any arising from the letter itself, had been removed.

[35] At a meeting on March 9 with Chase, no mention was made of the March 3 letter. Chase made it clear to Grenon and Pointer that Group was considering other offers. Neither Grenon nor Pointer raised the question of exclusivity or a right of first refusal.

[36] On March 30 (“the March 30 proposal”), Group received a proposal from GE. It sought Group's approval “in principle" and acknowledged that: "the precise legal structure can only be resolved after the Bank has agreed on Phase II." The proposal spoke of three "Phases" and acknowledged that "Phase III is not described at all...". It acknowledged that nothing could be accomplished without the co-operation of the Bank of Montreal and stated specifically that “it is not proposed that any steps for Phase I (the negotiations between Group and Colborne to establish the terms of Colborne's involvement in the restructuring) be effected without first having obtained the approval of the Bank of Montreal for Phase II.” It proposed a contribution of $1.5 million capital by GE "on condition that an agreement be reached with the Bank...". It further proposed

that Group's shares of Petroleum be redistributed: 50% to GE, 22.5% to Group, 22.5% to the Bank, and 5% to Pointer and Savage. There was no reference in the proposal to the March 3 letter agreement nor to a period of exclusivity or right of first refusal.

[37] Geer and Chase reviewed the March 30 proposal and considered that it was only an outline of an idea or a discussion paper. Chase reported that to Pointer.

[38] On April 5, Grenon advised Chase by fax that GE would be prepared to offer $2.5 million for Group's Petroleum shares if a satisfactory arrangement could be made with the Bank of Montreal.

[39] Geer and Chase came to Calgary on April 7 and met separately with Pointer and Savage of Petroleum, Tonken and Bill Dickson [Vice President of Operations] of Stampeder, and Grenon and Edwards. At the Pointer/Savage meeting, Pointer and Savage urged Geer and Chase to consider the GE proposal and to help convince the Bank of Montreal to agree to it; at the Tonken/Dickson meeting, Stampeder made an offer of $2 million for Group's shares of Petroleum, subject only to a due diligence requirement (the offer was neither rejected nor accepted at that point); at the Grenon/Edwards meeting, Geer and Chase said that they favoured the GE concept but needed a more detailed proposal to take to the board.

[40] In dealings with the Bank of Montreal during April 1993, Geer and Chase attempted to convince the Bank that the GE plan was preferable to any deal with Stampeder. As already noted, the Bank accepted Stampeder's offer to purchase its interests in Petroleum and advised Pointer and Chase of that fact.

[41] On May 10, Grenon phoned Chase to request approval from Group to approach a third party candidate to participate in the GE proposal for restructuring Petroleum. After discussing it with Geer, Chase gave Grenon such approval. Grenon faxed a letter ("the May 10 letter") to

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Chase to confirm the approval. Chase signed it and returned to Grenon. Thereafter, through May and June, Grenon carried on discussions with Trocana, a subsidiary of Petro-Canada, exploring details of a possible merger between Petroleum and Trocana. In the meantime, Chase continued his efforts to have the Bank of Montreal consider the GE proposal. He also informed Grenon that the Bank controlled the timetable of events and that once the Bank made up its mind, Group would have to move quickly. Chase told Grenon that Group was seeking an accommodation from the Bank but did not disclose that it related to the Westshore shares.

[42] While Grenon was endeavouring to make an arrangement with Trocana, the Stampeder deal was at a standstill due to a deadlock between Group and the Bank. Group was adamant that it would not dispose of its Petroleum shares to anyone without assurance that it would recover the Westshore shares from the Bank for $500,000.00. Group was insisting that the Bank consider the proposal of GE, but the Bank was equally adamant that it would not allow any transaction by which Group would receive more than $2 million for the Petroleum shares.

[43] In an effort to break the log jam, Tonken arranged a meeting on June 29 between officials of the Bank, Group and Stampeder. Compromises were discussed. Chase then met with Pointer and Savage, who were disappointed to learn that a deal with Stampeder was a possibility. Pointer mentioned the March 3 letter. Chase asked for a copy of it.

[44] Later on June 29, Chase and Pointer met with Bank of Montreal officials in an effort to persuade them to consider a proposal from GE. The Bank officials were intransigent on the $2 million return limit to Group and pointed out that they had not received an offer of any kind from GE. They also said the Bank was committed to deal with Stampeder.

[45] That same day, Chase and Pointer met Grenon to report on the meetings with the Bank and Stampeder. They discussed how they could persuade the Bank to consider an offer from GE and agreed that GE should make a written offer to the Bank. But the next day when Pointer

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called to encourage Grenon to act quickly, Grenon said there was no need to do so as GE could rely on the right of first refusal created when Chase signed the May 10 letter. Pointer asked for a copy of it. After reading it, he concluded that GE was entitled to a right of first refusal under the terms of the March 3 letter. Pointer called Chase to discuss this. Chase again asked Pointer to send him a copy of the March 3 letter, which Pointer did that day, June 30.

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[46] On July 2, without consulting either Group or the directors of Petroleum, Pointer signed a letter created by Grenon, stating that the May 10 letter "constitutes the approval of Group to the Restructuring plan presented to Group by Colborne as required by the March 3, 1993 letter to [Petroleum] from Colborne, such that certain terms and conditions that commence to operate on such approval are now in effect." On the same day, Grenon wrote Chase asserting a right of first refusal saying:

> To the extent anyone attempts to conclude a restructuring without regard to our right of first refusal, we will be seeking an injunction, launching a lawsuit, etc. I can only speculate how the Bank and the potential money raisers for Stampeder might react to this. Even a relatively short delay, which is about the worst we can expect to achieve, may see the currently over-heated equity markets cool to the extent that Stampeder can't raise the money it needs.

[47] On July 5, Grenon met with Geer and Chase in Vancouver. Geer demanded that Grenon retract, in writing, the assertion of a right of first refusal. Grenon appeared to agree to do so and the next day forwarded a letter which was interpreted as such a retraction. Notwithstanding that, Grenon, engaged lawyers and worked almost daily with Pointer to create documents, including a right of first refusal agreement, willingly signed by Pointer, designed to force Stampeder into a position where it would have to make an arrangement with GE.

[48] Among the first documents signed by Pointer was a "Statement of Facts". In that statement, referring to a right of first refusal agreement, he said, "I do not feel I should execute such agreement without the approval of Group, which approval I am sure will not be

forthcoming." On the advice of Grenon's lawyer, those words were removed. Later Pointer, on behalf of Petroleum, signed several versions of a right of first refusal agreement ("RFR") prepared by another of Grenon's lawyers. The final version required that the terms and conditions of the RFR not be disclosed to (amongst others) the directors or officers of Petroleum. It also provided for liquidated damages of $17 million for breach by Petroleum.

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[49] Pointer also executed at least three different copies of a unanimous shareholder agreement ("USA"), allegedly on behalf of 542 as the sole shareholder of Petroleum, which essentially prohibited 542 from taking any steps in furtherance of any restructuring, winding-up, etc., without GE's written consent.

[50] While Grenon and Pointer were busy preparing what Grenon termed his "nuclear arsenal", Group, Stampeder and Bank of Montreal were finalizing the details of a sale to Stampeder.

[51] On July 30, Grenon wrote to Stampeder stating that he was aware of the imminent closing of Stampeder's purchase of Petroleum's shares, that Colborne "was hopeful that [Stampeder] will meet with us after closing the Petroleum acquisition to discuss a prospective transaction with us involving Petroleum", and offering to "present our proposal to you after you have closed your transaction with Group". No right of first refusal or unanimous shareholder agreement was mentioned.

[52] On the advice of his lawyers, who considered that the July 30 letter might constitute a waiver of any right of first refusal, Grenon wrote to Stampeder on August 3 purporting to "retract" the July 30 letter.

[53] Stampeder and Ricinus' purchase of the Bank of Montreal's interest in Petroleum and of all the outstanding shares of Petroleum (from 542) closed on August 3. Chase certified in writing to Stampeder that Group had not approved any restructuring proposal within the meaning of the March 3 letter and that the sale did not violate any agreement to which Group or 542 was a party.

Pointer was present at the closing, but said nothing of the RFRs or the USAs he had executed only days earlier.

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[54] On August 6, Colborne issued a press release stating that Colborne was seeking to terminate the Stampeder deal on the basis of certain rights. The same day, Colborne filed its Statement of Claim and Grenon's lawyer called Stampeder's counsel offering to "make a deal". Stampeder refused, demanded to see the alleged agreements, but was denied them.

[55] Stampeder "went public" on August 13 with a special warrant offering in order to raise the funds to pay for the purchase of Petroleum's debt and equity interests. Some 5.5 million shares were issued at $5.50 per share.

[56] In addition to the foregoing facts which are pertinent to the dispute involving all the corporate parties and Grenon and Edwards, there are uncontested facts relevant to the litigation between Group, 542 and Petroleum on one side and Pointer on the other.

[57] In May 1992, the Group board discussed providing Pointer and Savage each with a 5% equity participation in Petroleum's restructuring. In December 1992, the Petroleum board approved that participation which meant they each would be entitled to receive 5% of the amount of any value realized by Group for Petroleum. The Group board formally recognized the equity participation scheme on February 24, 1993. On July 27, 1993, the Group board agreed to pay Pointer 5% of the proceeds of sale of Petroleum to Stampeder.

[58] On July 28, 1993, Pointer executed an agreement with Petroleum (signed by Chase on behalf of Petroleum) which provided that if the Stampeder deal was completed and resulted in the termination of Pointer's employment, he would be entitled to a severance payment of $175,000. Stampeder had the option to retain Pointer for 30 days after the closing of the deal. In such a case, half the funds would be paid upon closing and the remaining half after the 30 days. Pointer

received $87,500, one half of his severance pay, on August 3 when the deal with Stampeder closed. The remaining half was to be paid at the end of a 30 day period during which Stampeder/Ricinus was to have the benefit of Pointer's services.

[59] Pointer also provided a release to Group, Petroleum and 542 of his equity participation upon the assurance that he would receive $100,000 (i.e., 5% of $2 million) on August 6.

[60] On August 6, Pointer provided Geer with a new release incorporating changes requested by Geer. Chase prepared a cheque for $100,000 to courier to Pointer. Chase then heard from Tonken of the "secret agreements" and the filing of the statement of claim by Colborne. He immediately stopped the delivery of the cheque to Pointer and cancelled it. Stampeder and Petroleum terminated Pointer's employment and refused to pay the balance of his severance payment.

[61] Group and 542 defended the action commenced by Colborne alleging that the claims made by the plaintiff were based on actions of Pointer for which he had no authority. They claimed contribution and indemnity from Pointer as a third party.

[62] Stampeder, Ricinus and Petroleum defended the action and counterclaimed against Colborne, Grenon, Edwards and Pointer. They alleged that Pointer breached his fiduciary duties to Petroleum by taking unauthorised steps which provided Colborne, Grenon and Edwards with the documents on which they based their claims. The counterclaim alleged that Colborne, Grenon, Edwards and Pointer acted fraudulently and unlawfully conspired to interfere with the economic and contractual relations of the Plaintiffs by Counterclaim. An amendment [Appeal Book starting at 9653] alleged that the Colborne, Grenon and Edwards' statement of claim was filed in circumstances which constituted an abuse of process. The counterclaim sought damages because it was alleged that the conduct of the Defendants by Counterclaim adversely affected the

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share offering of Stampeder which followed its purchase of Petroleum. It also asked for punitive damages.

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[63] Pointer commenced a separate action against Group, Petroleum and 542. He sought performance of severance and stock option agreements which he allegedly had with one or more of the defendants, or alternatively, damages. Petroleum defended and counterclaimed alleging that Pointer breached fundamental terms of his employment relationship with Petroleum and also his fiduciary duties to Petroleum. It asked for a declaration that the severance agreement was null and void together with damages.

II. THE JUDGMENT

[64] The actions were tried together before Virtue J., who dismissed all the claims of Colborne, Grenon, Edwards and Pointer and allowed the counterclaims against them. He also held them liable for punitive damages and for the solicitor-client costs of some of the parties.

[65] The trial judge made certain express findings of credibility against Pointer and Grenon. Generally, he preferred the evidence of witnesses for Group, 542, Stampeder, Petroleum and Ricinus ("the respondents") over the evidence of the witnesses for Colborne, Grenon, Edwards and Pointer ("the appellants"). He described the actions of the appellants, particularly Grenon and Pointer, in terms such as "false", "deliberate act", "plan of deception", "fiction", "concoctions falsely created", "a benighted and devious effort", "deceitful", "dishonest and fraudulent" and "unlawful".

[66] He found that in matters concerning any refinancing or restructuring of Petroleum, there was an established procedure which Pointer understood and accepted. It involved Pointer reporting to Chase and to the president of Group, who for most of the relevant period was Geer. Pointer and Chase were in frequent and regular communication with respect to Group's efforts to

sell its shares of Petroleum or to restructure the company. The process for any formal approval was to first, obtain the approval of the board of directors of Petroleum, then obtain the approval of Group's management committee, and finally, obtain the approval of the board of directors of Group.

[67] When Grenon and Edwards first became involved in the Petroleum restructuring or sale, they intended that it be an engagement between them and Group. Pointer told Grenon that he was not authorised to sign for Group and arranged to have the engagement letter addressed to Petroleum rather than Group. Pointer knew that Petroleum was not the proper party to the agreement, but he told GE that he would deal with the matter of moving the obligation from Petroleum to the appropriate party when the strategy was more fully developed. The trial judge found this was the beginning of a series of actions Pointer took in an effort to personally control matters affecting Group's shares and the restructuring of Petroleum and that Grenon concurred in it.

[68] He also found that Pointer knew that the board of directors of 542 was to mirror that of Petroleum. Although he instructed the solicitor who incorporated 542 that the directors of 542 were to be the same as the directors of Petroleum, he did not see to the completion of that. Consequently, Pointer remained the sole director and president of 542 for several months and used his false position to the disadvantage of Group.

[69] The trial judge found that from an early point in the relationship with GE, Pointer was motivated by concerns for his personal future. Grenon’s original idea was to sell off Petroleum's oil and gas assets but retain the tax losses to be used in a merger with a revenue company. Pointer opposed this because Petroleum, and his job, would disappear. He ultimately persuaded Grenon to go along with an approach that would see the tax losses internalized and so keep Petroleum operating as an oil and gas company.

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[70] After the February 24 Group board meeting, Pointer told Grenon that Group had to be free to deal with Stampeder. In the following days, Grenon struggled to get something in writing granting a period of exclusivity. Grenon and Pointer had originally intended that a letter agreement referring to exclusivity and a right of first refusal should be addressed to Group. But after learning of Group's resistance to that, they decided that the letter agreement should be addressed to Petroleum and signed by Pointer. The trial judge found that they knew if the letter agreement was addressed to Group, as originally intended, it would be rejected. Grenon addressed the letter agreement to Petroleum in an attempt to draft his way around the difficulty that Group was not prepared to grant a period of exclusivity or a right of first refusal. Grenon did not send a copy of the letter agreement to Group, although it directly affected Group's shares.

[71] Pointer spoke to Geer by telephone on March 5 but he made no reference to the letter or its subject matter despite the fact that it was a matter which could have restricted Group's ability to deal with its shares. The trial judge found that Pointer deliberately kept the existence of the letter from Geer because he knew Geer would not allow him to sign it. Pointer signed the document after his conversation with Geer. He also found that Pointer did not sent a copy of the March 3 letter agreement to Chase. This was unusual because the record showed that the consistent practice on matters affecting Group's interests was for Pointer to record everything in writing and to send copies to Chase. He found Pointer's failure to send a copy of the March 3 letter agreement to Chase was a deliberate act on Pointer's part to keep this particular document from Group's attention so that Pointer could achieve his personal objectives for dealing with Group's shares.

[72] The March 30 proposal, the March 3 letter and the May 10 letter formed the basis for GE's claim of a right of first refusal. The March 30 proposal was considered by Group to be no more than the outline of an idea and not a concrete proposal on which to act. It was found by the trial judge to be an ambiguous and confused document.

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[73] The trial judge did not construe the March 3 letter, March 30 proposal and May 10 letter as leading to any right of first refusal.

[74] He found that prior to May 10, Chase had been pressing Pointer and Grenon to produce a definitive plan for consideration by the management committee of Group. If the plan passed the management committee, it would be considered by the board of Group. In particular, Chase had been pressing Grenon to develop a definite approach to the Bank of Montreal, whose concurrence would be required before any plan could proceed. Chase wanted specifics because he was endeavouring to have the Bank consider Colborne's plan despite the Bank's apparent intention to deal with Stampeder. On May 10, Grenon told Chase that he would have to talk with an unidentified party in order to develop a definite position. He said he wanted something in writing from Group to show such a party that Group was interested in dealing with Colborne. Chase agreed to sign a letter for that purpose.

[75] Grenon faxed a draft of such a letter to Chase. After discussing it with Geer, Chase requested some alterations, which Grenon made. One change removed a reference to Colborne dealing directly with Stampeder. Another involved adding the words, " provided that this restriction shall not apply in respect of a party with which Petroleum or Group is currently in active discussion with respect to a Restructuring." The letter was signed by Chase and returned to Grenon on May 12.

[76] The May 10 letter referred to the fact that Colborne was involved in negotiations "which may allow us to generate an offer for the Bank's position in Petro. We are hopeful that the offer will appeal to the Bank more than the current proposal that is in front of it [by which Grenon meant Stampeder] and that it will also be more attractive to Group." It went on to say, "However, with the alternative proposal currently in front of the Bank we are probably going to need much more of a final solution to get the Bank's approval." It also used phrases such as "to the extent

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that Group or Petroleum does approve of any transactions that we may propose" and "if Group or Petroleum does not approve of a transaction proposed by GE".

[77] The trial judge found that given the above quoted language, no matter what the balance of the letter may have said, it was difficult to comprehend how Grenon honestly could have believed that Chase's signature on that letter constituted the approval by Group to a restructuring plan referred to in the March 3 letter, or at all. He found that Grenon knew that approval by Group, meant approval by the Group board of directors. He knew further that no GE plan would ever get to the Group board until he had satisfied Chase and Geer that GE had a plan which would satisfy the Bank of Montreal, with which GE had no contact since February 9. The trial judge found that even if Grenon honestly expected that the May 10 letter was to constitute the approval of Group to the GE proposal, then he deceived Chase about the purposes for which he was seeking the letter.

[78] Geer agreed to the May 10 letter on the understanding that it would allow GE to meet with a third party and expedite GE's efforts to present a definite proposal to Group. The trial judge found that the letter did not constitute Group's approval of a GE proposal for the restructuring of Petroleum as referred to in the March 3 letter agreement. More importantly, he found Grenon knew that it did not constitute such approval.

[79] The trial judge accepted that the first reference Chase heard of GE's claim of a right of first refusal was in a telephone conversation with Pointer on June 21. GE made strong efforts to discredit the evidence of Chase on this point. They called a handwriting expert, who gave opinion evidence that an entry made by Chase in his diary concerning the telephone call of June 21 had been made with a different writing instrument and therefore, was not made at the time when Chase testified they were made. The trial judge rejected that opinion because it was based upon infra-red photographs of insufficient reliability. He also was of the opinion that neither the expert

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nor anyone else could arrive at the conclusions the expert expressed on the basis of what the expert observed.

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[80] During the several meetings of June 29, Chase asked Pointer, if he had learned anything more about Grenon's assertion that GE had a right of first refusal. According to the trial findings, Pointer mentioned the March 3 letter to Chase for the first time, but said it was just a letter that laid out the working relationship between the parties. Chase asked Pointer to send him a copy of the letter. On that day, Pointer did not know of the May 10 letter. He was told about it the next day by Grenon. When Pointer saw a copy of it, he concluded that GE was entitled to a right of first refusal under the terms of the March 3 letter agreement. The trial judge found that from this point forward, Pointer saw the possibility of relying on Grenon's claim to a right of first refusal as an opportunity to advance his own interests. He found that thereafter Pointer was prepared to sign, and did sign, in Petroleum's name, anything suggested by Grenon which might advance the Colborne proposal and defeat Stampeder's endeavours to close its deal with the Bank and Group.

[81] The first such document was a July 2 letter which stated that the May 10 letter "constitutes the approval of Group to the Restructuring plan presented to Group by Colborne as required by the March 3, 1993 letter to Westar Petroleum Ltd. from Colborne, such that certain terms and conditions that commence to operate on such approval are now in effect." The trial judge found that this was a major step in a plan of deception devised by Grenon and Pointer to force Stampeder to turn over the Petroleum tax losses and pools to GE.

[82] The next document created was the "Statement of Facts". In the first signed version, Pointer, referring to a proposed right of first refusal agreement, said, "I do not feel I should execute such agreement without the approval of Group, which approval I am sure will not be forthcoming."

[83] The right of first refusal document Pointer eventually signed was prepared on Grenon's instructions by a lawyer with considerable corporate experience. The document prohibited Pointer from revealing it to his corporation or his fellow directors. Grenon's lawyer in his experience had never before drafted anything with such restrictions. Grenon's lawyer suggested Pointer should seek the advice of counsel before signing the document. The trial judge found that Pointer ignored the advice of counsel not to sign it, or at least to have it authorised by the board of directors before signing.

[84] The next documents in the series purported to be a resolution of the board of directors of 542. It claimed to give Pointer, among other things, the widest possible powers to enter into agreements with GE. Grenon himself prepared this document, had Pointer sign it and never revealed it to the lawyers who were preparing the other documents for him.

[85] Next, Grenon instructed his lawyer to draft a unanimous shareholders agreement between 542 and Colborne and a resolution of 542 purporting to authorise "any director" to execute it. Pointer signed the resolution on July 27, as "the sole director of 542" and signed the unanimous shareholders agreement on behalf of 542. The USA prohibited Petroleum from furthering any proposal (including a sale of Group's shares to Stampeder) without the consent of Colborne and gave Colborne the right to appoint one of two directors of Petroleum in order to stalemate the board. It contained a provision prohibiting the disclosure of the document to anyone connected with Petroleum. The document was signed by Pointer in three original versions, two bearing different dates and one undated.

[86] The trial judge found these purported agreements and resolutions were "concoctions falsely created by Grenon and Pointer in a benighted and devious effort to force Stampeder to deal with Colborne on Grenon's terms." The documents were not to be revealed to Stampeder until it had completed its purchase of Group's shares, at which point Grenon planned to "bring

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Stampeder to heel by springing on them the right of first refusal and the unanimous shareholders agreement."

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[87] The trial judge found that Grenon knew of the arrangements for a severance payment to Pointer of $175,000 and of Group's obligation to pay a further sum of $100,000.00 in settlement of a right to share in any value received for Petroleum. Pointer wanted to make certain that he obtained payment before Group and Stampeder learned that he had signed the RFRs and USAs. Grenon agreed that Stampeder should not be told of the agreements until after Pointer got his money. Despite Pointer's attempts to arrange for immediate payment of the entire amount of his severance pay, only one half was paid and the balance was held back by Stampeder pursuant to its right to have his services for 30 days after closing.

[88] Pointer arranged with Group that he would be paid his incentive bonus (in lieu of equity participation) of $100,000.00 on August 6. Pointer informed Grenon, who agreed to wait until that date to notify Stampeder of the existence of the agreements. Pointer ensured that there were no copies of the USA or RFR in the files of 542 or Petroleum. He did not release them from his locked briefcase until instructed to do so by Grenon on August 6.

[89] The trial judge found that in filing the statement of claim and issuing the press release announcing that fact on August 6, GE intended to block Stampeder's ability to raise, from the investing community, the funds it needed to complete the purchase. By this means, they would force Stampeder to make a deal with Colborne.

[90] Concerning Pointer, he held that Pointer, by his conduct, "violated the spirit and terms of the arrangement" such that he forfeited any claim to the incentive payment. The conduct referred to included breaching the conditions of the arrangement itself, breaching his duty as Group's agent in dealing with Group's shares, breaching his duties as director of Petroleum by working to frustrate the interests of all the stakeholders, failing to act honestly and fairly in dealing with his

co-directors of Petroleum, fraudulently conspiring with Grenon to enter into an RFR which would defeat the interests of Petroleum's shareholder; fraudulently abusing his position as sole director and officer of 542, and several other "breaches".

[91] The trial judge made certain other findings and interpretations which were attacked on appeal, but which it is unnecessary to recite, as the disposition of this appeal is not in any way affected by them. Some of them will be mentioned below in the context of summation of the arguments of the parties.

III. GROUNDS OF APPEAL

A. The Appellants

[92] Colborne, Grenon, Edwards and Pointer appealed the awards made against them. All but Edwards also appealed the dismissal of their respective claims. Group and 542 cross-appealed the refusal of the trial judge to award them solicitor-client costs.

[93] The appellants took the following positions: Colborne and Grenon argued that Colborne had reached an agreement with Petroleum and 542 to restructure Petroleum, and had gained an RFR from Petroleum to participate in any restructuring of Petroleum.
The key steps allegedly leading to this RFR were the March 3 letter, the March 30 proposal, the May 10 letter, the July 21 formal RFR signed by Pointer, and the USA.

[94] On the basis of the rights allegedly gained under those agreements, Colborne and Grenon claimed that:

(a) Petroleum breached the RFR by cooperating in the Stampeder deal and by failing to provide notice to Colborne of the Stampeder deal.

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(b) 542, as sole shareholder of Petroleum, breached its USA by permitting the Stampeder transaction to go ahead without proper regard for the RFR. Ricinus also breached this USA, being a "deemed party" under the *Alberta Business Corporations Act* S.A. 1981, c. B-15, as amended ("ABCA").

(c) Stampeder, Ricinus and Group are liable for the tort of intentional interference with contractual relations and/or the tort of unlawful interference with economic interests, essentially, for interfering with the contractual obligations of Petroleum and 542 towards Colborne.

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[95] Colborne and Grenon also denied any liability on the counterclaim of Stampeder, Ricinus and Petroleum, primarily because even if the appellants acted aggressively or if their conduct was "unsavoury", there was no legal wrong committed, and because it was not properly established on the basis of admissible evidence that Stampeder, Ricinus and Petroleum suffered any loss as a result of these transactions.

[96] Colborne [and in what follows, unless otherwise stated, reference to Colborne's position on appeal will include Grenon] raised some 27 grounds of appeal. Pointer and Edwards both substantially adopted the Colborne grounds. In addition, Pointer raised 11 of his own and Edwards, another 5.

[97] Colborne's grounds of appeal may be divided into the following groups:

1. Grounds relating to the trial judge's failure to find an enforceable contract between Petroleum and Colborne, and his failure to find any enforceable rights against 542 and Ricinus arising from the USA.

2. Grounds relating to the trial judge's dismissing of the tort claims (intentional interference with contractual relations and unlawful interference with economic interests) against Stampeder, Ricinus, Group and 542.

3. Grounds relating to the awarding of damages on the counterclaim both in finding that any damages were established and in finding that the requisite elements of the various alleged torts had been established.

4. Grounds relating to the punitive damages awarded against the appellants.

5. Grounds relating to the solicitor-client costs awarded in favour of Stampeder and Ricinus against the appellants.

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[98] Pointer's position mirrored Colborne's in many respects. His overall theme was that the trial judge seriously erred in assessing the duties of Pointer when faced with the seriously conflicting interests of Petroleum and Group, and where Pointer confidently believed that his actions were justified as actions which were in Petroleum's best interests. Although Pointer approached some issues slightly differently than Colborne, there was sufficient similarity in the submissions to make it convenient that the grouping of issues applied to Colborne's arguments may be used for Pointer as well. One additional group is needed, however:

6. Grounds of appeal unique to Pointer’s claim against Petroleum and Group for breach of the “equity participation agreement” and the severance agreement, and for Petroleum’s counterclaim against Pointer for return of the severance amount paid.

[99] Since Edwards appealed only the finding of liability against him and not the dismissal of his claims against Stampeder and the other defendants, many of the grounds raised by Colborne and Pointer are not applicable. On the other hand, Edwards expressly adopted Colborne's submissions with respect to the findings of liability on the counterclaim by Stampeder, Ricinus and Petroleum. To that extent, the same groupings used to address the arguments of Colborne may be used for Edwards. Edwards' other grounds of appeal may be grouped as:

7. Grounds of appeal unique to Edwards' situation, focussing on his lack of direct involvement in any of the subject transactions.

B. The Cross-Appellants

[100] Group and 542 cross-appealed the trial judge's refusal to award solicitor-client costs in their favour. Their position was simply that they were equally affected by this lawsuit as were Stampeder, Ricinus and Petroleum, and that the conduct and the claims against them were equally unfounded and abusive. The Group/542 cross-appeal makes an eighth "group" of grounds of appeal:

8. Grounds arising on the cross-appeal, regarding the trial judge's refusal to award solicitor-client costs to Group and 542.

IV. ARGUMENTS

1. Grounds relating to the trial judge's failure to find an enforceable contract between Petroleum and Colborne, and his failure to find any enforceable rights against 542 and Ricinus arising from the USA.

[101] Colborne's first group of grounds of appeal (adopted by Edwards and Pointer) revolved around the submission that the trial judge made several "pervasive errors of law". These particularly related to:

(a) the distinct legal identities, obligations and rights of Petroleum, 542 and Group,

(b) the nature and effect of Pointer's obligations to Petroleum, as distinct from Group, and

(c) the nature of the various agreements executed by Pointer on behalf of Petroleum and the significance of various facts in relation to those agreements.

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(i) The Distinct Legal Identities

[102] The appellants argued that the trial judge erred by ignoring the distinct legal identities of Petroleum, 542 and Group, effectively “piercing the corporate veil” where it was inappropriate at law to do so on the basis of the evidence before the court. He viewed Petroleum as having virtually no authority to act independently from Group and essentially ignored 542 as the true 100% shareholder of Petroleum. The appellants argued that the evidence clearly indicated that 542 was, from December 1992 on, the legal and beneficial owner of Petroleum. Moreover, this was not a situation in which a "compelling reason" existed to ignore the distinct legal identities and hold both 542 and Petroleum to be the "puppets" of Group.

[103] The respondents did not directly reply to these arguments, but rather submitted that the trial judgment was based on fact findings of dishonesty and manipulation by Pointer, Grenon and Edwards. They argued that a high standard of review applies. The appellants essentially want the Court of Appeal to re-try the issues, which it should not do.

(ii) Pointer's Duties to Petroleum vs. Group

[104] According to the appellants, this error led the trial judge to misconstrue Pointer's obligations and the legality of his actions. Because Pointer was the CFO and a director of Petroleum, his fiduciary duties were owed to Petroleum and not Group. Where Petroleum's and Group's interests conflicted, Pointer was obliged to advance Petroleum's, not Group's interests. The trial judge placed insufficient emphasis on the conflict between Group’s and Petroleum’s interests which resulted because of Group's desire to obtain from the Bank of Montreal a release of the Westshore shares. Since Pointer held the view, on reasonable grounds, that the Colborne proposal was in the best interests of Petroleum and 542, he was entitled and even obligated to take steps to see that proposal succeed over the Stampeder deal. The trial judge erred, submitted

the appellants, in holding that Pointer owed (and breached) fiduciary obligations to Group, rather than recognizing that Pointer acted in what he believed were Petroleum's best interests.

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[105] Stampeder, Ricinus and Petroleum responded to the appellants by arguing that Pointer's conduct was far from being in Petroleum's "best interests" on the facts. Pointer's secrecy in executing the alleged agreements (including non-disclosure to his fellow directors/officers) was in violation of his fiduciary obligations to Petroleum; his perceived duties did not provide him with authority to execute what he did; the full Petroleum Board would have had to authorise the RFR; "all stakeholders" were behind the Stampeder deal, and there was no particular advantage for Petroleum to the Colborne deal.

(iii) Petroleum's Capacity to Execute the RFR

[106] The appellants further argued that the trial judge's blurring of the corporate identities led him in part to err in holding that Petroleum did not have the capacity to grant the RFR agreement. The RFR in this case was not a right to acquire the Petroleum shares, but rather a right to participate in a Petroleum restructuring. Petroleum had the authority to grant such a right and could be liable for breach of its obligations pursuant to it (i.e., for failure to give notice to Colborne of all the Stampeder deal details, for co-operating with the Stampeder transaction, etc.). This authority existed even though the granting of such a right would affect the ability of the sole owner of the Petroleum shares to dispose of them.

[107] The respondents did not directly reply to this point, presumably, because even if the appellants succeed in showing that the trial judge erred in this regard, that would not demand that the appeal be allowed. The respondents focussed, rather, on Pointer's authority and upon the (non)-effectiveness of the various letter agreements.

(iv) Pointer's Authority to Execute the RFR on Petroleum's Behalf

[108] The appellants said that the trial judge misunderstood the issue of Pointer's authority to execute the RFR agreement when he considered whether Pointer had such authority from Group. They submitted that although Pointer may not have had authority from Group, he did have authority to carry on the "business and affairs" of Petroleum. Executing the RFR agreement fell within the scope of that authority.

[109] Stampeder, Ricinus and Petroleum took issue with that argument. They said that Pointer could not have bound Petroleum to the RFR agreement for at least two reasons: first, because any RFR agreement was contingent upon Group approval because the March 3 letter expressly required such approval [but see below for the appellants' position on this] and second, because the authority to manage the business and affairs of a corporation are collectively granted to its directors and there was no resolution of the board of Petroleum delegating to Pointer such power to bind Petroleum. On the contrary, the expenditure limits imposed on Pointer were a mere $50,000, considerably less than the liquidated damages clause of the RFR.

(v) Requirement for Group Approval in March 3 Letter

[110] The appellants argued that although the March 3 letter agreement stated that Colborne's right to claim a right of first refusal was contingent upon Group approval to the Colborne restructuring plan, since this was a Petroleum agreement, not Group's agreement, the assessment of whether Group approval had been given was to be made by Petroleum. Pointer made that determination on Petroleum's behalf (rightly or wrongly, it does not matter) on June 30. This triggered the right to claim and execute a right of first refusal.

[111] Stampeder, Ricinus and Petroleum replied that Pointer had no authority to make such an assessment of whether Group had approved the Colborne plan. The trial judge properly found as

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a fact that no one, including Pointer, reasonably could have believed that the May 10 letter constituted Group approval of the Colborne plan. Therefore, the trial judge properly rejected the suggestion that it was up to Pointer (Petroleum) to determine subjectively whether Group approval had been granted.

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(vi) The Term "Restructuring" in the March 3 Letter

[112] The appellants submitted that the trial judge incorrectly concluded that the Stampeder deal was not a restructuring within the terms of the March 3 letter, and so, could not trigger the RFR. On its face, this is a strong argument and the respondents do not appear to take issue with it. But demonstrating that the trial judge erred in his interpretation of this document does not take the appellants very far since the numerous questions about Pointer's authority and *bona fides* remain.

(vii) Whether the RFR Agreement was Contingent on Group Approval

[113] In a subtle twist of an earlier argument, Colborne suggested that although the March 3 letter may have made "perceived Group approval" a condition of Colborne's right to claim a right of first refusal, once the RFR was signed around July 21, 1993, Petroleum "unconditionally" accepted the obligations set out therein.

[114] Stampeder, Ricinus and Petroleum responded to this suggestion essentially by arguing that the trial judge's characterization of the RFR as a fraudulent, unenforceable document was unassailable upon any review of the facts.

(viii) Pointer's Actual or Ostensible Authority to Execute the USA

[115] The appellants claimed that Pointer had actual authority under the by-laws of 542, as the sole director and officer at the time, to execute the USA on behalf of 542. This was further bolstered by Pointer's passing of a resolution, as a one man board, granting Pointer exceptionally wide powers to enter into agreements with Colborne et al. The appellants claimed the trial judge erred in ignoring the fact that Pointer was a "one man board" of 542 at the relevant time, notwithstanding Group's alleged intention that the 542 Board mirror that of Petroleum. In any event, they said, even if Chase and Savage were *de facto* members of the 542 Board at the relevant time, any one of the 542 directors could execute the USA. In the further alternative, they submitted that Pointer had ostensible authority to execute the USA on behalf of 542.

[116] Ricinus and 542 (who are the only respondents against whom claims are made on the basis of the USA) responded in essence that the facts support the trial judge's finding that the USA was a sham and of no force. Such a document required full 542 board approval to be valid. The various USA documents and resolutions giving Pointer alleged authority to execute them were all created after July 26, 1993, the date the 542 board was increased to 3, but back dated. Additionally, 542 could not breach an agreement it knew nothing about and which was kept secret from the majority of the board. Moreover, there was no valid corporate purpose for the USA from 542's perspective. Further, the respondents argued that Colborne waived any rights it may otherwise have had under a USA because of its deliberate concealment of the USA.

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(ix) Did the Alleged USA Meet the Formal Requirements Under the ABCA?

[117] The appellants challenged the trial judge's interpretation of s.1(z) of the ABCA, defining a USA. They argued he erred in holding that a sole shareholder corporation can only create a USA by following s.1(z)(ii), not s.1(z)(i).

[118] The respondents supported the trial judge's view.

[119] This is an issue only if the validity of the USA cannot be determined on the basis of Pointer's authority to execute it or his *bona fides* in so doing.

2. Grounds relating to the trial judge's dismissing of the tort claims (intentional interference with contractual relations and unlawful interference with economic interests) against Stampeder, Ricinus, Group and 542.

(i) Claim for Intentional Interference with Contractual Rights

[120] The appellants submitted that the trial judge erred in dismissing their claim for intentional interference with contractual rights because there were never any valid contracts entered into between Colborne and Petroleum or 542. Here, they simply adopted their previous grounds of appeal relating to the RFR and USA agreements. The respondents replied that this tort was not plead, but in any event, the trial judge was correct that because there were no valid contractual rights extant, the claim for "interference" with such rights must fail.

(ii) Claim for Unlawful Interference with Economic Interests

[121] Colborne claimed that the trial judge erred in describing the economic interest which Colborne submitted was interfered with and in misunderstanding the nature of the "unlawful act" alleged against Group and Stampeder. More particularly, the suggestion was that the trial judge

failed to recognize that the appellants had a legitimate "business expectancy to restructure" Petroleum and he failed to understand the unlawful acts alleged.

[122] This submission was not advanced with any vigour and the respondents likewise gave it little attention. It is difficult to contest the trial judge's fact findings that there was no "unlawfulness" in either Group's or Stampeder's conduct.

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3. Grounds relating to the awarding of damages on the counterclaim, both in finding that any damages were established, and in finding that the requisite elements of the various alleged torts had been established.

(i) Damages assessment founded on inadmissible expert evidence

[123] The appellants claimed that the trial judge erred in admitting and then utilizing, as a basis for his findings on damages, the opinion evidence of the witness Wilf Gobert. The complaint founded on the failure of the respondents to provide statements and reports from Gobert as required by Rule 218.1 of the *Alberta Rules of Court*. Upon objection at trial, Gobert's evidence was allowed in as non-expert factual evidence. The appellants argued that despite the allegedly factual nature of Gobert’s evidence, it was expert opinion evidence and moreover, it provided the very foundation for the damages assessment of the trial judge. By evading the requirements of R. 218.1, the respondents "ambushed" the appellants with expert evidence and the appellants suffered prejudice thereby.

[124] Stampeder, Ricinus and Petroleum replied that overall Gobert's evidence was factual and the trial judge properly exercised his discretion to allow the witness some latitude in expressing opinions. Further, they argued that if the appellants felt ambushed by the evidence, the proper course for them would have been to request an adjournment.

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(ii) Reasonableness of the Finding of Causation

[125] The appellants claimed that the trial judge's finding that the appellants' conduct caused the damages awarded was unreasonable. Even assuming Gobert's evidence was properly admitted, there was evidence to suggest other trends would have affected Stampeder's public financing and no rational reason to accept that the special share warrants issued on August 13 would have been priced any differently in the absence of the lawsuit.

[126] Stampeder, Ricinus and Petroleum replied that the trial judge's finding on causation cannot be said to be a "palpable and overriding error". The trial judge found Colborne's purpose in issuing the press release was to make it difficult for Stampeder to raise the needed funds, thus, forcing a "deal" with Colborne. They argued, in the alternative, that damages may be awarded "at large" where the torts of abuse of process or conspiracy are made out. Colborne in its reply argued that this issue is foreclosed on appeal, since the trial judge specifically rejected Stampeder's claim for such damages and it was not appealed.

(iii) Calculation Errors in Assessing Damages

[127] The appellants claimed that the trial judge made palpable and overriding calculation errors in determining the quantum of damages: first, he used the August 13 share price rather than the August 12 share price; second, he failed to recognize the price of special warrants was generally lower than the trading share price to enhance their desirability in the market; third, he failed to account for the commission Stampeder would owe to Peters & Co.; fourth, he should have discounted the value to reflect unknown "other factors" which may have affected the share price.

[128] Stampeder, Ricinus and Petroleum asserted that "the award of damages is a decision that is fundamentally one of judicial assessment, not of calculation."

(iv) Finding of Conspiracy

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[129] The appellants submitted that the conspiracy finding cannot stand: first, because damages were not proved; second, because the trial judge committed palpable and overriding errors in finding the "building blocks" of a conspiracy; and third, because the trial judge's finding that the predominant purpose of the appellants' conduct was to injure Stampeder was unsupported by the evidence. The appellants detailed the various "building blocks" which they suggested make up the foundation of the finding of conspiracy. They then attacked each of those blocks as being inadequate to support a conspiracy.

[130] Stampeder's replied by pointing out that the trial judge clearly did not trace the conspiracy back as far as the appellants allege, but rather, he clearly defined his starting point as "following the June 29th meetings". Further, Stampeder set out numerous fact findings and evidence in support of the conspiracy finding.

[131] Ultimately, this amounted to a battle over fact findings, not over the law regarding conspiracy. Similarly, Colborne's complaint about the finding of an intent to injure Stampeder amounted to a debate about whether there was evidence to support the trial judge's fact findings.

(v) Finding Abuse of Process

[132] The appellants argued that the trial judge erred in finding the existence of an "extraneous and collateral purpose", but for which the action would not have been started, and in finding there was an act "unrelated to the proceedings". Both of these elements, the appellants said, are required to establish abuse of process.

[133] Apart from a brief discussion of the law, the parties disagreed again about what "spin" to put on the facts. The appellants argued that what the trial judge considered improper purposes were not outside the scope of litigation, particularly, the purpose of starting the action with a view

to persuading Stampeder to “make a deal” with Colborne. Stampeder argue that it and other actions constituted improper purposes. Stampeder, however, did not appear to respond to Colborne’s claim that the trial judge erred in finding that there was an act “unrelated to the proceedings”.

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[134] Pointer argued a distinct ground of appeal regarding the abuse of process claim, namely, that he should not have been found liable for abuse of process because he was not a party to the Colborne, Grenon and Edwards’ statement of claim issued on August 6, 1993. Apparently, when Stampeder sought the amendment to the pleadings to allege abuse of process, it was specifically said not to relate to Pointer.

(vi) Finding Unlawful Interference with Economic Interests

[135] In addition to again relying on the no damages and misapprehension of Pointer’s fiduciary duties points raised earlier, the appellants argued that this tort was not established because there was no termination of Stampeder’s economic interests and no evidence that unlawful means were used.

[136] Stampeder took issue with the notion that an interest must be completely terminated in order for a remedy to lie. It argued that the loss of expectation of fair prices on the issuance of shares was sufficient to establish that an economic interest was interfered with and that there was ample unlawfulness in the findings of fraud, breach of fiduciary duties, etc.

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(vii) Finding of Fraud

[137] The thrust of Colborne's complaint with the fraud finding was that the trial judge erred in finding dishonest conduct. First, Colborne submitted that the trial judge erred by essentially creating a new category of civil fraud, modelled on the elements of criminal fraud. Colborne acknowledged the high standard of review applicable to this Court's consideration of the trial judge's fact findings, but countered this by noting that allegations of fraud must be clearly and conclusively proven.

[138] In particular, Colborne attacked the trial judge's view that Grenon did not have a right of first refusal pursuant to the March 3 letter and did not honestly believe he had such a right. They argued that since Grenon sought and was given legal advice that Colborne did have a right of first refusal, it was palpably unreasonable to conclude Grenon knew he had no such rights. Further, Colborne argued that Grenon's non-disclosure of the various "secret documents" was improperly considered to be evidence of fraud, since Grenon was under no legal obligation to disclose the documents, particularly, to Stampeder. Colborne pointed out that only Stampeder, not Petroleum, was found to have been defrauded. Even if a duty existed to disclose to Petroleum, it did not exist vis-à-vis Stampeder. Finally, Colborne argued the trial judge erred in finding dishonest conduct in Grenon's sending the July 30 letter which "lured" Stampeder into the closing with 542 and Group.

[139] Stampeder replied to these submissions point by point, arguing that there was ample evidence on which to sustain the trial judge's findings of fraud.

4. Grounds Relating to the Punitive Damages Awarded Against the Appellants

[140] In a short passage of the judgment, the trial judge held the appellants liable for punitive damages in the amount of $1 million. All the appellants appealed that part of the judgment and

all for the reasons set out in the Colborne factum. Essentially, Colborne argued that punitive damages should not have been awarded at all, but particularly not in the amount of $1 million. The suggestion was that even if the appellants are liable for one or more of the "actionable wrongs" plead by Stampeder in its counterclaim, they all acted in good faith and in the belief that they had an arguable case. In these circumstances, they submitted, no punitive damages should have been awarded. Further, because Stampeder "encouraged and participated" in both the breach of the confidentiality provisions in Colborne's agreements with Petroleum and the breach of the Bank of Montreal's duty of confidentiality to Petroleum, among other things, Stampeder should not benefit from an award of punitive damages. Additionally, because the general damages award here was so large, punitive damages were unnecessary and inappropriate. Finally, they argued that in any event, the quantum of punitive damages awarded was excessive, particularly, in comparison to other recent cases, even exceptional ones, in which the punitive damages were considerably lower.

[141] Stampeder, Ricinus and Petroleum responded that given the fraudulent, conspiratorial conduct of the appellants, this was a suitable case for punitive damages. As to quantum, they argued that the trial judge was correct to consider the size of the potential profit which the appellants stood to gain if they succeeded in their fraudulent scheme. The huge potential gain demanded a very significant punitive damages award, particularly, here, where the appellants were of substantial means.

5. Grounds Relating to the Solicitor-Client Costs Awarded in Favour of Stampeder and Ricinus Against the Appellants

[142] Colborne and the other appellants submitted that the trial judge set Stampeder's recoverable fees too high. Colborne went further and asked for solicitor-client costs against Stampeder, Ricinus and Petroleum, both for trial and the appeal.

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(i) Alleged errors of principle in setting Stampeder's costs

[143] Colborne did not directly contest the fact that Stampeder, Ricinus and Petroleum were awarded solicitor-client costs, rather, they argued that the figure set by the trial judge was inordinately high given: (a) the lack of material before the trial court supporting Stampeder's alleged fees, (b) the duplication of services rendered to Stampeder, which retained both Howard Mackie and MacLeod Dixon because of its own oversight in failing to see that its Howard Mackie solicitor would have to be a witness, (c) the trial judge's failure to reduce the costs awarded, despite stating that he would not take into account the "bonus" billed to Stampeder by Howard Mackie after the trial judge had said in his reasons for judgment that he intended to award solicitor-client costs and (d) the vast difference in Stampeder's fees compared to the other parties, including Colborne.

[144] The sum of these factors, Colborne argued, led to the conclusion that the trial judge failed to exercise his discretion judicially.

[145] Stampeder's response simply suggested that costs are discretionary; the trial judge exercised his discretion judicially; this Court should not interfere lightly with such an exercise of discretion; and the trial judge properly refrained from sending the matter to taxation because he "wanted it resolved" without further litigation over costs. In short, Stampeder did not address the question of whether the exact amount set was appropriate and why. It simply relied upon the high standard of review of discretionary orders.

(ii) Colborne seeks solicitor-client costs

[146] As noted, Colborne went beyond saying Stampeder's costs figure was too high, they also claimed solicitor-client costs against Stampeder, Ricinus and Petroleum contingent upon Colborne's success on appeal.

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[147] The only real basis for this claim was the fact that these respondents alleged fraud, conspiracy, etc. against Colborne and “severely harmed” its reputation. The claim was awkward in light of the fact that the real thrust of the appellants’ arguments were in support of a new trial, rather than for this Court to allow the appellants’ claims and dismiss the counterclaims. Admittedly, Colborne sought to have the counterclaims dismissed. However, Colborne’s request for solicitor-client costs was contingent upon a result that it was truly wronged by these events and the action. They do not seek that result in this Court and should not expect the costs consequences sought.

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6. Grounds of appeal unique to Pointer's claim against Petroleum and Group for breach of the "equity participation agreement" and the severance agreement, and to Petroleum's counterclaim against Pointer for return of the one half of the severance amount paid.

[148] This “group” of issues is specifically related to the action brought by Pointer against Group and Petroleum, and Petroleum’s counterclaim against Pointer, relating to the payments Pointer expected to receive upon completion of the Stampeder deal. The trial judge dismissed Pointer’s claim and allowed Petroleum’s claim for the return of the $87,500 already paid. Pointer appealed both aspects of that judgment.

(i) Severance Agreement

[149] With respect to the severance amount, Pointer simply argued that the trial judge made a manifest error in finding that Pointer represented to Chase that he would assist in closing the Stampeder deal in consideration, presumably, for the severance payment. The Petroleum response to Pointer’s submission was to highlight the facts upon which the court could have concluded that Pointer did in fact mislead Chase.

(ii) Equity Participation Payment

[150] With respect to the promise by Group to pay Pointer 5% in lieu of the equity participation in a restructured Petroleum, the trial judge found that "the very basis for the participation incentive was to ensure that managements's objectives were attuned to the stakeholders' objectives (Group and the Bank) in dealing with matters concerning Group's shares."

[151] Pointer's adopted the position (stated earlier in relation to the appeal of the finding of liability against Colborne and Pointer) that he owed his duties to Petroleum, not Group, and was not bound to account for the "purely collateral objectives" of Group. He argued that he only owed duties to Petroleum and fulfilled them.

[152] On the other hand, if the agreement was an incentive for Pointer to help achieve a particular result, then if the trial judge's findings of fraud, etc. are sustainable, then his conclusion on this issue also appears to be sound.

7. Grounds of appeal unique to Edwards' situation focussing on his lack of direct involvement in any of the subject transactions.

[153] Edwards appealed only the finding of liability against him on Stampeder's counterclaim, not the dismissal of his claims against Stampeder, Ricinus and Petroleum. He adopted Colborne's arguments respecting the appeal from the counterclaim and added others which emphasized that he was not an active participant in or even aware of any of Grenon's, Pointer's and Colborne's actions which provided the basis for liability. Grenon and Colborne essentially acknowledged Edwards' non-participation. Their factum said that "in the event that the Counterclaim is upheld . . . no right to claim contribution and indemnity from Edwards in respect of the payment of such judgment would be asserted against Edwards by or on behalf of Grenon or Colborne.

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[154] The respondents made no such concession and indeed, directly contested Edwards' arguments that he should not be held liable even if Colborne, Grenon and Pointer are.

[155] Basically, Edwards submitted that the trial judge erred in failing to consider Edwards' role in the entire series of events separately from the roles played by Pointer and Grenon. The trial judge treated Edwards as though he was aware of and participated in or at least sanctioned everything done by Grenon – hence he was liable to the same degree. Edwards argued that the evidence was clear that he took no part in any of the drafting of documents, devising strategies or even was aware of the details of the various documents. Further, the trial judge made no findings of dishonesty against Edwards. In light of the uncontroverted evidence that Edwards honestly believed Colborne had acquired certain legal rights and was entitled to assert them, the trial judge could not have reasonably made such findings.

[156] Stampeder's response to this argument was threefold. First, the trial judge did indeed make findings of fact which accepted that Edwards actively participated in the relevant steps and could not have honestly believed Colborne had acquired the rights it claimed. Second, Stampeder pointed to various statements which it suggested demonstrated that the trial judge found Edwards personally liable for the torts alleged in the counterclaim. Third, Stampeder argued that Edwards may be held liable as a partner of Grenon since there was ample evidence that the two were in fact partners in respect of these events and since it is settled law that one partner will be liable for the other's tortious acts.

[157] Edwards' reply countered some of the arguments made by Stampeder by highlighting evidence which supported his argument that he had no direct involvement in the tortious conduct. He said the real issue was whether he should be held vicariously liable because the trial judge's conclusion that Grenon and Edwards acted together was not supported by the evidence.

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[158] Edwards argued that if the trial judge found Edwards liable vicariously rather than as a principal, he erred in doing so without considering the circumstances. That is, the situation is analogous to an employee who commits a tort outside the scope of his or her employment. Here, if the torts alleged in the counterclaim are proven against Grenon, then he was clearly acting outside the scope of the partnership. Edwards should not be held liable in those circumstances. Alternatively, Edwards suggested that at the very least, the punitive damages award cannot stand where liability is vicarious as opposed to direct.

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8. Grounds arising on the cross-appeal regarding the trial judge's refusal to award solicitor-client costs to Group and 542.

[159] Group and 542 cross-appeal the trial judgment only to the extent that they were refused solicitor-client costs. Their grounds of appeal are as follows: (a) the trial judge erred in finding that there were genuine issues to be tried between Group and Colborne; (b) the trial judge erred in failing to recognize that the actions which he held warranted solicitor-client costs in favour of Stampeder applied equally to Group and 542, and (c) even absent an award of solicitor-client costs, the trial judge erred in failing to provide an inflation factor for the costs awarded on Column 6 of Schedule C.

[160] In essence, Group argued that the appellants alleged serious intentional torts at trial, including conspiracy, but abandoned them on appeal, that the claims against Group were without merit, and that the appellants' conduct of the trial was deserving of sanction in the form of costs. Group and 542 also specifically argued that Edwards should not be excused from having to pay solicitor-client costs, noting that one who is willing to lend his name to a "statement of claim seeking millions of dollars of damages and alleging serious, culpable conduct" ought to take the time to read the relevant documents.

[161] Colborne responded that the costs award was a proper exercise of discretion and should not be disturbed. They argued that the trial judge was correct in finding genuine issues between Group and Colborne, that credibility findings also had to be made, that Colborne's conduct in

relation to Group was not particularly offensive, that most of Group's complaints related to matters caused by Group's own conduct in producing documents, and finally, that an inflationary increase was not requested at trial and should not be granted now nor should it be used to indirectly award solicitor-client costs.

[162] Pointer also contested the cross-appeal for similar reasons.

[163] Group's reply focussed on whether Group acted improperly in its production of documents and whether this may have or should have been a factor in refusing to award solicitor-client costs to Group. Group highlighted passages from the trial judge's reasons in the costs proceedings, arguing that they demonstrated that the production of documents issue had no blameworthiness attached.

V. ANALYSIS

1. The Main Appeal: Colborne et al. v. Group et al. and Stampeder et al.

[164] The appellants argued that the trial judge made pervasive errors which undermined the entire judgment. They said the most fundamental error was ignoring the distinct legal identities of Group, 542 and Petroleum. Flowing from that error was the fundamental error of ascribing fiduciary duties on the part of Pointer as being owed to Group rather than to Petroleum or 542. They further argued that the trial judge erred in finding Pointer did not have the capacity or authority to bind Petroleum by the RFR.

[165] In our view, had the trial judge taken the approach urged on us by the appellants, he would have been led inescapably to the conclusion that the appellants seek to avoid, that is, that the alleged right of first refusal and the unanimous shareholder agreement were both invalid.

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[166] The appellants' starting point is the distinctness of Petroleum. As a corporation it had the right to pursue objectives which might conflict with those of its sole shareholder be that Group or 542. The management of Petroleum was in the hands of the directors, not Group. The directors owed fiduciary duties to Petroleum and to no other party. Providing the directors acted honestly and in good faith in a manner which they believed on reasonable grounds was in the best interests of the company, their actions were not impeachable.

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[167] The appellants relied heavily on the judgment of Berger J. in *Teck Corporation Ltd. v. Millar* (1972), 33 D.L.R. (3d) 288 (B.C.S.C.). In our view, that case has only limited, if any, application to the matter before us. It was decided there that directors have absolute power to manage the affairs of a company even to the extent of contravening the expressed wishes of the majority shareholders provided that they act in good faith in the best interests of the company and that there are reasonable grounds for their belief in the propriety of their actions. Berger J. concluded that if the directors of a company decide, on reasonable grounds, that a takeover will cause substantial damage to the company's interests, the directors are entitled to use their powers to protect the company. The challenged action there was an agreement to issue shares in order to prevent a majority shareholder from exercising control of the company.

[168] Notwithstanding that the directors themselves benefited from the share issue, it was held that they were acting in good faith because the primary purpose of their decision was to further the interests of the company.

[169] The trial judge here found that Pointer was motivated by his own interests rather than those of Petroleum. It is apparent that he did not accept Pointer's evidence that he believed he was acting in the best interests of Petroleum. The appellants argued that proper regard was not given to the explanation which Pointer offered for his conduct. It was submitted that the trial judge failed to understand that Group was prepared to sacrifice Petroleum in order to regain the Westshore shares. In those circumstances, Pointer was duty bound to protect Petroleum. His

fiduciary duties to that company took precedence over any obligations he had as an agent of Group.

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[170] In our view, there are two reasons why the appellants cannot succeed even were one to view Pointer's action only in the light of his fiduciary duties to Petroleum disregarding any third party obligations and any personal interests which may have motivated him. The first is a failure on the good faith test in the circumstances of this case. The second is his own clear and incontrovertible breach of his fiduciary duties to Petroleum

[171] The appellants argued that the trial judge incorrectly concluded that Pointer owed a direct fiduciary duty to Group based on the decisions in *Gainers Inc.* v. *Pocklington Holdings Inc.* (1995), 35 Alta. L.R. (3d) 348(Q.B.) and *Tongue* v. *Vencap Equities Alberta Ltd.* (1994), 148 A.R. 321 (Q.B.); aff. (1996), 184 A.R. 368 (C.A.). They said that those cases are either distinguishable from, or inapplicable to, the facts of this case. It is not necessary for us to consider the correctness of that argument. Assuming *arguendo* that they have no application here, the authority which remains, and which is the cornerstone of the appellants' position, is *Teck*.

[172] In *Teck*, there was no question of the power of the board of directors to enter into an agreement to issue shares. It was also not a case of a single member of a group acting unilaterally. In the case of Petroleum, Pointer was one of three directors. The proposition which the appellants wish us to adopt is that a director may act unilaterally to bind a corporation so long as he in good faith believes his conduct to be in the best interests of the corporation. That proposition would lead to an absurd and chaotic state of affairs. Directors by their *bona fides* or good faith belief in the best interest of the company would empower themselves individually to do what they collectively may have decided against doing. The *Teck* case does not take us that far.

[173] Before the question of the good faith belief in the best interests of a company even arises, the power or authority of a director or directors must be clear. In Alberta, the duty of directors

and officers of a corporation is set out in section 117, of the ABCA, which provides, in part, as follows:

> Every director and officer of a corporation in exercising his powers and discharging his duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation . . .

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[174] It is only authorised acts which are immunized from close scrutiny by the good faith test. In this case, the trial judge found that Pointer did not have the authority to enter into an agreement which could have had the effect of obligating Petroleum to pay liquidated damages many times in excess of the monetary limits of his spending authority. That finding of fact has unshakeable support in the evidence and we cannot interfere with it.

[175] The only argument which the appellants and Pointer can make is that, absent explicit authority, Pointer was duty bound to act in the best interests of the corporation and if he did so in good faith, then his actions are justified and binding and immune from impeachment. We do not accept the validity of that argument. But, again *arguendo*, if directors can act without explicit authority, then, in our opinion, the reach of the good faith test would go beyond an examination of the reasonableness of belief in the best interests of the company. It would also encompass an honest belief in the implied authority to act and the reasonableness of that belief.

[176] The question of immunity of an official, in that case a public servant, for acts done purportedly within authority was considered in *Dorman Timber Ltd.* v. *British Columbia* (1997), 40 B.C.L.R. (3d) 230 (C.A.). Finch J.A. examined the meaning of the words “good faith” in a statute prohibiting proceedings where an official acts “reasonably and in good faith while discharging or purporting to discharge responsibilities”. He said at p. 253:

> My conclusion is that the correct test of good faith is subjective: there is good faith if the public servant honestly believes (understood as a state of mind) that he or she has authority. There are of course limits to a belief that, even though genuine, a court can accept as honest. Where there is absolutely no foundation at all for the belief, it will not be honest. Likewise, if the public servant is willfully blind to the true facts, the belief will not be honest. In this context, the reasonableness of a belief will assist in determining whether the belief is honest. But a belief may be unreasonable and yet honestly held because of the subjective situation of the public servant.

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[177] Pointer's position can be no better than that, and indeed, we should not be taken as suggesting that a director's subjective situation and beliefs may be relied on to authorise otherwise unauthorised acts. It is not necessary for us to decide that. We only attempt to demonstrate that the appellants' arguments, taken at their highest, cannot lead to a result that differs from the one at trial.

[178] On the facts of this case, Pointer and the appellants must fail on the issue of the validity of the RFR. The best evidence of the state of a person's mind is the person's own contemporaneous verbalization of it. There is no question that Pointer did not have a reasonable belief in his authority to execute an RFR when regard is had to the first version of the "Statement of Facts" which he signed before he signed the RFR. He recognized that he needed, but lacked, Group's authority to sign it. There is no argument based on "good faith" which can validate his unauthorised execution of the RFR.

[179] The provisions of s. 118(3) of the ABCA do not assist Pointer. That subsection exempts a director from liability if he in good faith relies on an opinion or report of a lawyer. The trial judge found, amply supported by the evidence, that Pointer disregarded legal advice to not sign the RFR .

[180] The second reason why Pointer and the appellants cannot successfully rely on Pointer's fiduciary duties to Petroleum is because Pointer's execution of the RFR, by its terms, was a breach of his fiduciary duty to disclose to Petroleum all information of importance to the corporation. This Court noted in *Michel* v. *Lafrentz* (1992), 4 C.P.C. (3d) 155 that a director is bound to reveal to his corporation any information which is relevant to it. As stated at p. 158, "As a fiduciary, he cannot keep secrets from his beneficiary." By signing and concealing the RFR from Petroleum, he violated the fiduciary relationship which he argued gave validity to his action. A more spurious attempt to justify the unjustifiable is difficult to imagine.

[181] But Pointer, guided by Grenon according to the trial findings, plumbed the depths of corruption even further. He concealed the RFR from Petroleum even as he observed the corporation close a transaction which by the terms of the RFR would expose it to a liability of $17 million. That was not only a breach of his fiduciary duties to Petroleum, but as the trial judge found, it was dishonest and deceitful.

[182] Pointer was in no better position to act unilaterally as a director and officer of 542 than he was as a director and officer of Petroleum. His acknowledged sense that he could not sign the RFR without the approval of Group infected as well any suggestion that he acted in good faith in signing the USA for 542, which was one step closer to Group and whose sole purpose was to hold the shares of Petroleum for Group. Furthermore, Pointer committed himself to work to obtain some value for, not only Group, but for the Bank of Montreal by a sale or restructuring of Petroleum. In return, he was promised a 5% equity interest in Petroleum. The parties both recognized the contractual force of that arrangement. It was sought by Pointer and agreed to by Group before the significant events in the sale to Stampeder began to unfold. It is wrong to characterise that arrangement, as the appellants attempted, as a "bribe" to Pointer to favour the interests of Group over those of Petroleum.

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[183] As part of the ongoing efforts to obtain value for Group from Petroleum, 542 was incorporated and Pointer appointed president and director. In that capacity and considered in connection with his contractual obligations to Group, he occupied the position of a fiduciary. The three general characteristics of a fiduciary relationship are:

> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
>
> (Wilson J. in *Frame v. Smith* (1987), 42 D.L.R. (4th) 81 (S.C.C.), adopted in *LAC Minerals v. International Corona Resources* (1989), 61 D.L.R. (4th) 14(S.C.C.)).

[184] The characteristics of the relationship between Pointer as a director and president of 542 and Group met the test for the imposition of fiduciary duties on Pointer. In our view, the trial judge did not err in finding that Pointer owed such duties to Group and that he breached them by signing the resolution prepared by Grenon and the USA. We note in passing that there was no satisfactory explanation for the preparation of the resolution by Grenon rather than by the solicitor, Kim Reid, from whom Pointer said he was obtaining advice.

[185] The argument made by the appellants and Pointer urging this Court to find that the trial judge erred in not considering the distinct corporate entities involved in this matter is, in simple terms, a plea to shield Pointer and the appellants from the consequences of his dishonest and deceitful conduct by maintaining the corporate veil. In *Cunningham v. Hamilton* (1995), 29 Alta. L.R. (3d) 380 (C.A.), Fraser C.J.A. observed that separate legal entities will not be ignored absent some compelling reason. The exposure of dishonest, deceitful and corrupt conduct, is, in our view, a compelling reason to disregard the corporate veil. This is especially so when the

corporations themselves did not claim that such veil in practice existed and did not seek to maintain it. Rather it was the wrongdoer who attempted to wrap himself in it to hide his misdeeds. In our opinion, the trial judge made no error in considering that there was no corporate veil between Petroleum, 542 and Group for the purposes of examining the integrity of the conduct of Pointer.

[186] By any analysis, whether that chosen by the trial judge, or that proposed by the appellants, correctly applied, the actions of Pointer in signing and concealing the various documents in July and into August 1993 were unauthorised and invalid.

[187] The actions of Grenon and Colborne were equally, perhaps more, dishonest than those of Pointer. Grenon, Edwards and Colborne argued that the trial judge did not understand the realities of competition for control of a target corporation and that he applied an unduly rigid standard of honesty to the circumstances of this case. We reject categorically the proposition that a lower standard of honesty pertains to corporate or commercial situations than for others.

[188] The facts connecting GE to Petroleum, 542 and Group are essentially simple and beyond dispute. GE knew that the board of directors of Group controlled Petroleum. GE wished to have an exclusive arrangement with Group to plan the restructuring of Petroleum. Group would not agree, but did leave the door open to a limited exclusive arrangement. One limitation to any rights which GE might be given was made clear to GE throughout these events – Group was to be free to deal with Stampeder. Pointer, Grenon and Edwards understood that Group, acting for itself and for Petroleum, was not to be restricted in its dealing with Stampeder. Group kept GE informed of the state of the Stampeder negotiations and encouraged GE to make a competing proposal to the Bank of Montreal. In fact, Group openly favoured the idea GE had for the restructuring of Petroleum over the Stampeder proposal. While Group was dealing with Stampeder, GE said nothing about claiming a right of first refusal. Then, when it appeared that events were moving swiftly in favour of Stampeder, GE raised, then retracted, its claim of a right

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of first refusal yet immediately commenced the preparation of documents by which they sought to bind Group to do that which they knew Group chose not to do.

[189] The business community as a whole would be sorry to learn that the courts understand such conduct to be honest and condone it. The appellants' argument that their conduct was not dishonest or unlawful but merely unsavoury is simply unpalatable and unsupportable.

[190] We are satisfied that the trial judge did not err in his conclusion that the conduct of Pointer, Grenon and Colborne was dishonest and deceitful. He was correct in dismissing the claims brought by GE against Petroleum, 542, Group, Stampeder and Ricinus. The documents on which those claims rested were correctly found to be the product of fraudulent conduct and therefore, void.

[191] In the circumstances, it is not necessary to consider whether the trial judge was correct in alternative interpretations leading to invalidation of any of the documents produced by Grenon and Pointer.

2. Pointer's Appeal For Severance and Other Compensation

[192] Pointer sued Petroleum and its parent, Group, for breach of an equity participation agreement and severance pay. Petroleum counterclaimed for fraudulent misrepresentation and sought to recover the amount paid to Pointer prior to the fraud being discovered. The trial judge dismissed Pointer's action but allowed the counterclaim in the sum of $85,000.00. Pointer appealed the dismissal of his claims against Petroleum and Group, the judgment against him on the counterclaim, and the judgment in favour of Group for its costs.

[193] The issues raised on this portion of the appeal repeat many of the issues raised in the main appeal, namely:

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Did the trial judge err in law in finding that Pointer was in breach of contract, or of a fiduciary duty as an agent of Group, or of his fiduciary duty as director and officer of Petroleum or 542, warranting forfeiture of his equity participation?

Did the trial judge err in finding Pointer liable for fraudulent misrepresentation, warranting rescission of the severance agreement and forfeiture of the amounts already paid?

A. Pointer's claim to an equity interest

[194] Pointer contended in support of his claim, as he did on the issues in the main appeal, that the trial judge erred in finding that Pointer owed a fiduciary duty to Group, and in failing to recognize the independent legal status of 542 and Pointer's paramount duty to advance the best interests of that company and Petroleum. He argued that those errors arose from the failure to recognize admissions of adverse witnesses, factual errors and failure to make findings of credibility, which demonstrates reversible error.

[195] Recall some of the facts outlined above, Petroleum was a wholly owned subsidiary of Group. Pointer began his employment with Petroleum in 1985, and in May 1991, became the Chief Financial Officer and a director along with Chase and Savage. By then, Petroleum was in financial difficulty, which resulted in a proposal to restructure its loan with the Bank and to increase the equity value of the company. As part of its plan to restructure, in May 1992, Group agreed to establish an 10% equity incentive plan for its management as an incentive to generate value for the Bank and Group in Petroleum.

[196] In the fall of 1992, as another part of the plan to restructure Petroleum, Pointer proposed the incorporation of the company, 542, to be inserted between Group and Petroleum, which would be wholly owned by Group and would hold Group's shares of Petroleum. The directors were to mirror the board of Petroleum. Initially, Pointer was appointed as the sole director and president of 542, although Pointer told Reid, Petroleum's solicitor who handled the incorporation, that the directors were to be the same as Petroleum.

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[197] Pointer instructed Reid to prepare a stock option agreement and a unanimous shareholders agreement which had the effect of showing that Pointer and Savage each held 5% of the shares of 542 and that 90% were held by Group. This was done without the knowledge of Group, but with the hope that Group would approve that plan.

[198] That plan was reviewed and approved by the board of Petroleum on December 3, 1992 and was presented to a meeting of the Group board of directors on December 10, 1992. That board was surprised to learn that 542 was not wholly owned by Group. But the board agreed in principle to the plan on the understanding that 542 would be a shell company, the board of directors would be restructured to mirror that of Petroleum, Group would be the beneficial owner of 100% shares of Petroleum and it would result in substantial savings of Saskatchewan capital tax. The Group board deferred a decision whether to provide Pointer and Savage with a 5% equity participation in Petroleum's restructuring.

[199] Pointer denied that 542 was inserted for any improper purpose and pointed to the anticipated tax savings, although those never materialized.

[200] When Chase and Geer learned, in January 1993, that 10% of the shares were still shown to be held by Pointer and Savage, Pointer was instructed to transfer the shares back to Group and to amend the directorship to mirror that of Petroleum's board. The shares were transferred shortly thereafter, but the other directors were not added until July 27 when Chase instructed the Group's

solicitors to add himself and Savage to that board. So, throughout the critical period from February to July when the impugned transactions occurred, Pointer knew that he remained the sole director of 542 contrary to the express directions of both Group and Petroleum.

[201] At the Group board meeting on February 24, 1993, the equity participation was formally recognized and on July 27, 1993, the Board ultimately agreed that Pointer should receive 5% of the Stampeder sale proceeds, or $100,000.00. That approval was given without any knowledge of any clandestine activities. The only written confirmation of that agreement was a release which was executed on August 6 in lieu of documenting the equity option and upon assurance that Pointer would receive $100,000.00. Chase issued, but later cancelled, a cheque to Pointer in that amount when he learned of Pointer's secret dealings with Colborne and the filing of the statement of claim.

[202] The lack of documentation makes it difficult to discern the objective of the agreement. Pointer suggested that it was intended to be an incentive for Pointer and Savage to remain with Petroleum. But the trial judge found its purpose was "to ensure that management, Group and the Bank had the same objectives for Group's shares." That finding was not strongly contested and we see no basis to interfere with it.

[203] The trial judge refused to enforce the incentive agreement because in his view, Pointer had violated its spirit and terms by failing to perform both his duty as an agent to Group and his fiduciary duty to Petroleum, and by engaging in conspiracy and fraud. The trial judge had already found that as an officer and director of Petroleum, Pointer owed a substantial duty to Group and the Bank. He found that when Pointer was assisting Group in the restructuring process he occupied a position outside the scope of his duties as an ordinary director of Petroleum and owed Group a duty to deal with its shares in a trustworthy manner. He was akin to an employee of Group.

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[204] The trial judge also found that Pointer was improperly shown as sole director and president of 542 during the critical period and used that position to sign resolutions and the USA with Colborne in a fraudulent attempt to defeat the interests of Group. He concluded that Pointer had breached the incentive agreement as well as the duty he owed to Group as its agent and as a director of Petroleum, and thus, had forfeited his right to be compensated for the incentive option, the purpose of which was to ensure that management advanced the interests of Group. Applying the reasoning of Berger J. in *Teck Corporation Ltd.* v. *Millar*, *supra*, he decided that Pointer was acting in his own rather than Petroleum's best interests. He found that Pointer had engaged in both fraud and conspiracy in the transaction concerning 542 to deprive Stampeder of its right to complete financing on the public market.

[205] As in the main appeal, Pointer argued that the trial judge erred in concluding that Petroleum and 542 were merely divisions of Group and Pointer was obliged to advance Group's strategy of selling Petroleum to Stampeder and to disclose Petroleum's contracts to Group. Since Petroleum was doing the restructuring, he argued it did not need Group's approval, even though Group was its sole shareholder. Pointer maintained that Group's interest in closing the transaction with Stampeder was motivated by its desire to close the side agreement with the Bank and was not a decision made in the best interests of Petroleum.

[206] Again, Pointer said it was enough to show that he believed he was acting in best interests of Petroleum and that proper regard was not given to his explanation of his conduct. But it is apparent that the trial judge found that Pointer's alleged belief that he was acting in best interests of Petroleum was not credible. Nor was there objective evidence that he intended to act solely in the best interests of Petroleum or 542.

[207] Moreover, as has already been stated, Pointer's fiduciary duty to Petroleum did not authorise him to do anything with Group's shares, other than to advance Group's interests as sole shareholder. And regardless of what Pointer believed to the best interests of Petroleum, once he

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perceived a conflict of interest, he was obliged to call a meeting of the directors of Petroleum to air his concerns or to apply for leave to bring a derivative action or an oppression action.

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[208] In our view, as stated above in our analysis of the issues on the main appeal, *Teck* does not stand for the proposition that each individual director can unilaterally determine what is in the best interests of a corporation. Only the board acting collectively can decide what is in the best interests of the corporation. The best interests of a corporation include the interests of the shareholders collectively. Where there is but one shareholder, the best interests of the corporation will accord with the best interests of that shareholder: *Gainers Inc.* v. *Pocklington Holdings Inc.*, *supra.* A director's duty to preserve the value of the corporation does not permit the director to ignore the collective interests of its shareholders. Nor do we agree that *Teck*, stands for the proposition that directors will never owe a fiduciary duty to the shareholders. Where the relationship between the shareholder and director is unique a director may owe a direct fiduciary duty to the shareholders: *Tongue* v. *Vencap Equities Alberta Ltd.*, *supra.*

[209] Here, the trial judge did not err in finding such a unique relationship between Pointer and Group. Pointer acknowledged that the relationship between Group and himself required him to act in Group's best interests because he stood to benefit from the equity participation agreement and because 542 was wholly owned by Group. As well, since Pointer was appointed director of Petroleum and 542 by Group, according to s. 117(4) of the ACBA, special consideration may be given to the interests of Group. As Pointer was acting on the instructions of Group in restructuring Petroleum, we see no error in the conclusion of the trial judge that Pointer's relationship with Group was akin to that of an employee. And, moreover, as part of that restructuring, it was Pointer who persuaded Group to transfer all of its shares in Petroleum. All of those factors support the conclusion that Pointer had a unique relationship which evolved into a fiduciary relationship with Group.

[210] Pointer argued that any attempt by Group to limit his authority would be unlawful due to the requirement in s. 117(1)(a) of the ABCA that directors and officers act honestly and in good faith with a view to the best interests of the corporation. He relied on *Scottish Cooperative Wholesale Society Ltd*. v. *Meer* [1959] A.C. 324 at pp. 366-367 where Denning L.J. held that directors of a textile company, who were nominated to also serve as directors of a cooperative society, were wrong in failing to defend the interest of the textile company against the conduct of the cooperative society. By subordinating the interests of the textile company to those of the cooperative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders. But that case is clearly distinguishable because it involved a dispute between majority and minority shareholders. Here, there is only one shareholder. And where good faith cannot be shown, Pointer cannot invoke s. 117(1)(a) of the ABCA to shield his activities. We repeat our agreement with the trial judge's finding, good faith was clearly absent in this case.

[211] Pointer argued further that the trial judge erred in focussing on his authority to grant the right of first refusal rather than on his authority to restructure Petroleum which included the authority to negotiate with Colborne and the right to execute the letter of March 3. In Pointer's view, he was authorised to provide the March 3 letter and to decide for Petroleum whether the RFR was triggered. Hence, he contended he honestly believed that he had the authority to sign the RFR.

[212] As stated earlier, whatever implicit authority Pointer may have had to facilitate the restructuring of Petroleum, it could not reasonably have included the authority to enter into the March 3 letter and RFR. Moreover, on the evidence of this case, it is difficult to accept that belief in such authority could be honestly held when it was in direct conflict with Pointer's understanding of what Group wanted, which was to pursue the Stampeder the option. To repeat, the facts were that Pointer recognized that he needed, but lacked, Group's authority to sign the RFR.

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[213] Additional facts and findings militate against the conclusion Pointer sought on appeal. Pointer failed to explain why he signed the letter of July 2, stating that the May 10 letter constituted the approval of Group to the restructuring plan per the March 3 letter, without consulting Group or the board of directors of Petroleum. Rather, the trial judge found that the July 2 letter and its execution was a major step in the plan of deception devised by Grenon and Pointer to force Stampeder into the position where it would make a deal to turn over the Petroleum's tax losses and resource pools to Colborne.

[214] Moreover, the trial judge found that the July 22 minutes of a board meeting of 542 on July 14 was a fiction and dismissed argument that Pointer had authority to act on the resolution or to sign the USA. Pointer knew the other directors would not approve of the agreement and so, falsely concocted it. The agreement purported to preclude Petroleum from doing anything without the consent of Colborne and to preclude 542 from taking any action it might take as a shareholder without the consent of Colborne. It was executed without authority and in clear breach of Pointer's fiduciary duty and it is trite law that courts will not enforce a contract for an unlawful purpose.

[215] Pointer said that the RFR agreement merely protected Colborne's right to match a competing restructuring proposal and did not bind Petroleum to any transaction. He argued, relying on *Teck*, that directors of a corporation may legitimately put plans in place to protect the company from takeover by unsuitable candidates. He also maintained that since Colborne's negotiations could have resulted in a greater return to the shareholders, he might have faced liability if he had supported the Stampeder transaction. Further, he said that 542 was entitled to protect Petroleum, despite the clear understanding conveyed at the December 10, 1993 meeting that Group was sole beneficial owner.

[216] However, Pointer failed to explain why the RFR definition of restructuring included the definition in the March 3 letter, why it was prepared in Reid's absence or why it provides that any trifling breach triggers the $17 million financial penalty created by Pointer for the exclusive benefit of Colborne. It is certain that Petroleum stood to gain nothing from it. In fact, the Colborne transaction would have dismembered Petroleum. Moreover, as emphasised earlier, Pointer's authority was subject to specific expenditure limits ($50,000) imposed by the Petroleum board and the liquidated damages clause exceeded that limit by three hundredfold.

[217] On either August 4 or 5, Pointer stripped the RFR agreement, all versions of the USA and the July 21 letter from the files of Petroleum and generated a memo, which was misleadingly dated July 15, referring to a right of first refusal. The USA and RFR were not produced until August 7 and the July 21 letter was not revealed until examinations for discovery. The only reasonable inference is that the RFR was a fraudulent and illegal document and that Pointer breached his fiduciary duty to Petroleum and 542 by executing it.

[218] Pointer distorted and misrepresented Reid's role and his evidence concerning the preparation of the RFR agreement. But the evidence of Reid's advice, that Pointer should not sign the RFR agreement, was unambiguous in our view. Pointer was determined to sign in any event and did not tell Reid he was involved in drafting the document. Reid was unwavering in his advice that if Pointer signed the RFR agreement, he seriously risked breaching his fiduciary duties to Petroleum. But that advice was ignored. As already concluded, s. 118(3) of the ABCA,which protects a director who in good faith relies on counsel, is of no assistance to Pointer, since Pointer did not act on that advice.

[219] Pointer sought to equate himself with Petroleum, but in fact he acted unilaterally, secretly and for improper motives. It was his duty to make full disclosure to the other directors and not their responsibility to ferret out his covert activities. There is no principle of corporate law that entitles an individual director to circumvent the authority of the board and secretly create

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documents. The confidentiality clause was unprecedented and contrary to the provisions of the ABCA. Even Edwards found it onerous and outside the limits of usual business practice. It is astonishing that Pointer would argue that the confidentiality clauses in documents unilaterally created by him required him to maintain secrecy. Pointer argued that there was no evidence that Stampeder relied on any non-disclosure. But the secrecy was directed towards Petroleum and those actions were manifestly not in the best interests of Petroleum.

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[220] The underlying premise of Pointer's claim was that the trial judge failed to understand that Pointer was compelled by his fiduciary duties to act secretly and alone with Grenon to concoct a $17 million liability within Petroleum that would be triggered by the sale of Petroleum shares to Stampeder, to circumvent the Board of Petroleum, and to stand silently by while that liability was triggered. It is beyond belief that this was in the best interests of Petroleum. In fact, Pointer knew that transaction would trigger a $17 million penalty in favour of Colborne, yet he said nothing. It was his duty to disclose, but knew that if he did, he would get neither his severance allowance nor his equity option. That money would not come to him unless Stampeder closed the deal.

[221] In the result, we see no error in the reasoning of the trial judge that Pointer owed and breached fiduciary duties to both Group and Petroleum, or in his conclusion that Pointer was not entitled to benefit from the incentive agreement.

B. Pointer's claim to severance pay

[222] On July 29, 1993, following discussions between Pointer and Chase anticipating that the sale of Group's shares to Stampeder might result in the termination of Pointer's employment, Geer agreed that Pointer should receive a severance payment of $175,000.00, and other benefits valued at $8,120.31, on condition that the Stampeder deal closed . At the same time, Pointer was engaged in concealing from Chase the fact that he had signed the USA and the RFR. Before

learning of Pointer's covert activities, Stampeder, which had by then acquired Petroleum, paid Pointer one half the sum payable under the severance agreement, that is $87,500.00. But, on August 8, when Stampeder discovered his stratagem, Pointer was fired and the balance due under the agreement was withheld.

[223] Pointer then alleged a fundamental breach of the severance agreement and sued to obtain the balance and Petroleum counterclaimed to recover the amount paid.

[224] The trial judge found that Pointer committed fraud in inducing Chase to enter the severance agreement by representing that he was assisting Group to sell its shares to Stampeder, when in fact he was engaged in a conspiracy that would dramatically transform the consequences of that transaction. Because the misrepresentation was material to the contract, the trial judge held that Petroleum was entitled to rescission of the contract and judgment for the amount paid.

[225] On this appeal, Pointer claimed $242,423.31 plus interest.

[226] Pointer argued that the trial judge made a manifest error in finding that he represented to Chase that he would assist in closing the Stampeder deal. He also maintained that by late July, he had told Chase that Petroleum was of the view that Group had approved and that any transaction would have to be subject to Colborne's rights.

[227] The evidence showed otherwise. When the severance arrangement was first agreed upon on July 27, Pointer was told by Chase that it was unique to the closing of the Stampeder deal. Chase testified that he knew Pointer was disappointed that the deal appeared to be going ahead with Stampeder and not Colborne. Pointer, however, said nothing of the USAs and revisions of RFRs which he and Grenon were then preparing. In fact, when Chase asked him about the March 3 letter, Pointer said it was nothing more than a working plan, not a right of first refusal.

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[228] On August 3, Pointer met with Chase to prepare for the closing of the Stampeder transaction. Pointer reviewed a certificate that Chase was to sign certifying that Group did not have any outstanding rights to acquire its shares and that they were free of all encumbrances or third party claims. Pointer said nothing of the RFR or USA. On the same day, he participated in a meeting of the Petroleum board which approved the severance agreements for himself and Savage and then attended the formal closing of the Stampeder deal. Again, he did not disclose the existence of the RFR, USA and other documents which the appellants have relied upon.

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[229] At the formal closing, Chase had with him a cheque for half the severance amount. The severance payments were to be made in two installments, one half on closing and one half 30 days later. Hence, Pointer needed the Stampeder deal to close. But Pointer's duplicity was demonstrated on August 3, when he sought full payment of the severance package. The trial judge also found that Grenon knew of the arrangements and agreed that Stampeder should not be told of the RFR or USA until after Pointer received his payments. From August 3 to August 6, Pointer also assisted in keeping the documents from coming to light by removing copies of the RFR and USA as well as correspondence from the records of Petroleum. During these same days, he continued to demand payment of the equity participation. Only on August 6, when Pointer was about to receive the equity participation payment, did Stampeder and Group learn of the existence of the USA. That payment was withdrawn and the second half of the severance was not paid.

[230] The evidence supported the trial judge's conclusion that Pointer deceived Chase about the true role he was playing in the final stages of the negotiations with Stampeder and that misrepresentation went to the factual foundation upon which the parties entered into the severance agreement. We find no reason to interfere with the trial judge's decision that the contract was rescinded and that Petroleum was entitled to judgment against Pointer for the amount paid under the contract.

C. Award of Costs at Trial

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[231] The trial judge awarded solicitor-client costs against Colborne et al. on the grounds that their actions were intended to be used as a lever to intimidate Stampeder into making a deal with them and constituted an abuse of process. Pointer argued that the pleading of abuse of process was not directed against him. The trial judge, however, did not except out Pointer in his finding of abuse of process along with the other business torts of conspiracy, unlawful interference with economic interests and fraud. Although Pointer was not directly involved in the press release or statement of claim, the damages to Stampeder were nonetheless foreseeable to him due to his complicity in the events that led to it. Therefore, as he is jointly liability for the counterclaims of Stampeder, so he is liable for the award of solicitor-client costs.

3. Group and 542's Cross-Appeal

[232] The trial judge awarded Group and 542 party-party costs at three times Column 6 of Schedule "C" of the *Alberta Rules of Court*. Group and 542 cross-appealed that award on the grounds that the trial judge erred by failing to award solicitor-client costs to compensate for the costs of defending groundless litigation and to prevent the abuses of the court processes. They maintained that the actions of Colborne, Grenon, Edwards and Pointer were aimed at destroying the Group-Stampeder transaction and necessarily harmed all parties to that transaction, including Group and 542.

[233] Absent an error of law, disregard of applicable principles or misapprehension of facts, an appellate court will rarely interfere with a discretionary award of costs which is based on the trial judge's view of the conduct of the case. However, it appears to us that the trial judge failed to follow the indicia for awarding solicitor-client costs which were outlined by this Court in *Jackson and Parkview Holdings Ltd.* v. *Trimac Industries Ltd. et al.* (1994), 155 A.R. 42. In our view, those indicia are satisfied in this case with respect to Group and 542, to the same extent that they were satisfied with respect to Stampeder.

[234] They include the fact that the claims of Colborne, Grenon, Edwards and Pointer were found to be groundless, and the actions of Grenon and Pointer were found to be fraudulent, dishonest and deceitful, and that they involved the use of the courts as an instrument of that conduct. Further, the appellants' evidence was found to be neither reliable nor credible. At trial, Grenon, Edwards and Colborne alleged conspiracy on the part of Group and 542, a claim which they abandoned on appeal. Edwards had not read the March 3 letter even though he based his claim on it. Moreover, several unsuccessful attempts were made throughout the trial to impugn the honesty and integrity of the cross appellants' witnesses.

[235] The trial judge awarded Stampeder solicitor-client costs because in his view Colborne et al.'s actions were intended to intimidate Stampeder into making a deal with them and constituted an abuse of process. But he failed to recognize that those same actions were also aimed at Group and 542, who were drawn into the same snare which ultimately entangled them in this lawsuit. Clearly, the suit was primarily intended to thwart the Group-Stampeder transaction and not merely to harm Stampeder's equity financing. Though the trial judge found there were no genuine issues to be tried, he later appeared to contradict that finding in his ruling on costs. He stated that he was required to make important credibility findings. But, after finding that neither Grenon nor Pointer genuinely believed that the May 10 letter constituted approval, there could not be any genuine issue arising from the allegation of interference with rights arising from the March 3 letter.

[236] Edwards, a lawyer, cannot avoid responsibility for the award of costs by pleading ignorance of key documents, which were in his possession and under his control, when he permitted his name to be added as a plaintiff without familiarizing himself with them. He unequivocally sought to reap the full benefit of the litigation; he must now also bear its full burden.

[237] The absence of any claim or finding of tortious conduct, or of any award of damages in favour of Group and 542, does not preclude an award of solicitor-client costs in their favour

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because it is the conduct of the trial which is the determining factor in a cost award. Although this Court will only rarely interfere with the exercise of discretion in an award of costs, the failure to appreciate the true target of the abusive conduct warrants intervention in this case. Accordingly, we allow Group and 542's cross-appeal. They are awarded costs at trial for both actions to be taxed on a solicitor-client basis.

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4. Culpable Involvement of the Appellant Murray Edwards

[238] The trial judgment levied compensatory and punitive damages against the appellant, Edwards, as well as Colborne and its principals. On appeal, Edwards sought to divorce his activities from Grenon and Pointer. On the evidence, it was clear that Edwards, who along with Grenon, drove Colborne and its activities, played, at best, a subsidiary role to Grenon in Colborne's predatory attempts to acquire Petroleum and its attempts to frustrate Stampeder's purchase in order to advance its own acquisition plan. Indeed, Mr. Marshall, counsel for Stampeder, agreed that there was no evidence that Edwards prepared or participated in the preparation of the misleading documents used to advance Colborne's deceptions.

[239] Counsel for Edwards, Mr. Thrasher, and Stampeder's counsel, Mr. Marshall, canvassed the trial record (14,000 pages) and summarized, in submissions confined to that issue, the evidence supporting or refuting Edwards' exposure. This has been very helpful. However, it is not necessary to weigh and assess each evidentiary reference against Edwards' submission that he was unnecessarily and improperly swept up in the trial judge's condemnation of the other defendants by counterclaim.

[240] Edwards' culpable involvement, at least in the opinion of the trial judge, was mandated by the evidence of his discussions with various brokers before August 6, 1993, joining the suspect litigation and his idea of issuing an early press communique. The latter, in the conclusion of the trial judge, was done for the purpose of stultifying any support from the financial community, ". .

. for financing by Stampeder to enable it to pay out the Bank of Montreal". Despite Edwards' trial denial, it is difficult to conclude otherwise in the face of all the evidence.

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[241] Edwards had several conversations with Michael Timms of Peters & Co. Edwards conveyed to Timms his last ditch proposal for settlement in the expectation that it would be conveyed by Timms to Stampeder. It was that if Stampeder was willing to settle for Petroleum's production interests, Colborne would take its tax pool. He offered Timms a copy of Colborne's proposed statement of claim. Edwards continued to monitor Stampeder's financing progress by staying in touch with Peters & Co. through Timms. This culminated in another phone call on August 13, 1993, one regarded as critical by the trial judge. In it Edwards, in response to his inquiry, was advised that the question of whether Peters & Co. would be underwriting the Stampeder/Petroleum deal was not yet resolved. Edwards then took the occasion to remind Timms that Peters & Co. had a personal business relationship with himself and Grenon.

[242] The judge had to be mindful of a contemporaneous call to the underwriter, Peters & Co., by Edwards' associate, Grenon, in which Grenon said, "Presumably no underwriter would finance this deal with this kind of cloud hanging over it." Coincidence with no imputations drawable against Edwards? The judge might have so found. But he did not. This was not a threat, but it was clear evidence of a renewed attempt to lay third party pressure on Stampeder at a critical time. Thus, Edwards was *particeps* in the Grenon-Pointer-Colborne scheme, openly reiterating the warning to Chase first floated by Grenon in his July 2 letter. It led the trial judge to conclude that "Edward's call was intended to interfere with Stampeder's financing." We would decline to intervene in the trial fact-finding associating Edwards with Colborne's overall plan. Moreover, Edwards' position at trial was not easily reconcilable with his earlier affidavit of documents.

[243] The trial finding, in our respectful view, was far from irresponsible. At the very least, the trial judge's conclusion was sustainable and resistant to appellate interference. The result is that this aspect of Edward's appeal must be rejected. His adjuvancy was heavily a matter in the trial

judge's assessment of his credibility. In this it is relevant to remember Robert H. Jackson J.'s reminder to the appellate process that:

> A few minutes observation of the parties in the courtroom is more informing than reams of cold record.
>
> (*Ashcraft v. Tennessee*, 322 U.S. 143, at p. 169)

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[244] It is not necessary therefore, to proceed to Thrasher's submission that, in law, Edwards could not be vicariously answerable in damages for the tortious activities of the other defendants by counterclaim. His liability rests on more.

5. Stampeder et al. counterclaim

[245] Without reiterating the evidence reviewed above, we are satisfied that the trial findings, that the conduct of Colborne, Grenon, Edwards and Pointer exceeded the bounds of business behaviour to the extent that a court will intervene, are sound. Therefore, we will not interfere with the finding of liability against Colborne et al. for the torts counterclaimed by Stampeder, Petroleum and Ricinus.

6. Damages

A. Rule 218.1

[246] The appellants, Colborne et al., sought a new trial over the manner in which the opinion evidence of the expert, Wilf Gobert, was received. It was urged that Rule 218.1 of the *Alberta Rules of Court* was ignored when the trial judge ruled that the witness could be heard, notwithstanding Stampeder's (who sponsored Gobert) failure to furnish any statements, summaries or reports of Gobert's anticipated testimony and conclusions to opposing parties. The rule says:

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> 218.1(1) A party intending to call an expert witness at a trial shall, not less than 90 days prior to the day of the commencement of the trial, serve on every other party to the action a copy of a substance of opinion statement signed by the expert setting out the following:
>
> (a) the expert's name and qualifications;
>
> (b) the area of expertise that the party calling the expert is seeking to have the expert qualified in;
>
> (c) the substance of the expert's opinion.
>
> (1.1) A party on who a statement has been served under subrule (1) who intends to call an expert witness in rebuttal to the matters mentioned in the statement shall, not more than 45 days from service of the statement, serve on every other party to the action a copy of a statement signed by that expert setting out his name and qualifications and the substance of his opinion.
>
> (2) Unless subrule (1) or (1.1), as the case may be, has been complied with, a party may not call an expert witness to testify without leave of the court.
>
> (3) Where a party proposes to call an expert witness at the trial and to offer in evidence a report by the expert witness, that party shall, without prejudice to the right to any party to object to its admission in evidence, serve on every other party to the action a copy of the report not fewer than 10 days prior to the commencement of the trial.
>
> (4) This Rule does not apply to a very long trial action.

[247] Gobert's evidence has been referred to elsewhere in these reasons. Its significance to the outcome of the case was that it clearly led to the trial judge's conclusion that if Colborne et al. had not issued the Statement of Claim and media communique on August 5th, Stampeder's stock price would have steadily increased between August 5th to August 13th and attained a market price of $6.16 per share.

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[248] Objection to the receipt of Gobert's evidence was taken. It was fully argued that to admit it would ignore the strictures of Rule 218.1 and the intendment behind that rule. Stampeder defended the admissibility of Gobert's evidence despite lack of formal notice because it had already complied with Rule 218.1 by furnishing statements of the proposed evidence of two witnesses, Mote and McEachern, which evidence also related to the calculation of compensatory damages. Stampeder's position was that McEachern's evidence was redundant because Gobert's evidence would cover the same ground. No harm was therefore done: nobody was misled. That was the argument.

[249] The dispute emerged on the 94th day of a complex document trial. This may partially explain why there was no application to adjourn the proceedings to accommodate Colborne et al.'s concerns and allow for the consideration and preparation of rebuttal evidence if necessary. In any event, the trial judge chose to receive Gobert's evidence and it was only when the trial reasons for judgment were released did its impact in the case emerge.

[250] We think we should ally ourselves with the trial judge's discretion in resolving the issue. It is clearly contemplated by the relevant rule of court and despite Colborne's stated anxieties about the trial judge's decision to proceed to hear Gobert, he was undoubtedly aware of the following. These were proceedings in which damages (other than punitive damages) of $30,000,000 were sought. He was free to assume that an exhaustive discovery of the amount plead would have been made by Colborne and those parties aligned in interest with it, long before trial. If Stampeder's production of Gobert contributed to a "trial by ambush", it was not the type of ambush feared by Rule 218.1.

[251] We dismiss this ground of appeal.

B. Calculations of Damages

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[252] Very much in issue is the substructure of the award of compensatory damages to Stampeder, Ricinus and Petroleum in their tort counterclaim against Colborne, Grenon and Edwards, as well as Pointer.

[253] The sum awarded for compensatory damages was $3,630,000. It was coupled to punitive or exemplary damages in the amount of $1,000,000, costs, and prejudgment interest. These trial awards are defended by Stampeder et al., who take the core position that they should be validated by this Court simply because of appellate deference to their trial determination — the paramountcy of the trial judge in these matters.

[254] The history of Stampeder's compensatory damages was as follows. While the junior oil market was aware, by rumour, that Stampeder was about to broaden its asset base by acquisition, nothing was publicly confirmed until Stampeder's media announcement that it had acquired an unidentified private oil company for thirty million dollars. This information, published the following day by, at least, the *Globe and Mail*, was released after the close of trading on the Toronto Stock Exchange on August 3, 1993. It was in this form:

> Stampeder buying firm
>
> Stampeder Exploration Ltd. of Calgary says it has bought all the shares and debt of an unidentified private oil company for $30-million.
>
> Stampeder paid $2-million for the company's shares and agreed to purchase all of the private concern's debt from a Canadian financial institution for $28-million.
>
> Stampeder said the private company has oil production of about 1,850 barrels a day in southwest-central Saskatchewan, in an area where Stampeder has significant existing oil and gas interests.

> Stampeder said the acquisition increases its daily production by an estimated 65 per cent.

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[255] On August 6, 1993, the Colborne interests parried with their own communique. This was suggested by the appellant Edwards. It read:

> Colborne Capital Corporation ('Colborne') announces that it is in the process of filing a lawsuit against Stampeder Exploration Ltd. ('Stampeder') seeking to terminate the transaction recently announced by Stampeder concerning the acquisition of the shares of an unnamed private company or seeking damages in the alternative.
>
> For further information:
>
> Judi Schofield
> Colborne Capital Corporation
> (403) 221-8150

[256] Both announcements concealed more than they revealed. It will be seen that on August 6, readers, including the investment community, were only told, somewhat cryptically, that Colborne's proposed lawsuit would seek to terminate Stampeder's acquisition or would seek damages in the alternative. The possibility of immediate relief by way of injunction was not put forth.

[257] Faced with these tremors what did the market do? The answer seems to be very little; either on Stampeder's presumably good news released on August 3rd or Stampeder's presumably bad news released by Colborne on August 6th. This includes both the bidding for Stampeder stock or the volume of shares in Stampeder that were traded on the T.S.E.

[258] In our respectful assessment of the evidence, the market was so unruffled between August 6th and August 13th, the date Stampeder's subsequent special warrant equity financing issue came out, that it is, at least, difficult to conclude that the Colborne communique (and the Statement of

Claim which followed) played any instrumental role in the August, 1993 fortunes of Stampeder Exploration shares. About Colborne, the market simply didn't know or didn't care.

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[259] The compensatory damages ($3,630,000) flowed from the trial judge's estimate of the cost to Stampeder when he found that the company had been denied the ability to raise the amount of funding in the equity market that it would have generated had Colborne not published the press release of August 6, 1993 and issued the statement of claim which was promised. The statement of claim, of course, provided that Colborne would, by law, seek to terminate Stampeder's purchase of Petroleum (and 542) because of Colborne's claimed right of first refusal, which Stampeder had refused to recognize. The damage allegation at trial was that Stampeder, at the end of the day, had been denied the full fruits of equity financing for the Petroleum acquisition. These were urged to be monies which would have been received but for Colborne's tortious intervention, calculated to induce Petroleum and 542 to deal with Colborne instead of Stampeder.

[260] The difficulty in the calculation of this sizeable award ($3,630,000) lies in the determination of what price per share Stampeder might have gathered under its special warrant offering in the marketplace on August 13th absent Colborne's tortious misconduct. Stampeder had the onus of proving that its warrant offering on August 13, 1993 would have been higher than the $5.50 per share cost that it assigned to its own stock in the special warrant issue because of Colborne's attempts to embarrass the equity financing. The issue sold out at that price and provided funding for both the payout of Petroleum's debt to the Bank of Montreal and acquirement of Petroleum's remaining asset value. All of the $30,000,000 cost was recovered from the investment community under the special warrant issue.

[261] The trial judge held that because of Colborne's press communique of August 6, 1993, and the oblique motives behind it, Stampeder stock remained flat throughout the rest of the month. This prevented Stampeder from sharing in a market upswing enjoyed by comparable junior oil stocks within the investment climate of the day. (Peters Picks Index). After hearing opinion

evidence on the probabilities that the market rise would have included equities in Stampeder, the trial judge concluded:

> I am satisfied that the reason for this were (sic) the allegation made in the Statement of Claim issued by Colborne on August 6th, and the press release, which Colborne caused to be published on the same day, both were designed to convince the investing community that Colborne was in a position to set aside Stampeder's and Petro's (and 542775) acquisition.

He further found that:

> The evidence is clear that Colborne's allegation caused uncertainty in the investing community generally and especiallyStampeder's group of institutional investors and to Peters (sic) and Co. who Stampeder had selected as the lead underwriter for its impending stock warrant issue.

[262] Use of this methodology to calculate compensatory damage appealed to the trial judge because it was not:

> . . .[an] attempt to predict what a stock would do in the future but what the stock most probably would have done, based on hindsight not foresight, on what other stocks in an equivalent category actually did.

[263] The trial judge's formula was of perfectly good motivation. Yet it was not hindsight – it contained substantial elements of speculation. It had to. It breaks down when the assumptions that had to support it are reviewed. There are two areas of concern.

[264] First, the common shares of Stampeder had no proven history of marching in lock step with the market price of the other junior oils of the Peters Picks Index. Nor is it reliable to assume that it would have done so during August 1993. The trial judge used the Peters Picks Index to conclude that Stampeder would probably have attained a trading price and value of $6.16

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per share instead of $5.50, the price at which the shares were publicly traded on August 13, 1993. This, he held, forced the special warrant price down to $5.50 per share as decided by Stampeder and its underwriters. Under this rationale 5,500,000 special warrant shares were offered at that price. Hence the trial judge calculated the net loss to Stampeder's coffers at $3,650,000 – 66¢ per share (11.11% of market value).

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[265] The first criticism arises from the assumed pricing fraternity between Stampeder and the other junior oils found in the Peters Picks Index. Earlier in 1993, including the month of August, Stampeder's common stock appears to have marched to its own, not the industry's, drum. The point (and its implication) is persuasively summarized in the factum of the appellant, Edwards (p. 34, para. 18):

> The patent and demonstrable unreliability of the use of the Peters Picks Index as a predictor of how the shares of a company such as Stampeder would perform during any given one-week period is illustrated by a comparison of the relative performances of Stampeder and the Peters Picks Index in the week prior to issuance of the press release and statement of claim. On July 30th the Peter Picks closed at 3962.022 and on August 5th (the eve of commencement of litigation) they closed down just slightly at 3938.667. Stampeder had closed on July 30th at $6.25. Having regard for the evidence of Tonken, Bailey and Gobert that the Petro acquisition was a positive development which had been enthusiastically received by the market, it is reasonable to expect (if Gobert's opinion were sound) that Stampeder would have done better, and certainly no worse, than the Peters Picks had done during the period July 30 to August 5th. In fact, however, Stampeder's share price of $6.25 declined by 8 percent to close on August 5th (two days after public announcement of the Petro acquisition) at $5.75. It is respectfully submitted that it was patently unreasonable to conclude that, but for the litigation, Stampeder's share price would have performed as well as the Peters Picks Index in the week following commencement of the litigation, given that in the week preceding commencement of the litigation (when perceived *positive* news about Stampeder was being given to the

> market), Stampeder's share price had declined by fifteen times more than the Peters Picks prices.

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[266] Accurate prognostication as to where the stock market will go, or its handmaiden – how far an individual stock might have gone but for collateral influences – , is a conjuration few have mastered. To reach the conclusion that the common shares of Stampeder would have traded above $5.50 per share on August 13, 1993 had it not been for Colborne et al.'s intervention, the learned trial judge had to accept the opinions of the Peters Picks Index experts that Stampeder instead of stalling in the $5.40-$5.70 range, would have climbed to $7.08 by September 3, 1993. Within those projections he accepted the expert testimony that Stampeder would have traded at $6.16 on August 13, 1993. He held that it was Colborne and its media invocation leading to the issuance of its statement of claim which dampened a sure rise in the value of the security. This, in both its assumptions, was neither proved nor safe.

[267] Stampeder stock went from $1.75 (January 4, 1993) to $7.38 (June 30, 1993), an increase of 321% in six months. While doing so, Stampeder did not track gains by other junior oils in the Peters Picks Index. We have already referred to its singular performance in the first week of August 1993. During the month of June 1993, Stampeder rose from $5 per share, peaking at $7.50 per share and finally settling at $7-3/8. In July 1993, the stock first fell back to $5 but by month-end had closed at $6.25. August saw it dropping for about ten days, stabilizing for three or four days and falling back again. At the end of August it had closed slightly below the price at which it had opened at the beginning of that month.

[268] That the Stampeder special warrant issue sold out, indeed was oversubscribed, at $5.50, does not refute the possibility that it would have been fully subscribed even at some higher valuation. Special warrant price was a business decision. Certainly, it was not too expensive. Whether it was too low is not, at least, easily deducible from the evidence.

[269] Clearly in the summer of 1993, the common stock of Stampeder was dwelling in interesting times, whatever the fallout from the Petroleum acquisition publicity may have contributed to its value. Indeed, international oil prices were softening, but Stampeder held its value as well, if not better, than many junior oils regarded as its peers. It must be remembered that Stampeder was reputed in the industry to be a Beta stock – a market leader, either outperforming and underperforming the others. But it was still dangerous for the learned trial judge to assume that there was some umbilical relationship then in place between Stampeder and the other junior oils.

[270] It is equally clear, however, that from August 9, 1993 onward, the trading level of Stampeder did not correspond with the advancing market values of the composite of one hundred other oil stocks, the Peters Picks Index. This was explained by the witness, Gobert. Stampeder was not, at least in August trading volumes, an underlined stock, up or down.

[271] This raises the second assumption – that the attendant publicity created by Colborne caused a negative market climate for Stampeder within the investment community, institutional and speculative, during August 1993. To us, the evidence is far from satisfactory that the Colborne statement of claim and media commentary alone undermined investor confidence in Stampeder forcing the reduced warrant price offering.

[272] With the 26,548,399 outstanding shares in Stampeder already in public placement on August 6th (the day Colborne made its intervention publicly known), it is somewhat surprising that on the next Toronto Stock Exchange trading day – August 9, 1993 – demand for Stampeder's stock had slipped, but hardly precipitously, from $5.60 to $5.40 with the total shares traded being a mere 13,050. 13,050 shares represented .049% of the issued capital stock of Stampeder. The next trading day, August 10th, saw a mere 3,700 shares (only .014% of the company's issued capital stock) being traded by investors, institutional and otherwise, but who were later categorized by Stampeder as investors who were discouraged by worry brought on by Colborne's

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possible lawsuit. Further market activity in Stampeder shares revealed that on August 11th and August 12th, 3,300 and 108,200 shares changed hands. 6,300 traded on August 13th (Exhibit 219)*. The point of all this is that in terms of volume, the market really didn't seem to care about what Stampeder acquired or what Colborne had to say about it. In the Stampeder/Colborne exchange little confirmation for the shopworn adage that the market buys on rumour and sells on fact, emerged. There was no blood in the streets. Between August 9th (the first trading day after the Colborne communique) and August 13th, the stock remained constant at $5.60 per share, with a slight interim dip to $5.40 on August 9th and August 10th.

[273] It was not until August 12, 1993 that Stampeder's Toronto Stock Exchange trading volume regained the level attained by it on August 5, 1993 (two days after the publicity generated by its acquisition of Petroleum, but a day before the allegedly enervating Colborne announcement). Looked at from the standpoint of trading activity, the absence of any real erosion of market confidence in, let alone panic selling, of the issued capital stock of Stampeder, the Colborne press communique of August 6, 1993 and the statement of claim which followed made few ripples. From the placid trading that followed, neither announcement, it would seem, was either a growth or loss driver. Investors, unaware that the tax pools, not production, were the significant asset, may have suspected that either the acquisition of Petroleum was not worth $30,000,000 or that lawsuits of the type that was threatened were usually years away from becoming enforceable judgments.

[274] The proven market response in Stampeder stock is especially unsettling when Gobert's expert evidence is reviewed. Gobert allowed that the market takes two or three days to respond to news and that the ultimate evaluation of stock market forecasting lies in the market itself. Neither truism assists Stampeder.

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* There are some minor discrepancies between Exhibit 219 and the R.B.C. Dominion Securities summary of Exhibits 221 and 265. These exhibits are trading summaries from the TSE said to be relevant to trading in Stampeder Exploration Ltd. stock. We have followed Exhibit 219.

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[275] In today's Alberta, no evidence is required to support the proposition that the perception of an oil stock's value (and the base value and cost of any equity offering thereof) can shift (or drift) in response to many factors. Buyer confidence must discount escalating reserve replacement costs, national and international production levels, including the moods of OPEC, as well as worldwide political considerations; all play their role. While the international oil market craves stability, production and the price of oil do not always oblige. Within a national perspective, even winter drilling programs in the Canadian northwest and the rising costs of industry services and land access can materially affect prospects for future productivity, market reserves, profit and value.

[276] Even if the Peters & Co. prognostications were reliable – that Stampeder stock should have been trading at $6.16 instead of $5.60 per share on August 13th – an 11% swing in a six dollar junior oil stock was hardly calamitous. It was consistent with seesaw market trends, the presence of which are confirmed not only by the Peters Picks Index, but the oil and gas sub-index of the Toronto Stock Exchange as determined over the past decade.

[277] As to the proven impact of Colborne's public trumpeting of its alleged right of first refusal of the Petroleum deal, apart from the absence of empirical evidence that Colborne dragged Stampeder down in the estimation of the investing public, there are other considerations. Alberta oilmen and investors in their companies are not naive. It is well known that allegations in statements of claim and media releases are not offered under oath. The leverage hoped for from threats of litigation is often part of market politics and there is little hard evidence that Colborne's intended scuttling, or even embarrassment, of Stampeder's financing initiatives, led to a price reduction in the stock.

[278] To be fair, the trial judge faced a difficult evidentiary task in quantifying any damages claimed by Stampeder. But with respect, the evidence of Gobert and Stampeder's industry experts

was speculative; it did not reliably couple all diminution of Stampeder's equity financing to the machinations of Colborne and its principals. In 1808, 190 years ago, the English poet and artist, William Blake mused, "God forbid that truth be confined to mathematical demonstration," a caution which reemerged in *Killeen v. Kline* [1982] 3 W.W.R. 289 (B.C.C.A.), where Lambert J.A. observed at p. 302:

> The task of the appellate court is clearly made less perplexing if the cloak of mathematics does not seem to give an air of scientific accuracy to a decision that is fundamentally one of judicial assessment, not of calculation.

[279] Underlying this bitterly fought and protracted case remains the classic caveat raised by Cardozo J. earlier this century in *Broadway Photoplay v. World Film*, 225 N.Y. 104 at p. 108, "The rule of damages must give true expression to the realities of life." We fear that the damages awarded here may well have outrun those realities.

[280] At the risk of repetition, it is clear from the damage exhibits reviewed by counsel for Colborne, Mr. Duguid, that there was no positive evidence that the market price – therefore the value – of Stampeder shares, in the eyes of the investing public, regarded Stampeder's acquisition of Petroleum to be a positive development for Stampeder. After all, $30,000,000 was paid, but the market was not immediately told what Stampeder obtained or who Stampeder obtained it from: there was nothing about the tax attributes in either communique. The announced lawsuit (August 6, 1993) was a negative development for Stampeder. But how serious was it in the eyes of the market? The choice of the warrant price $5.50 (discounted, as usual, from the market value) a week later was an uncertain vessel by which to presume substantial downward pressure from Colborne's activities by themselves. At $5.50 per share, the warrant issue sold out. Indeed, it was oversold. It issued at an 11.11% discount. But it is a matter of assumption that it would not have sold out at some fixed higher price.

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[281] If Stampeder had the onus of proving its loss at the special warrant price that it selected, and it does, Stampeder has proven, at best, that it incurred a loss but it has not proven that loss to be $3,630,000. From the evidence of industry experience, past performance does not ensure future gains and it is not clear that the learned trial judge kept that in mind. Stampeder proved that 5,500,000 shares of its stock moved quickly at $5.50. But in special warrant issues that discount of 11.11% from its trading price was not unusual. This was confirmed in the evidence of J. C. (Cam) Bailey of Peters & Co.

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C. Ancillary Challenges to the Damage Calculations of the Learned Trial Judge

[282] There are other challenges to the damage methodology employed by the learned trial judge. They were argued by counsel for Colborne, Mr. Trawick, as "calculation errors":

(a) The trial judge concluded that, absent Colborne's intervention, the price of Stampeder's stock would have advanced 7.19% between August 5th and August 13, 1993, as did Stampeder's peer stocks in the Peters Picks Index. Colborne's argument was that August 13th was not the relevant day from which to calculate loss. While the special warrant price ($5.50) for the financing was decided on August 13th, the price was actually fixed by the closing price of Stampeder stock on the previous trading day, August 12th. Therefore, Stampeder's assumed value, from the Peters Picks Index, should have been projected from the earlier date – $6.1268, not $6.16. That translates to an increase of 6.55%, not 7.19% as Stampeder's August 12th closing price was $5.625. Colborne argued that this would substantially reduce the trial judge's extrapolation of Stampeder's loss from $0.66 for each special warrant sold to $0.5768.

(b) In projecting Stampeder's loss, the trial judge overlooked the overhead cost to Stampeder that would arise from employing Peters & Co. to oversee the special warrant issue of August 13th. That was a 5% commission override calculated against all equity money generated by the special warrant issue. That commission amounted to $137,500, an expense that should have been reflected by a reduction in the calculation of Stampeder's net damages. Mr. Trawick said it was not.

(c) The trial judge concluded that without the intervention of Colborne's press communique and the issuance of its statement of claim, the stock of Stampeder would have traded at $6.16 on August 13, 1993. The special warrant issue involving 5,500,000 new shares had been planned to finance the Petroleum acquisition. The trial judge assumed that the special warrant price would have been in the same amount as the stock price – i.e. $6.16. Colborne said that was an unsafe assumption, having regard to normal underwriting practices.

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[283] Mr. Trawick for Colborne pointed out that the history of special warrant issues, generally, had seen them discounted from the current trading prices of the stocks involved. Otherwise, there would be no investor incentive to take them up. Colborne pointed to other special warrant issues of Stampeder stock both before and after August 13, 1993 to demonstrate this. In those cases, price was discounted in order to encourage interest in the special warrant issue. If the usual price discount accompanied the special warrant issue of August 13th, Stampeder's projected loss may well have been substantially less than the $3,630,000 awarded by the trial judge. The difference would lie between $6.16 per share and the discounted special warrant price. We think there is merit in this submission. It is at least arguable as Bailey, Peters' lead underwriter, testified that he could remember few undiscounted special warrant issues.

[284] The sum of all these concerns throw into serious question the methodology that is said to defend the trial damage award of $3,630,000 for pecuniary loss to Stampeder. With every respect to the learned trial judge, the assumptions he made, if not supportable, point to an overriding and determinative error in assessing the balance of probabilities deciding the factual issue here. The gravamen of the various torts that were successfully pleaded against Colborne et al. and Pointer was proof of damage.

[285] The learned trial judge concluded, and the finding is supportable, that the appellant Pointer used Grenon's colourable claim to a right of first refusal as a springboard to promote his own interest. He pledged Petroleum's backing and concurrence to much that Grenon assembled to advance the Colborne proposal which presupposed the impairment of the Stampeder/Bank of Montreal/Petroleum deal. That Pointer was not instrumental in the August 6 press communique does not absolve him. The infliction of damage to Stampeder was not only foreseeable but intended by him when regard is had to his complicity in the events prior to August 6th.

[286] We do not say that the record is devoid of support for the finding that the Colborne press release and its attendant legal proceedings in the Court of Queen's Bench of Alberta, impaired Stampeder's market value in the eyes of the investing public. We only reiterate that the loss should not be approximated and wholly laid upon Colborne et al.

[287] Evidence of effect is shown in the testimony of H. A. Jackson, an investment counsellor in the employ of The Hospitals of Ontario Pension Plan. Jackson, called by Stampeder, testified as follows:

> Q. Now, Mr. Jackson, in your experience, how common is it for private companies to issue press releases?
>
> A. It's not very common.
>
> Q. And, sir, what effect did this press release have on you as an investor in Stampeder?
>
> A. Well, there were, on a couple of different levels. First of all, I was confused about the pending acquisition that Stampeder had announced that they had. I was concerned whether in fact they actually had the acquisition, and also in light of the fact that we still had substantial shareholdings in Stampeder stock, I was concerned that the news release would negatively affect the stock price.

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Q. And to your knowledge on this date of August 6, sir, had a price been set for the financing?

A. No.

* * *

Q. All right. And, Mr. Jackson, what did you ultimately think of the price for the special warrant issue?

A. I thought that the company was fortunate to get the price they did. There's – you know, investors, we don't like uncertainty, and lawsuits create uncertainty, and there are a lot of – I mean, there are some people that would out and out sell a stock because of a lawsuit, and there are a lot of people that wouldn't purchase a stock because of a lawsuit, so I felt all in all, in the end, the company was fortunate to get their price. I had actually indicated that I wanted a lower price.

Q. Sir, did you continue to monitor the stock following the press release?

A. Yes, I did.

Similarly, Bailey of Peters & Co. testified in cross-examination:

Q. Okay. Now, you mentioned to Mr. Ircandia that the lawsuit may have had some effect on the market of some sort. You wouldn't be surprised that a major lawsuit would have an effect on the market for a publicly traded stock, would you?

A. Yes, I'm not surprised.

Q. Yes, you're not surprised?

A. Right.

Q. And, indeed, if the market works as it's supposed to, people will react to news of things like major litigation, won't they?

A. That's correct.

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Q. That's why information is disseminated?

A. That's correct.

[288] There was no evidence that Jackson's concerns resulted in any sale of existing Stampeder shares by The Hospitals of Ontario Pension Plan.

[289] The fact that Stampeder's trading value was likely negatively influenced by Colborne's misconduct does not define the dollar cost attributable to Colborne. That was the trial judge's task and, in review, ours. And we are far from satisfied that Stampeder's market decline was wholly attributable to the activities of Colborne, its principals or Pointer.

[290] As stated, we are concerned that the calculation of pecuniary damages here was reached under assumptions that the evidence did not support. The award of $3,630,000 for compensatory or pecuniary damages to Stampeder for the attempted impairment of its Petroleum acquisition financing should be substantially discounted. We think that a fair assessment of Stampeder's probable loss arising from Colborne's August 1993 intercession should be 50% of the sum which was awarded at trial. This award includes the "calculation errors" urged by Colborne et al.

D. Exemplary or Punitive Damages

[291] Equally, the exemplary or punitive damages in the amount chosen by the trial judge cannot stand. A $1,000,000 award of punitive damages is, so far as we can determine, unprecedented in Canadian law. Such an award calls up the concerns arise from some recent American runaway jury awards in cases against insured corporate entities such as *B.M.W. of North America Inc. v. Gore*, (1996) 517 U.S. 559 (U.S.S.C.) and others. Not only is the award of punitive damages a head of damage that is emotionally enticing to triers of fact, but it is one which can be easily miscalculated. This is not to say that punitive damages should be taken from triers of fact, it is only that such awards should be carefully policed, especially where relief lies

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elsewhere. In Alberta, the rationale underlying awards of punitive damages lies within Clement, J.A.'s declaration of principle in *Paragon Properties Ltd. v. Magna Envestments Ltd.* (1972), 24 D.L.R. (3d) 156 (Alta.S.C.A.D.) at p. 167:

> The basis of such an award [of punitive damages] is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is, in the opinion of the Court, warranted. The object is variously described to include deterrence to other possible wrongdoers, or punishment for maliciousness, or supra-compensatory recognition of unnecessary humiliation or other harm to which the claimant has been subjected by the censurable act.

Paragon Properties Ltd. v. Magna Envestments Ltd. was decided in 1972. Clement J.A.'s remarks have since been endorsed by Wilson and McIntyre JJ. in *Vorvis v. I.C.B.C.* [1989] 1 S.C.R. 1085.

[292] Still the award and calculation of punitive damages is no longer at large at either the trial or appellate levels: *Hill v. Church of Scientology of Toronto (post).* While we have nothing to say in favour of the business practices employed by the Colborne people and Pointer, it is not idle to remember that neither the Court of Queen's Bench nor the Court of Appeal of Alberta, in the exercise of their civil jurisdiction, are courts of morality, or the civil keepers of the business community. Each court administers a statutory and parallel criminal jurisdiction that may be better suited to punitive courtroom reprisal. That alternate jurisdiction may administer sanctions other than judicial outrage and crushing monetary awards in cases where proven misconduct is found and is deserving of publicity and money punishment to deter others in future.

[293] In *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, Cory J. reconfirmed the general appellate reluctance to intervene in trial damage awards. Nonetheless, he did recognize the need for Canadian appellate courts to supervise awards for punitive damages more critically than awards for general or compensatory damages. Noting at p. 1208 that:

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> ... Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal.

Cory J. continued at p. 1209:

> 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 so outrageous that punitive damages were rationally required to act as deterrence?

[294] With this caution in mind we look at the misconduct of Colborne, Pointer, Grenon and Edwards as drawn from the evidence, measuring it against the remedies levied against them by the trial judge. It is our view that $1,000,000 in punitive damages is really a windfall for the respondents. Such an award serves no rational purpose that wasn't met by a fair calculation of compensatory damages (see above), unlimited (but taxable) solicitor-client costs throughout (which will be taxed in seven figures) and prejudgment interest. This is no arbitrary interference with the trial award as it is our view that the objectives of deterrence and punishment are still met within the heads of damage found elsewhere in the judgment. In other words the compensation award, and costs, beyond exemplary or punitive damages, was ". . . alone patently sufficient to satisfy whatever need there may be for punishment or deterrence." *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.).

[295] We do not resile from the trial judge's repudiation of Colborne et al. and Pointer's misconduct and motives. Nonetheless, it is relevant that Stampeder stood its ground and successfully defended its Petroleum acquisition against the appellants' attack. When all was said and done, Stampeder successfully acquired Westar Petroleum Ltd. It acquired the tax attributes and it acquired its future production. It paid nothing more than it was prepared to pay – $30,000,000; $28,000,000 to the Bank of Montreal to retire debt and $2,000,000 to Westar. Nothing that Colborne tried to do deprived Stampeder of what it had sought all along. Nor did Colborne et al. cause the price of the acquisition to inflate. Stampeder got the assets and shares of

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Petroleum it had agreed to purchase. Its bargain was kept. The cost came from the issuance, via special warrant, of 5,500,000 more shares of Stampeder's capital stock.

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[296] In the end, there was no pecuniary gain for Colborne. On the contrary, Colborne, its principals and Pointer have shouldered liability for compensation damages, interest, payment of costs on a solicitor-client basis (coupled to their own individual legal fees for a ninety-five day trial and a nine day appeal). There was no base profit to disgorge. Beyond that, the business activities of the Colborne principals and Pointer have now been outed and castigated. Pecuniary damages resulting from Colborne's attempt to embarrass Stampeder's financing, costs and interest will indemnify the respondents and will warn those who may in future be tempted to seek commercial advantage through the commission of fraud. Thus, there is no severable rational purpose sustaining a duplicated and substantial punitive damage award. As a head of damage, it had already been met within the compensatory award of pecuniary damages, interest, and a broad-gauged award of legal costs bearing in mind the trial judge's conclusion that:

> . . . the plaintiff's actions were intended to be used as a lever to intimidate Stampeder into making a deal with the plaintiffs . . . Stampeder should not be required to fund such a lawsuit in any way.

To Stampeder, we add 542, Petroleum, Group and Ricinus.

7. Costs of the trial and the proceedings before the Court of Appeal

[297] The trial judge chose to award the costs of this extended trial to Stampeder, Petroleum and Ricinus calculated on a solicitor-client basis. Westar Group Ltd. and 542775 were awarded one set of costs to be taxed under triple column six of Schedule C of the *Alberta Rules of Court*. Solicitor-client costs were awarded on grounds that the actions of Colborne et al. were intended to be used as a lever to intimidate Stampeder into making a deal.

[298] Peter Attlee Williams was awarded costs in Action #9301-12382, but they were confined to single column six of Schedule C. Williams is not a party to the appeal.

[299] All the above trial costs were ordered to be payable, jointly and severally, by Colborne Capital Corporation, James T. Grenon, Murray Edwards and Thomas H. Pointer.

[300] While the principal appeal must be allowed because of the failure of Stampeder, Ricinus and Petroleum to justify the full trial award of damages attributable to the Colborne/Grenon/Pointer and Edwards' attempt to thwart Stampeder's acquisition of Petroleum, it does not follow that their unlawful 1993 contrivance should be awarded costs at either level of litigation. Indeed, in the circumstances disclosed by the evidence, they should not be immunized against their payment. The trial judgment in the principal action reveals that the trial judge regarded himself as obliged to use epithets such as fraud, misrepresentation, wilful non-disclosure, conspiracy, abuse of corporate office, jealousy and greed in his description of the activities of Colborne et al. It must also be remembered that apart from the counterclaim, Stampeder successfully defended an allegation levied against it in the initiating Colborne action.

[301] In our view, Stampeder, Ricinus and Petroleum were dragged into prolonged litigation and without justification. At risk in the proceeding were not only damages, but the industry reputation of the respondent corporations and their officers. In sum, Colborne et al.'s attempts to

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frustrate by oblique means Stampeder's acquisition of Petroleum ought never to have been attempted and litigation to that end abused the processes of the court. Through no lack of initiative by Colborne et al., Stampeder has been unable to maintain the damages awarded at trial. That does not mitigate the moral culpability of the appellants. Stampeder, Ricinus and Petroleum (as well as Williams) had to defend themselves and at substantial cost. We know of no reason within this record why they should not be saved harmless from all expenses incurred in that defence. Costs throughout these proceedings are awarded Stampeder, Ricinus and Petroleum and the same shall be payable on a solicitor-client basis. Solicitor-client costs, in law, are no substitute for exemplary damages. However, we base their award, as did the trial judge, on the respondents full release from all legal and associated expenses in this litigation.

[302] As stated earlier, Group and 542's cross-appeal on costs at trial is allowed and the costs of these proceedings are also awarded on a solicitor-client basis.

8. Conclusion

[303] We would allow the appeals of Colborne Capital Corporation, James T. Grenon, Murray Edwards and Thomas H. Pointer and vary the damages awarded against them at trial as follows:

(a) The compensatory damages awarded by Virtue J. are reduced to $1,815,000.

(b) The trial award for punitive damages is vacated.

The cross-appeal of Group and 542 is allowed and as a result:

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(c) Stampeder, 542, Petroleum, Group and Ricinus will be awarded one bill of costs for both actions 9301-12382 and 9301-13674 to be taxed on a solicitor-client basis.

(d) The trial award for interest at the rates prescribed in the *Judgment Interest Act* is affirmed, in both actions 9301-12382 and 9301-13674.

[304] Stampeder, Petroleum, Ricinus, Group and 542 are awarded costs on appeal to be taxed on a solicitor-client basis.

APPEAL RESERVED ON November 12, 1997

JUDGMENT DATED at Calgary, Alberta,
this 14th Day of January, 1999

_____
McCLUNG J.A.

_____
RUSSELL J.A.

_____
SULATYCKY J.A.

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TAB 31

In the Court of Appeal of Alberta

Citation: Condominium Corporation No. 0321365 v MCAP Financial Corporation, 2012 ABCA 26

Date: 20120127
Docket: 1001-0308-AC
Registry: Calgary

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Between:

Condominium Corporation No. 0321365,
and an Unspecified Unit Holder, As Representative Plaintiff

Appellant (Plaintiff)

- and -

MCAP Financial Corporation

Respondent (Defendant)

- and -

970365 Alberta Ltd., Dome Britannia Properties Inc., D. Marshall Project Management Ltd., Prairie Communities Corp., Joanne Wright, Michael Nowlan, Travis Henkel, Earth Tech Canada Inc., Hans Kneppers, John Cuthbert, Cuthbert Smith Consulting Inc., Residential Warranty Company of Canada Inc., Alberta Permit Pro Inc., Regional Municipality of Wood Buffalo, Gary Nissen, Archiasmo Architectural Works Limited, Macleod Dixon LLP, Burstall Winger LLP, David Marshall and Evan Welbourn

Not Parties to the Appeal (Defendants)

970365 Alberta Ltd., Dome Britannia Properties Inc., Prairie Communities Corp., Joanne Wright, Michael Nowlan, Travis Henkel, Earth Tech Canada Inc., Hans Kneppers, Kneppers Consultants Inc., Alberta Permit Pro Inc., Gary Nissen, Archiasmo Architectural Works Limited, David Marshall, Evan Welbourn, Real Estate Strategies Group Inc.,
David Bamber and Allan Penner

Not Parties to the Appeal (Third Parties)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice J.D. Bruce McDonald

Reasons for Judgment Reserved of The Honourable Chief Justice Fraser
Concurred in by The Honourable Mr. Justice Watson

Reasons for Judgment Reserved of The Honourable Mr. Justice McDonald
Dissenting in Part

Appeal from the Judgment by
The Honourable Mr. Justice L.D. Wilkins
Dated the 18th day of June, 2010
Filed the 24th day of November, 2010
(2010 ABQB 573, Docket: 0701-00737)

2012 ABCA 26 (CanLII)

Reasons for Judgment Reserved of
The Honourable Chief Justice Fraser

I. Introduction

[1] The appellant, Condominium Corporation No. 0321365 (Condo Corporation), owns the common property of a seven building condominium complex in Fort McMurray known as Alfred Penhorwood Place (Condo Project). The Condo Project consists of 168 units. Real Estate Strategies Group Inc. (RESG) was involved with and in some fashion assisted purchasers of 72 of the units in the Condo Project. Together with a representative plaintiff for the condominium unit holders, the Condo Corporation is suing a number of defendants for damages to remedy the alleged faulty design and construction of the Condo Project. The defendants include the developer of the Condo Project, 970365 Alberta Ltd. (970365) and the respondent, MCAP Financial Corporation (MCAP), which provided interim financing to 970365 for the Condo Project.

[2] The appellants allege that the Condo Project, which they characterize as a "disaster", suffers from several serious problems. In particular, they assert that the Condo Project is sinking into the ground because the footings have failed and geotechnical standards for compaction and fill were not followed. They further allege that all roofs require replacement, that the wall system has failed resulting in extensive moisture penetration, and that the air quality and circulation are very poor and hazardous to health. They also allege that the units in the Condo Project and related common property were not substantially completed at the time of transfer of title to the units, and that this triggered certain statutory protections in favour of the purchasers under the *Condominium Property Act*, RSA 2000, c C-22 (*Act*).

[3] MCAP applied under Rule 159(2) of the former *Alberta Rules of Court* (*Old Rules*) seeking a summary judgment dismissing all the appellants' claims against MCAP. Prior to hearing the summary judgment application, the chambers judge dealt with and granted, with the consent of counsel for MCAP, an outstanding application to amend the Statement of Claim. Once that was concluded and the amendment allowed, he dealt with the summary judgment application on the basis of the Amended Amended Statement of Claim. This is the proper procedure and one that ought to be followed as a matter of good practice. That is to say, outstanding applications to amend pleadings should be resolved prior to a chambers judge's considering a summary judgment application on its merits: ***Elbow River Marketing v Canada Clean Fuels Inc.***, 2011 ABCA 258 at para 3.

[4] After hearing MCAP's summary judgment application on its merits, the chambers judge granted summary judgment dismissing all claims against MCAP. It is from this decision that the appellants now appeal.

[5] I have concluded that the appeal must be allowed in part. An inspection of undoubted law plus arguable or provable law shows that there are several material factual disputes interlocked with significant legal issues, all of which need to be tried. This is particularly so where, as here, the legal

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issues in dispute are unsettled or complex or intertwined with the facts: ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380, 401 AR 88 at para 11.

[6] I stress that my purpose in reviewing the limited evidence and law I do is to demonstrate why there are genuine issues for trial and therefore why certain claims ought not to have been summarily dismissed. Accordingly, my analysis is not intended to provide a complete or balanced view of the contested facts nor foreshadow what may happen at trial. It is for a trial judge to consider the outstanding claims following a full hearing on the merits of the case. Further, for convenience of legal analysis, I discuss various areas of law separately along with certain key allegations of fact only relating to each. But the factual matrix is linked to all claims. Finally, I do not address the question of possible defences, causation, remedies, quantum of damages or mitigation with respect to any of the legal claims. These are separate issues and they too, depending on the outcome of the trial, are for the trial judge.

II. Relevant Legislation

[7] To place in context background information and factual and legal issues in dispute, I must first set out the essential portions of the section of the *Act* primarily engaged on this appeal, namely s. 14, as well as s. 15:

> 14(1) For the purposes of this section,
>
> (a) "common property" includes facilities and property that are intended for common use by the owners notwithstanding that the facilities or property may be located in or comprise a unit or any part of a unit;
>
> (b) "cost consultant" means a person who meets the requirements of the regulations to be a cost consultant or is otherwise designated as a cost consultant pursuant to the regulations;
>
> (c) "developer" includes any person who, on behalf of a developer, ... receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement; ...
>
> (e) "substantially completed" means, subject to the regulations,
>
> > (i) in the case of a unit, when the unit is ready for its intended use, and
> >
> > (ii) in the case of related common property, when the related common property is ready for its intended use.

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(2) A reference in this section to "related common property" is, in relation to a unit, a reference to the following:

(a) the common property or a portion of the common property that is necessarily incidental to the completion of the unit;

(b) the common property or a portion of the common property that is necessarily incidental to the intended use of the unit;

(c) in the case of a unit other than a bare land unit, the common property or a portion of the common property consisting of

> (i) utilities required to service the unit and the common property,
>
> (ii) a facility providing for reasonable access to or entrance into the unit,
>
> (iii) a facility providing for reasonable access to highways, municipal roads or streets,
>
> (iv) waste removal facilities or other facilities for handling waste, and
>
> (v) any other improvements or areas
>
> > (A) designated by the regulations, or
> >
> > (B) required under any other Act or regulations,
>
> that are necessarily incidental to the intended use of the unit;

(d) in the case of a unit other than a bare land unit, in addition to the common property referred to in clauses (a) to (c), any common property or any portion of the common property that has been represented in the purchase agreement by the developer as being or as going to be available for the use of the owner of the unit and, without limiting the generality of the foregoing, may include one or more of the following:

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(i) roadways, parking areas and walkways;

(ii) fences or similar structures;

(iii) landscaped areas and site lighting; ....

(3) A developer shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

(4) Notwithstanding subsection (3), if a unit is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the cost of substantially completing the construction of the unit as determined by a cost consultant.

(5) Notwithstanding subsection (3), if the related common property is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the proportionate cost of substantially completing the construction of the related common property as determined by a cost consultant ....

(10) Subject to subsection (11), this section does not apply in respect of money paid to a developer under a purchase agreement if that money is held, secured or otherwise dealt with under the provisions of a plan, agreement, scheme or arrangement approved by the Minister that provides for the receipt, handling and disbursing of all or a portion of that money or indemnifies against loss of all or a portion of that money or both....

(13) Where, with respect to a unit or related common property, or both,

(a) money is held in trust under this section ..., and

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> (b) the developer has not met the requirements under which that money is to be paid out of the trust or otherwise disbursed,
>
> the corporation or an interested party may apply to the Court for an order for that money to be paid out for the purposes of substantially completing the unit or related common property, as the case may be, or to be used as directed by the Court....
>
> (15) Once the unit or the related common property, or both, as the case may be, in respect of which money is being held in trust under this section are, as determined by a cost consultant, substantially completed, any money remaining in trust may be paid to the developer.
>
> 15 Section 14 does not apply if the purchaser does not perform the purchaser's obligations under the purchase agreement.

[8] The purpose of s. 14 is clear. This is part of a package of remedial consumer protection legislation designed to protect purchasers buying condominium units off plan, that is before a condominium project has been built. The Legislature opted not to bar closing of purchase agreements where a unit or related common property is not substantially completed. Instead, the Legislature has sought to achieve its objective by statutorily mandating that developers hold back in trust from purchase proceeds sufficient funds to substantially complete sold units and their related common property. It has also imposed a duty of fair dealing on developers and purchasers "with respect to the entering into, performance and enforcement" of agreements: s. 11.

[9] In enacting this package of legislation, the Legislature was alive to several economic and social realities. On the one hand, it did not want to prevent developers from securing, on reasonable terms, the financing required to build and complete condominium projects. On the other, it recognized that consumers needed to be protected from hit and run developers, who promise much but deliver little, whether because of ineptitude, negligence, greed or worse yet, fraud. Through this statutory regime, the Legislature has provided some reasonable assurance that what developers agree to provide, and purchasers agree to buy, will be completed as promised: see ***Bare Land Condominium Plan 8820814 (Owners) v Birchwood Village Greens Ltd.***, 1998 ABQB 1023, 235 AR 217 at paras 9-10.

[10] The statutory trust and holdback provisions in s. 14 may be summarized as follows. If a unit in a condominium project or the related common property is not substantially completed at the time of transfer of title to the unit, then the developer is required to hold in trust sufficient monies to pay for the cost of substantially completing the construction of the unit *as determined by a cost consultant* plus monies sufficient to pay for the proportionate cost of substantially completing the

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construction of the related common property *as determined by a cost consultant.* Under s. 1(2)(c) of the *Condominium Property Regulation*, AR 168/2000, a cost consultant must act "at arm's length from the developer of the unit or common property". The Legislature also prohibited contracting out of these provisions: see s. 80(1) of the *Act* which provides that "... any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void".

[11] The Legislature understood that it would not be sufficient to mandate that only the actual developer of the project be bound to comply with these provisions. To minimize the risk of purchase monies flowing out to third parties despite the statutory prohibitions, the Legislature expressly expanded the definition of "developer" under s. 14 of the *Act* to capture and include third parties receiving monies paid by purchasers of units in certain circumstances. Prior to 2000, "developer" was defined simply as a "developer or a person acting on his behalf". This definition was then amended to the present wording under s. 14(1)(c) of the *Act* which provides that "developer" includes "any person who, on behalf of a developer, ... receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement".

[12] The interpretation of this definition will be a live issue at the trial of the matters in dispute between the appellants and MCAP. So too will be the question of whether the units and related common property in the Condo Project were substantially completed at the time of transfer of title of the various units – and who determines this question and under what circumstances. In particular, did the Legislature leave this up to the developer of a project or a s. 14 cost consultant? To be clear, for purposes of complying with the statutory trust and holdback provisions under the *Act*, "developer" in the context of this case includes 970365 and other parties, if any, found to fall within the definition of "developer" under s. 14(1)(c).

[13] The only exception from the statutory trust and holdback provisions imposed on a "developer" is set out in s. 14(10). If a project is within the scope of this exemption, then the statutory trust and holdback provisions do not apply. To come within the exemption, the purchase monies paid must be held, secured or dealt with under the "provisions of a plan, agreement, scheme or arrangement approved by the Minister". The Court was advised that the vast majority of new condominium projects in Alberta fall within this exemption. That includes projects covered under a government-approved plan such as the Alberta New Home Warranty Program which provides a form of insurance coverage for purchase monies. But the Condo Project is not covered by the Alberta New Home Warranty Program or any other approved plan. Therefore, on this record, the exemption under s. 14(10) does not – and did not – apply to the Condo Project.

III. Background Information

[14] I now turn to certain background information for which there is evidence on this record. That evidence remains to be evaluated at trial by the trial judge in the context of all relevant evidence. I also recognize that MCAP has offered contrary evidence on some points and that there is additional

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evidence as well that I do not canvass in these reasons. Nevertheless, for purposes of this appeal, the present record includes evidence in support of the following.

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[15] MCAP was the construction lender for 970365 and provided interim financing for the Condo Project in accordance with a commitment letter dated July 8, 2002 (the Commitment Letter). The Commitment Letter, which governed the relationship between MCAP and 970365, set out the terms and conditions under which funds would be made available to 970365. There were two other parties to the Commitment Letter, the principal officer of 970365, Gary Nissen, and the parent corporation of 970365, Dome Britannia Properties Inc. Nissen and Dome Britannia accepted and executed the Commitment Letter as guarantors of MCAP's loan to 970365. The Commitment Letter initially dealt with financing for the first three buildings in the Condo Project. By a further agreement dated March 5, 2003 made amongst the parties to the Commitment Letter, it was amended to provide financing for all seven buildings in the Condo Project.

[16] The Commitment Letter contained a number of terms under which financing would be provided. In particular, Funding Condition 11 stated (at Appellants' Extract of Evidence (AEE) A18):

> A soils test report (load bearing capacity) by an acceptable professional engineer or such other similar report as is acceptable to the Lender, must be provided, demonstrating to the satisfaction of the Lender and its Cost Consultant that the proposed construction and site improvements of the Project are feasible under existing soil conditions, together with evidence that the construction specifications for the Project provide for construction in compliance with such conditions and with the recommendations, if any, which may be contained in such soils test report.

[17] The Commitment Letter identified the need for "the Lender's Cost Consultant" to verify the costs of the Condo Project: see *eg.* Funding Condition 7 at AEE A17. The cost consultant was described in various ways throughout the Commitment Letter. For example, references were made to "the Cost Consultant" (see *eg.* Funding Condition 7 at AEE A17) or "its cost consultant" (see *eg.* Funding Condition 22 at AEE A20) or the "Lender's cost consultant (see *eg.* Availability Condition 2 at AEE A21). Other Conditions 28 provided that:

> The Lender's [monitor(s)/cost consultants] shall be: Cuthbert Smith Consulting ... The terms of reference for the monitor/cost consultant will be as detailed in Schedule "B".

[18] Schedule "B" then set out the Terms of Reference for the subject cost consultant. Those terms included the requirement that prior to the initial advance, a required Project and Budget Review Report include "Documents confirming that project has been designed in accordance with

Geotechnical Engineer's Report": see AEE A32. The Commitment Letter prescribed that all requests by 970365 for advances or draws include an inspection certificate from the "Lender's Cost Consultant" confirming that "the work to date is in accordance with the plans and specifications" and calculating "the amount of holdbacks and cost to complete": see Availability, Condition 2 at AEE A21. It was also a term of the Commitment Letter that if actual costs exceeded the budgeted and approved costs, such that the completion costs exceeded the balance of the loan not yet advanced, that 970365 would contribute the excess toward the Condo Project before receiving any further advances: see Funding Condition 22 at AEE A20.

[19] MCAP retained the "firm" of Cuthbert Smith Consulting (CSC) to act on our behalf as Cost Consultant" under a letter agreement between the two dated July 16, 2002 (CSC Contract). CSC's role as cost consultant was detailed in the CSC Contract. Certain parts of the Commitment Letter were attached to the CSC Contract. Among them was the section on the Funding Conditions, including Funding Condition 11 regarding the soils conditions report noted above. The Terms of Reference for the cost consultant attached to the Commitment Letter were also attached to the CSC Contract. This included the requirement that prior to any progress advance for work in place, CSC "[p]rovide revised cost schedule showing original Budget, Budget changes, revised Budget, total work in place, net holdback, work in place previous, payment due, and cost to complete [*sic*]": AEE A226. Thus, the CSC Contract mirrored the Commitment Letter in certain key respects.

[20] On July 15, 2002, a conversation took place between Doug Frey of RESG and Robert Balfour of MCAP. What was discussed during that conversation has not yet been fully explored. It was followed by what the appellants claim was a critical phone conversation the next day, that is on July 16, 2002 (2002 Phone Call). There is evidence on this record that the 2002 Phone Call took place between two representatives of RESG, namely Frey and Allan Penner, and the Vice-President of MCAP, Michael Roulston. According to the appellants, it was during the 2002 Phone Call that Roulston, on behalf of MCAP, represented that the terms and conditions of the Commitment Letter would be enforced for the benefit of those represented by RESG, namely purchasers of units in the Condo Project and the Condo Corporation. The appellants also contend that Roulston represented that CSC was the cost consultant for the purposes of s. 14 of the *Act*.

[21] The 2002 Phone Call, and what transpired during that Call, would figure prominently in the events that unfolded in 2003 when RESG's ongoing concerns about the Condo Project were finally brought to a head in September of that year.

[22] CSC had a scheduled inspection of the Condo Project arranged for September 10, 2003. RESG was apparently advised by Peter Abramovich of CSC in a phone message left September 10, 2003 that its request to attend this inspection would not be honoured. Penner did attend the site on September 10 and 11, 2003, accompanied by Ellen Martin, the resident manager of the Condo Project. Penner's evidence is that he was "shocked at the state of the site....": AEE A112. On September 11, 2003, Dan Kuhn of Permit Pro accompanied Penner to the site. Penner deposed that

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Kuhn identified four Alberta Building Code violations which Kuhn advised he would immediately address with 970365: AEE A112-113.

[23] On September 12, 2003, Penner, on behalf of RESG, wrote a detailed 10 page letter to CSC (Deficiency Letter), copying MCAP, setting out various alleged serious deficiencies in the design and construction of the Condo Project, including suspected Alberta Building Code, development permit and contractual deficiencies. It is the appellants' position that this Deficiency Letter signalled grave concerns that the units and related common property in the Condo Project were not in fact substantially completed as contemplated by the *Act*. In particular, in their view, the suspected construction and design deficiencies identified for which statutory holdbacks might therefore be mandated included the effectiveness and safety of the mechanical system, the use and operation of the Heat Recovery Ventilator units, corridor pressurization and airflow, and the compaction and composition of fill materials in the asphalt areas.

[24] Accordingly, in the Deficiency Letter, RESG repeatedly requested that CSC provide it with estimates of costs to correct the identified deficiencies. It also confirmed that it had been "advised" that CSC had been selected as the required cost consultant for purposes of s. 14 of the *Act*. It pointed out to CSC that it "appears you were made aware of the fact that your reports are being used for statutory purposes, in addition to your monitoring role for MCAP.... Your role is to determine the appropriate level of funds to be held in trust for the benefit of purchasers, after assessing all pertinent information at your disposal. Your role is not to take your instructions from the developer": AEE A150 and A183. RESG closed the Deficency Letter by reminding CSC that 970365 had an obligation under the *Act* to act fairly and that it had breached that duty in several ways. It specifically asked CSC for an "immediate reply" to the Deficiency Letter.

[25] At the time that the Deficiency Letter was sent, construction was still progressing on the Condo Project. Although some transactions to purchase units in the Condo Project had closed, many others had not.

[26] Four days later, that is on September 16, 2003, Penner received a telephone call from James Cuthbert, the principal shareholder and director of CSC. There is evidence that Cuthbert advised Penner that he had reviewed the Deficiency Letter, that CSC was in the process of preparing its report to MCAP with respect to the September 10, 2003 site visit and that Cuthbert would require some time to evaluate the items Penner had raised in the context of CSC's dual role as the lender's monitor and the s. 14 cost consultant.

[27] On September 22, 2003, Penner wrote CSC another letter (Geotechnical Testing Letter) on behalf of RESG, copying MCAP, and urgently requesting that further development activity on the site of the Condo Project cease until a geotechnical soils test could be conducted to evaluate site conditions. This Letter asserted that there was "alarming evidence" that the recommendations by the geotechnical consultants had not been followed: AEE A160. It then proceeded to outline some of that evidence. RESG also put CSC on express notice that Roulston of MCAP had assured RESG

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during the 2002 Phone Call "that the terms of the commitment letter would be carefully monitored and upheld" by CSC: see AEE A160-1. RESG also wrote CSC another letter that same day, that is September 22, 2003, notifying CSC that it was considering advising certain tenants that "there exists a serious life safety issue, which will compound as the weather gets colder": AEE A162.

[28] On this record, the geotechnical testing RESG had requested in the Geological Testing Letter did not happen. Instead, on September 23, 2003, 970365 wrote a letter to CSC instructing CSC that CSC had not been retained as a s. 14 cost consultant and that it did not consent to CSC's taking on such role. The next day, September 24, 2003, MCAP wrote a letter to CSC instructing CSC to the same effect in essentially identical terms, that is that CSC had not been retained as a s. 14 cost consultant and MCAP did not consent to its taking on this role. RESG was not copied on either letter.

[29] There is evidence on this record that 970365 threatened to cancel agreements of purchase and sale and retain the deposits paid if the transactions of purchase and sale were not closed as 970365 demanded. Under s. 15 of the *Act*, purchasers lose the protection of s. 14 if the purchaser does not perform his or her obligations under the purchase agreement.

[30] On September 26, 2003, a number of purchases of units in the Condo Project were closed and MCAP received $1,463,940 from 970365's lawyers. Later, between October 8 and 16, 2003, MCAP received another $2,891,439 from 970365's lawyers. MCAP applied the funds received to reduce the debt 970365 owed to MCAP. Letters from 970365's lawyers to lawyers for purchasers of units in the Condo Project referenced the requirements of s. 14 of the *Act* at least, it appears, as regards the completion of the "related common property". For example, at AEE A268, in a letter dated August 15, 2003, 970365's lawyers gave the following undertaking to counsel for a purchaser (see also another letter to the same effect at AEE A524-525):

> To maintain a holdback pending completion of related common property in accordance with section 14 of the Condominium Property Act, provided that we shall be entitled to rely on the advice of our client's cost consultant, Cuthbert Smith, Chartered Quantity Surveyors, to determine the appropriate amount of such holdback from time to time.

IV. Reasons of the Chambers Judge

[31] Before the chambers judge, the appellants alleged that MCAP was responsible to them for the losses arising from the deficiencies in the Condo Project on a number of grounds. The chambers judge considered five issues:

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> (1) Did MCAP owe any duty of care to the appellants so as to ground an action in negligence for failing to strictly enforce and uphold the terms and conditions of the Commitment Letter?
>
> (2) Did MCAP breach a duty of care to the appellants through its alleged representation that the terms of the Commitment Letter would be strictly enforced so as to ground an action in negligent misrepresentation?
>
> (3) Was MCAP a "developer" within the meaning of s. 14 of the *Act*?
>
> (4) Did MCAP conspire with others in the breach of any statutory or fiduciary duty?
>
> (5) Was MCAP unjustly enriched by receipt from any purchaser of the net purchase price for any condominium unit?

[32] On the first issue, the chambers judge held that no sufficiently close relationship existed between MCAP and the appellants to justify imposing what would be a novel duty of care: Appeal Book Digest F96 at para 25. And even if it did, the chambers judge concluded that imposing such a duty on a lender would fundamentally change the nature of project financing and disrupt the market place. Thus, he determined that this too justified the court's refusing to impose such a duty. Accordingly, the appellants had no claim against MCAP in negligence.

[33] On the second issue, the chambers judge concluded that there was no basis for finding the required proximity between MCAP and the appellants. He determined it was not reasonably foreseeable by MCAP that any prospective purchaser could reasonably rely on the alleged representation; there was no evidence that any did; and in any event, any such reliance by a purchaser could not be found to be reasonable. Therefore, a claim in negligent misrepresentation did not lie.

[34] On the third issue, whether MCAP was a developer, the chambers judge held that when MCAP received funds from 970365's lawyers, the funds were the property of and paid by 970365 even though those funds came from purchase proceeds of the sale of units in the condominium project. Consequently, MCAP did not receive funds "on behalf" of a developer and did not fall within the definition of a "developer" under the *Act*.

[35] On the fourth issue, the chambers judge concluded that it would be impossible for MCAP to conspire with others in the breach of any duty since he had already found that MCAP owed no statutory or fiduciary duty to the appellants.

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[36] Finally with respect to the fifth issue, unjust enrichment, the chambers judge noted that the law requires that a plaintiff be deprived of a benefit and that a defendant be correspondingly enriched without juristic reason. He found that since MCAP had received funds from 970365 under the terms of an interim financing agreement, this constituted a juristic reason for that receipt. Also, he determined that the receipt was not at the expense of the purchasers "but pursuant to the terms of their purchase agreements with the developer and required in order to obtain a discharge of MCAP's mortgage on their title": ABD F104.

[37] As a result, the chambers judge summarily dismissed all claims against MCAP.

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V. Issues

[38] The issues on this appeal may be summed up as follows. Did the chambers judge err in concluding that:

> (1) MCAP could not have owed a duty of care to the appellants in the circumstances of this case and thus, no action could lie in either negligence or negligent misrepresentation;
>
> (2) no claim could be brought against MCAP for breach of a statutory trust or unjust enrichment; and
>
> (3) MCAP did not fall within the s. 14(1)(c) definition of a "developer" in the circumstances of this case.

VI. Standard of Review

[39] Absent an error of law, the standard of review on an appeal of a summary judgment is reasonableness given the discretionary nature of the remedy. In ***Murphy Oil Company Ltd v Predator Corporation Ltd***, 2006 ABCA 69, 384 AR 251 at para 23, this Court explained the standard of review this way:

> ... the applicable standard of review is correctness with respect to errors of law. For both errors of mixed fact and law, and fact alone, the standard is palpable and overriding error, unless the error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard of correctness applies to that extricable legal question.... Deference is owed given the discretionary nature of a decision to grant summary judgment. Accordingly, a chambers decision will not be upset unless it is unreasonable....

[40] Where a legal standard is applied to a set of facts, if an extricable question of law is engaged, the applicable standard of review remains correctness with respect to that question of law: ***Housen v Nikolaisen***, 2002 SCC 33 at para 36, [2002] 2 SCR 235. Findings of fact are accorded great deference, absent palpable and overriding error: ***Housen***, *supra* at paras 10 and 25. Whether a cause of action exists is a question of law reviewable on a correctness standard: ***Mitten v College of Alberta Psychologists***, 2010 ABCA 159 at para 9, 487 AR 198.

VII. Test for Summary Judgment

[41] What then is the test for summary judgment? Under the *Old Rules*, Rule 159 (2) and (3) provided:

> 159(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.
>
> (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.

[42] The *Old Rules* have now been replaced by new *Rules of Court* [*New Rules*] effective November 1, 2010. Under transitional *New Rule* 15.2(1), the *New Rules* apply to this appeal. *New Rule* 7.3.1(b) provides that summary judgment is available when "there is no merit to a claim or part of it". It is unnecessary on this appeal to consider whether there exists a subtle difference in the summary judgment rule under the *New Rules* as opposed to the *Old Rules*. That is not in issue on this appeal and I leave it for another day. It is clear under both the *New Rules* and the *Old Rules* that summary judgment may be granted where there is "no merit" to a claim or part of it.

[43] In the first instance, a summary judgment application involves two steps. First, the moving party must adduce evidence to show there is no genuine issue for trial. This is a high threshold. If there is no genuine issue for trial, then there will be no merit to a claim. Accordingly, if the evidentiary record establishes either that there are missing links in the essential elements of a cause of action or that there is no cause of action in law, then there will be no genuine issue for trial. The fact there is no genuine issue for trial must be proven; relying on mere allegations or the pleadings will not suffice: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para 11, [2008] 1 SCR 372. Second, once the burden on the moving party has been met, the party resisting summary judgment may adduce evidence to persuade the court that a genuine issue remains to be tried:

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Murphy, *supra* at para 25. That effectively means showing that the claim has what is often referred to as "a real chance of success". This may be accomplished by establishing the existence of disputes on material questions of fact, including inferences to be drawn therefrom, or on points of law that cannot be readily resolved given the factual disputes.

[44] The question here is whether the chambers judge was correct in concluding that there was no merit to any of the appellants' claims.

VIII. Analysis

[45] I now turn to the three issues raised by this appeal.

A. The Duty of Care Issue

[46] The appellants' position is that MCAP owed a duty to the appellants to take reasonable steps to ensure that 970365 complied with and satisfied the terms and conditions of the Commitment Letter. They contend that MCAP's alleged failure to do so was either negligence or negligent misrepresentation. They assert that the chambers judge erred in concluding that MCAP could not have owed a duty of care to the appellants on either ground in the circumstances of this case.

1. Why There is No Genuine Issue for Trial Based on the Claim in Negligence

[47] To determine whether the appellants' claim in negligence against MCAP for failing to enforce the terms and conditions of the Commitment Letter should be summarily dismissed, the chambers judge was required to begin with this starting point. Is there a genuine issue about whether MCAP owed a duty of care in tort to the appellants?

[48] The appellants contend that an interim financier owes a duty of care to the purchasers of a condominium unit in a project financed by it to enforce the lending agreements between the financier and the developer of the project. To date, Canadian courts have not recognized the existence of such a duty of care. In deciding whether the law of negligence should be extended to recognize this claimed duty, the chambers judge correctly turned to the two-part test set out by the House of Lords in ***Anns v Merton London Borough Council***, [1978] AC 728 as adopted and recast by the Supreme Court of Canada in ***Kamloops (City of) v Nielsen***, [1984] 2 SCR 2 at pp 10-11 (the recast test being referred to as the ***Anns*** test). See also ***Cooper v Hobart***, 2001 SCC 79, [2001] 3SCR 537 at paras 25 and 29-39; ***Hill v Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 SCR 129 at para 20; and ***Reference re Broome v Prince Edward Island***, 2010 SCC 11, [2010] 1 SCR 360 at para 14.

[49] The first stage of the ***Anns*** test focusses on the relationship between the plaintiff and defendant. It contains two requirements: reasonable foreseeability of harm plus a close and direct relationship of proximity sufficient to justify the imposition of a *prima facie* duty of care. In other

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words, a court must determine whether a sufficiently close relationship – otherwise called proximity – exists between the defendant and the plaintiff that has suffered the damage such that the defendant could reasonably foresee that carelessness on its part might cause damage to the plaintiff. If foreseeability and proximity are established, a *prima facie* duty of care arises. The second stage asks whether there are any policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach may give rise.

[50] I have concluded that the chambers judge was correct in determining that a construction lender does not owe a duty of care to the purchasers of units in a condominium project which it is financing or to the condominium corporation. Difficulties arise at both stages of the ***Anns*** analysis, making the recognition of a duty of care in these circumstances legally unmanageable and commercially unreasonable.

[51] To begin, liability in negligence is premised on the assumption that a party can reasonably foresee who would be damaged by its actions. While a plaintiff need not be foreseeable as an identified individual, the plaintiff must belong to a class of persons within the foreseeable range of risk: ***Stewart v Pettie*** [1995] 1 SCR 131 at para 28. This presupposes an ability on the part of the allegedly negligent party to determine who would fall within that range, that is within the affected class, as well as the degree to which that class might be adversely affected.

[52] However, in the context of the lender-purchaser relationship, problems arise in defining the composition of the class to whom a lender would owe a duty of care. Knowing this would be very important to an interim financier. What if the financier were willing to waive a default or grant extensions of time to the developer or consent to other changes, major or minor, to existing loan agreements? This it would typically be entitled to do under its contractual arrangements with the developer. But in order to mitigate its risk of being sued in negligence for breach of a duty of care, the lender would no doubt seek to consult those to whom it owed a duty of care or, at a minimum, put them on notice of proposed changes before implementing them.

[53] The difficulty is that an interim financier would not ordinarily be able to determine with any reasonable degree of certainty who should be consulted. Downstream purchasers change on a rolling basis. This problem is compounded by the very real possibility of units being "flipped" to other purchasers without notice to the developer or interim financier before construction is completed and before transfer of title. And where would the additions to the class stop? Would it include only the initial purchasers? Or ones to whom units had been "flipped" before closing? Or future purchasers even after title had been transferred following closing? And for how long into the future would this go on? This demonstrates that attempts to define the "class" to whom an interim financier would owe a claimed duty of care would be bound to lead to undue uncertainty for all.

[54] Turning to the proximity requirement, what a court is looking for is whether the circumstances of the relationship between the parties are such "that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her

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affairs": ***Hercules Managements Ltd v Ernst & Young***, [1997] 2 SCR 165 at para 24. Put another way, in deciding whether the required proximity exists to give rise to a *prima facie* duty of care, is it just and fair to impose a duty of care in law on the defendant?

[55] On the broad issue of fairness, an interim financier's legitimate business interests might well conflict with those of the purchasers and condominium corporation. For example, a financier may elect to declare a loan in default, not advance any further funds and realize on its security rather than extend time to cure a default, advance the balance of the loan and allow the project to be completed. What if purchasers preferred the latter option? On what basis would these competing business interests and choices as between the lender's contractual rights and a supposed duty of care in tort to enforce those contractual agreements for the benefit of third parties then be resolved? By whom? And whose interests would prevail? And in what circumstances? And in any event, how, when and on what basis would a lender consult with the purchaser beneficiaries of a duty of care and secure their consent to changes in the financing agreements? And what would the lender do when and if there were disagreements amongst the purchasers?

[56] These problems expose a fundamental flaw in the appellants' assertion that a lender owes a duty of care to purchasers of units in a project it is financing. The Commitment Letter is a private contract between MCAP and 970365. No rights accrue under that contract to third party beneficiaries, including the purchasers of units in the Condo Project and the Condo Corporation. The alleged "duty to enforce" the Commitment Letter essentially amounts to an attempt to step round this limitation and create a cause of action. This attempt to obtain benefits for third party beneficiaries via the law of negligence is, in these circumstances, fundamentally unsound. It would place the lender in the position where legitimate business rights it has in contract could be undercut, indeed rendered nugatory, if a third party beneficiary did not agree with the way in which the lender was exercising its contractual rights.

[57] Collectively, the concerns noted reveal the practical and policy difficulties inherent in finding the required foreseeability of harm and proximity between an interim financier, on the one hand, and purchasers and a condominium corporation, on the other, sufficient to ground a *prima facie* duty of care. Many of the features of the subject relationship would necessarily be undefined, not only in scope and time but also content. By themselves, these reasons justify rejection of a duty of care.

[58] A consideration of the second stage of the ***Anns*** test also justifies rejection of the appellants' claimed duty of care. At this stage, a court must consider the purposes served by permitting recovery as well as any policy considerations which would call for a limitation on tort liability. The relationship between the parties is not the focus; it is the effect that recognizing a duty of care might have on other legal obligations, the legal system and society: see ***Cooper v Hobart***, 2001 SCC 79, [2001] 3 SCR 537 at para 37. Generally, the question of concern to the courts is this. Would imposition of the duty of care expose the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class": ***Hercules***, *supra* at para 31?

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[59] Policy considerations have particular import where the claims are not for serious physical harm or threats to a person's health and safety but rather for economic loss in a commercial context: see *eg.* John G. Fleming, *The Law of Torts*, 10th ed. (Sydney: Law Book, 2011) at 202-203. In commercial cases, potential plaintiffs acting with due diligence may well have alternative means of protecting their positions. Their autonomy as individuals means that they have the freedom to make the choices they see fit. For this reason, policy considerations in commercial cases may more readily weigh in favour of limiting tort liability.

[60] Compelling policy reasons exist for not recognizing a duty of care by an interim lender to the purchasers of condominium units or the related condominium corporation to enforce the terms of a lending agreement. Intractable practical problems exist with defining the scope of any such duty. Just how far would a lender be required to go in enforcing the terms of the lending agreements? The fact that there is no reasonable answer to this question reveals the difficulty inherent in defining an issue related to the scope of the duty – and that is the standard of care. That standard of care must be capable of being identified with some degree of precision: see ***Fullowka v Pinkerton's of Canada Ltd.***, 2010 SCC 5, [2010] 1 SCR 132 at para 80.

[61] Further, were this duty of care found to exist, this would fundamentally alter the economic and commercial realities of construction financing and significantly undermine the continued viability of the commercial lending industry. The risks to interim financiers in financing developers would increase substantially. It would no longer be sufficient for a lender to protect its interests and ensure repayment of its loan. Instead, a lender would effectively become a guarantor of the due performance by the developer of its obligations to the lender. This makes no sense. A developer owes obligations to a lender; the lender does not act as surety for the developer's non-performance of obligations owed to it. If the developer's obligations to the lender were to become the lender's obligations to third parties, the allocation of commercial risk would then fall disproportionately on the lender. The lender would typically face this dilemma: pursue the developer to "fully enforce" all contractual agreements with the lender or run the very real risk of liability to third parties.

[62] The deleterious effects that recognizing this novel duty of care would have on commerce and the financial industry and in turn economic development are obvious. Additional costs would be incurred by individual lenders in their quest to minimize the risk of being sued for not properly enforcing the terms and conditions of lending agreements between it and a borrower. Lenders would no doubt seek to pass these costs along to borrowers and borrowers to consumers. Imposing obligations on interim financiers that allocate risk in a commercially unreasonable manner is not in the public interest since this would in turn seriously jeopardize the availability of capital for the development of housing. In the end, all consumers – homeowners and renters alike – would lose.

[63] Thus, these reasons too justify rejecting the recognition of a duty of care by an interim financier in favour of purchasers of units in a project and its condominium corporation. Accordingly,

there is no genuine issue for trial based on the appellants' claim against MCAP in negligence for failing to strictly enforce the terms and conditions of the Commitment Letter.

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[64] However, this conclusion does not foreclose the possibility of liability being imposed on an interim financier for negligent misrepresentation depending on the specific facts of an individual case. It is to the issue of the appellants' claim against MCAP for negligent misrepresentation which I now turn.

2. Why There is a Genuine Issue for Trial Based on the Claim for Negligent Misrepresentation

(a) Elements for a Successful Negligent Misrepresentation Claim

[65] The Supreme Court of Canada outlined the required elements for a successful negligent misrepresentation claim in ***Queen v Cognos Inc***, [1993] 1 SCR 87 at para 33. First, there must be a duty of care based on a "special relationship" between the representor and the representee. Second, the representation in question must be untrue, inaccurate or misleading. Third, the representor must have acted negligently in making the representation. Fourth, the representee must have relied, in a reasonable manner, on the negligent misrepresentation. And fifth, the reliance must have been detrimental to the representee in the sense that damages resulted.

[66] Regarding the first element, the duty of care, the same general framework that is used to assess whether a duty of care exists in negligence – the two-part ***Anns*** test – applies to negligent misrepresentation: ***Hercules***, *supra* at para 21.

[67] At the first stage of the ***Anns*** test, in deciding whether a *prima facie* duty of care exists to ground a claim in negligent misrepresentation, a court must determine whether the defendant-representor and plaintiff-representee can be said to be in a relationship of proximity or neighbourhood, that is a "special relationship". As to what is required to create the necessary special relationship and corresponding *prima facie* duty of care, two criteria must be met. The defendant ought reasonably to foresee that the plaintiff will rely on its representations; and reliance by the plaintiff would be reasonable in the circumstances: see ***Hercules***, *supra* at para 24. If these criteria are satisfied, then the special relationship exists to give rise to a *prima facie* duty of care. Thus, for negligent misrepresentation claims, more than foreseeable harm to a foreseeable plaintiff is required; the reasonableness of the plaintiff's reliance must also be considered.

[68] If the proximity requirement is met, a court must then go on and consider the second part of the ***Anns*** test. Are there policy considerations that warrant not recognizing, or otherwise limiting, the duty of care? It is at this stage that a court is concerned about the possibility of indeterminate liability. Of course, to properly take policy considerations into account, a court must have a clear understanding of the scope of the alleged misrepresentation. The precise wording of that misrepresentation is key to assessing whether a duty of care has been breached. The Supreme Court confirmed the nature and extent of that in ***Cognos***, *supra* at para 55:

> The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading.

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(b) Analysis of Reasons of Chambers Judge

[69] Against this backdrop, I now turn to why I have concluded that the chambers judge erred in summarily dismissing the negligent misrepresentation claim.

[70] To situate this in context, the appellants' claim against MCAP for negligent misrepresentation rests on the following theory. MCAP owed a duty of care to the appellants based on the special relationship between the appellants and MCAP as reflected in the dealings between RESG, the appellants' representative/agent, and MCAP. MCAP impliedly represented to RESG that (1) the terms and conditions of the Commitment Letter would be strictly enforced and upheld by CSC; and (2) it had retained a cost consultant for the purposes of s. 14 of the *Act*. Neither occurred and MCAP was negligent in making these implied representations. MCAP ought reasonably to have foreseen that RESG, and those it was representing, would rely on these representations. The appellants, through RESG, relied on these representations and that reliance was reasonable. MCAP's failure to enforce the terms of the Commitment Letter and to retain a cost consultant for purposes of s. 14 has resulted in significant damages to the appellants.

(i) Trying the Case is Not for the Chambers Judge

[71] The chambers judge began by concluding that it was "highly unlikely" that the appellants would be successful at trial in establishing that a representation had been made. He reasoned that while MCAP had asserted that its representative never undertook to enforce the Commitment Letter, the appellants offered "only an impression that that was what was meant" in the 2002 Phone Call between Penner and Frey of RESG and Roulston of MCAP. The chambers judge erred in purporting to try the case given the patent conflict in the evidence on the issue of the alleged representations. It was not for the chambers judge to determine that it would be "highly unlikely" that the appellants' claim would succeed at trial. Whether MCAP made any implied representation and, if so, the content of any such representation, are both issues for a trial judge following a trial on the merits.

(ii) Whether an Implied Representation was Made Remains a Live Issue

[72] Further, the chambers judge framed the issue improperly. The question is not whether there was evidence that MCAP made an *express* representation; the absence of evidence about an express representation is not dispositive of the real issue. Nor is the question whether the evidence established that the appellants received an *impression* only of what was meant by Roulston of MCAP. The question is whether there was evidence on this record to support the appellants' claim that MCAP made an *implied* representation. The underlying assumption by the chambers judge that

representations are not actionable at law because they depend on inferences or implications rather than on direct and express statements is incorrect: see ***Cognos***, *supra* at paras 73-76.

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[73] Whether a statement or implied statement is a representation is a question of fact that depends on a trial judge's assessment of the evidence and inferences drawn from the evidence: ***Ault v Canada***, 2011 ONCA 147, 274 OAC 200, leave den. (October 20, 2011) [2011] SCCA No 206 (QL). The impression conveyed may in fact be evidence of an implied representation. If the party listening received that impression from what was said – and not said in response to what was said – it may be some evidence that a reasonable bystander would also have had the same impression. A trial judge would consider what MCAP conveyed through Roulston during the 2002 Phone Call viewed from the perspective of a reasonable person in those circumstances.

[74] Put simply, representation by implication, that is an implied representation, may well suffice to ground a successful claim in negligent misrepresentation. The chambers judge's failure to recognize that this is so and that there is on this record a dispute on a material fact, namely whether MCAP made an implied representation, constitutes reviewable error. These are both matters for a trial judge as is whether any representation, if implied, is actionable negligence.

(iii) Scope of Implied Representation is Also in Dispute

[75] This takes me to a further error. The chambers judge appears to have characterized the alleged representation this way. Is there evidence that MCAP represented that it would enforce strictly the terms of the Commitment Letter? But what this means in the context of this case was never explored by the chambers judge. It should have been. In the result, he failed to recognize that the scope of the alleged representations was broader than he assumed.

[76] The appellants' claims go beyond maintaining that MCAP represented during the 2002 Phone Call that the terms of the Commitment Letter would be monitored and upheld by CSC. The import of this claim is that MCAP represented that it would audit or supervise the quality of construction of the Condo Project through CSC. In addition, the appellants contend that MCAP represented that CSC had been retained as a cost consultant for purposes of s. 14 of the *Act*. Penner, on behalf of RESG, alleges that during the 2002 Phone Call, Frey specifically asked Roulston whether a cost consultant had been engaged, who it was and whether the selected cost consultant, CSC, possessed the necessary qualifications in terms of timeliness and quality in reporting processes: see AEE A498-499. RESG contends that MCAP assured it during the 2002 Phone Call that the terms of the Commitment Letter would be enforced including the provisions relating to the cost consultant for the Condo Project.

[77] MCAP contends that no representation of any kind was ever made to any of the appellants during the 2002 Phone Call or otherwise. It submits that the terms and conditions of the Commitment Letter were confidential and intended to be treated as such. Again, while there is evidence to this effect, there is also evidence from Penner of RESG from which it may be inferred

that the subject of the Commitment Letter and the cost consultant in particular came up, and were discussed, during the 2002 Phone Call. Penner contends that it was made clear to Roulston of MCAP during that conversation that if MCAP did not undertake the due diligence required under the Commitment Letter that "we would have to": AEE A499.

[78] This, and other evidence, underscores the fact that serious factual disputes exist about many issues: what transpired during the 2002 Phone Call; whether CSC was the cost consultant for purposes of s. 14 of the *Act*; who retained CSC for this purpose; if CSC was not the cost consultant for this purpose, whether MCAP represented to RESG that CSC was nevertheless acting in that role and capacity; whether RESG relied on that representation to the detriment of the purchasers for whom it alleges it was acting as representative/agent; whether MCAP knew that there was no cost consultant for the Condo Project and, if so, when; whether MCAP, by itself or in concert with 970365, concealed that information from RESG or failed to inform RESG that its understanding that there was a s. 14 cost consultant was incorrect; and, if so, what, if anything, turns on any of this.

[79] There are other related statutory interpretation issues that might well be relevant and linked to the cost consultant issue. Given the requirement that the cost consultant act at arms length from the developer, who is to retain the cost consultant for purposes of s. 14 of the *Act*? And when, if ever, is this to occur? Does the legislative scheme envision one cost consultant only per project? Further, do the duties of a cost consultant under the *Act* mirror the duties of the cost consultant under the Commitment Letter?

[80] In the Geological Testing Letter, Penner confirmed RESG's position on the 2002 Phone Call, namely that Roulston of MCAP had assured RESG that the terms of the Commitment Letter would be monitored and upheld by CSC. The Geological Testing Letter was written within a week of the Deficiency Letter. By the time of both, it had become obvious, at least to RESG, that there were a number of grave deficiencies in the Condo Project. Penner, on behalf of RESG, not only sent the Geological Testing Letter to CSC, but also copied MCAP. RESG urged that geotechnical testing be conducted at the site of the Condo Project since it appeared that recommendations of the geotechnical consultants had not been followed. Roulston testified that, to the best of his knowledge, MCAP did not respond to this Geological Testing Letter or advise RESG that it should not rely on MCAP: AEE A593-595.

[81] When Roulston was cross-examined about the reference in the Geological Testing Letter to his having represented to RESG during the 2002 Phone Call that the terms of the Commitment Letter would be carefully monitored and upheld by CSC, and the fact that MCAP had not responded to that Letter, Roulston stated that MCAP had no intention of responding to RESG about the Commitment Letter because it was confidential and RESG should not have had a copy. He emphasized that MCAP would never talk about or make commitments to third parties about the Commitment Letter. That may be so. But whether it is, and what, if anything, turns on this, is for the trial judge. So too is the issue of what transpired during the 2002 Phone Call.

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[82] It is sufficient to note that on this record, a pointed evidentiary dispute exists on the cost consultant issue. Given the context here and the centrality of the cost consultant issue, the evidence led to date reveals that there is a material dispute whether MCAP represented to RESG that CSC would be acting as cost consultant for the purposes of s. 14 of the *Act*. The evidence adduced to date confirms the existence of this factual and legal dispute. That evidence also reveals the existence of a dispute on whether MCAP represented to RESG that the terms and conditions of the Commitment Letter would be strictly enforced and upheld by CSC. Therefore, unless summary dismissal is warranted on another ground, all of this is a matter for a trial judge as is the question of whether there is linkage between these two alleged representations.

(iv) Material Disputes Remain on Special Relationship – Reasonable Foreseeability and Reliance Issues

[83] I recognize that the chambers judge did go on to conclude that summary dismissal was justified irrespective of his assessment that it was "highly unlikely" that the appellants would succeed in proving that MCAP had made a representation. His reasons for so concluding were that:

> [I]t was not reasonably foreseeable by MCAP that any prospective purchaser or plaintiffs could reasonably rely on the alleged representation.
>
> Furthermore, there is no evidence that any such purchaser or plaintiffs did rely...upon that alleged undertaking.
>
> In my view, any such reliance by a purchaser or plaintiffs or the alleged purchaser's representative RESG cannot be found to be reasonable. A purchaser could not reasonably look to the interim finance lender to ensure the proper completion of the project": ABD F101 at paras 54-56.

[84] This analysis is flawed. The proposition that it was not reasonably foreseeable by MCAP that any prospective purchaser could reasonably rely on the alleged representation and that there is no evidence that any purchasers did so ignores the fact that these matters are tied up with a dispute on other material facts, namely the relationship between RESG and the appellants, on the one hand, and RESG and MCAP, on the other. In the Amended Amended Statement of Claim, RESG is described as "a representative of purchasers in the Project": AEE A79. In an affidavit before the chambers judge, Penner, part owner of RESG, refers to RESG as an "authorized representative of a number of past and present owners of condominium units" and describes RESG as an "advocate" for the RESG purchasers as regards individual unit matters, and for all potential purchasers as regards the condominium common property: AEE A89. There is also evidence that MCAP was on notice that RESG was acting as a "real estate syndicator" in the sale of the units with everything that this would arguably entail: AEE A48, A49. In this regard, there is evidence that RESG was acting in

accordance with certain agreements made between it and 970365 to sell units in the Condo Project and that both 970365 and MCAP were involved in direct dealings with RESG for this purpose. In addition, the affidavit evidence indicates that RESG made certain representations to the prospective purchasers": AEE A87.

[85] Thus, there is a genuine issue whether RESG was acting as an agent for the purchasers or in some other capacity such that knowledge by or representations that MCAP made to RESG, if any, could be held to be knowledge of the appellants. Further, in any event, regardless of the technical nature of the relationship between the purchasers and RESG, there is also a material dispute about whether MCAP ought to have reasonably foreseen that any alleged representation to RESG would arguably be a representation to prospective purchasers through RESG and would be relied on and whether, in turn, RESG or the ultimate purchasers or both did rely on those alleged representations. And if RESG alone were found to have relied on the alleged representations, then a further issue is whether that would suffice for purposes of the appellants' claim against MCAP given other evidence that indicates that the purchasers were relying on RESG to represent them in relation to their purchases of units. Again, these are all matters for a trial judge.

[86] The record reveals that RESG was particularly concerned to ensure that a cost consultant for purposes of s. 14 of the *Act* had been retained for the Condo Project. When a party asks a question and receives an answer, one reasonable inference is that they are relying on the answer given, and, depending on the circumstances, that the answer is important to it. Otherwise, unless idle chit chat, why ask the question? In other words, when specific information is requested and a response provided, this may be relevant in assessing whether a party will reasonably foresee that it will be relied on. All of this is for a trial judge including whether the questions that RESG asserted it posed to MCAP about the cost consultant went to the issue of who would play the central role envisioned under s. 14 of the *Act* in protecting purchasers and what, if anything, turns on this. In considering these issues, a trial judge should evaluate the 2002 Phone Call in accordance with commercial realities. The term "cost consultant" has a special meaning under the *Act*.

[87] More fundamentally, the reason the chambers judge gave for finding that any such reliance could not be reasonable is without merit. That stated reason: a purchaser cannot look to an interim lender to ensure the proper completion of the project. I agree that an interim lender owes no duty of care to purchasers of units in a project it is financing to ensure that the project is completed in accordance with the lending agreement. I have explained why this is so earlier. However, a court cannot use the absence of a duty of care based on a lender-purchaser relationship to determine whether the specific facts and circumstances of a particular case created or gave rise to a special relationship between the lender and purchasers and a corresponding duty of care sufficient to ground an action in negligent misrepresentation. But that is what happened here. This too constitutes reviewable error. There may well be circumstances in which a lender owes a duty of care to third parties involved in a project it is financing sufficient to ground an action in negligent misrepresentation: see ***Keith Plumbing & Heating Co v Newport City Club Ltd***, 2000 BCCA 141, 184 DLR (4th) 75.

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[88] As to why reliance on the alleged representations would be reasonable, a trial judge would need to take into account a number of considerations. Professor Bruce Feldthusen has set out in *Economic Negligence* (3rd ed. 1994) at pp. 62-63 five general indicia of reasonable reliance, namely: (1) the defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made; (2) the defendant was a professional or someone who possessed special skill, judgment, or knowledge; (3) the advice or information was provided in the course of the defendant's business; (4) the information or advice was given deliberately, and not on a social occasion; and (5) the information or advice was given in response to a specific enquiry or request. To what extent these indicia existed in this case is for a trial judge.

[89] Therefore, it was not open to the chambers judge, on this record, to determine that it was not reasonably foreseeable by MCAP that any prospective purchasers could reasonably rely on the alleged representations. There is ample evidence here demonstrating the existence of a material dispute on this point too. Again, all of this is for a trial judge with the benefit of a full hearing.

[90] So too is the question of whether any alleged representation involved a future expectation and whether, in law, that claim is actionable. There is authority that only a representation of a present fact and not a future intention can give rise to actionable negligence. This issue was not definitively resolved by the Supreme Court in ***Cognos***, *supra* at para 71-72. Nevertheless, the weight of authority at present supports the view that statements about future intentions cannot ground an action in negligent misrepresentation: see ***Motkoski Holdings Ltd. v Yellowhead (County)***, 2010 ABCA 72, 474 AR 367 at paras 39-55. That said, one has to be careful not to confuse a statement of present fact with the future consequences flowing from the negligent misrepresentation of that fact. Many statements of existing facts are inextricably linked to the future and it is what happens in the future that brings home the full extent of the damages caused by the negligent misrepresentation.

(c) Conclusion

[91] Thus, for these reasons, the appellants have shown that the claim for negligent misrepresentation is a genuine issue for trial.

B. Why a Genuine Issue for Trial Exists on the Claims Related to Breach of a Statutory Trust and Unjust Enrichment

1. Threshold Elements for Knowing Assistance and Knowing Receipt

[92] The appellants submit that MCAP participated in a breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of a trustee or by receiving monies it knew were subject to trust conditions. In submissions before the chambers judge, this argument was not

developed at any length. Understandably, therefore, it was not dealt with expressly by the chambers judge. However, on appeal it became one of the main grounds of appeal.

[93] In ***Citadel General Assurance Co v Lloyds Bank Canada***, [1997] 3 SCR 805, the Supreme Court of Canada discussed the fundamental distinction between a stranger to a trust knowingly assisting in a fraudulent and dishonest design on the part of a trustee ("knowing assistance") and knowingly receiving trust property ("knowing receipt") and set forth the different thresholds that had to be met in each situation. Assuming for the sake of argument that MCAP is not a "developer" for purposes of s. 14, MCAP would be a stranger to the statutory trust created under s. 14 of the *Act*.

[94] Under the first category, knowing assistance, a finding of liability requires that the stranger to the trust have either actual knowledge of the trustee's fraudulent and dishonest design or be reckless or willfully blind to that intention. And where the trust is, as here, imposed by statute, the stranger will be deemed to have known of it: ***Air Canada v M & L Travel Ltd.***, [1993] 3 SCR 787 at para 39. The dishonest and fraudulent intent of the trustee does not refer to fraud in the criminal sense; conduct that is morally reprehensible will do. Nor is it necessary that the stranger have acted in bad faith or dishonestly. The test is whether the stranger can be said to be "taking a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take": ***Air Canada***, *supra* at para 60.

[95] The second category, knowing receipt, occurs where a stranger receives trust property for its own use or benefit and with knowledge that the property was transferred to it in breach of trust. It is irrelevant whether the breach was fraudulent. For knowing receipt, the level of knowledge required is lower since the stranger is being enriched at the expense of the plaintiff. Thus, relief will be granted where a stranger, having received trust property for its own benefit and having knowledge of facts which would put a reasonable person on inquiry, fails to inquire as to the possible misapplication of trust property. Because the recipient is held to this higher standard, constructive knowledge, that is knowledge of facts sufficient to put a reasonable person on notice or inquiry, will be adequate as the basis for liability: ***Citadel***, *supra* at paras 48-49.

2. Threshold Elements for Unjust Enrichment

[96] The claim for unjust enrichment stands on a different legal footing than the claims for knowing assistance and knowing receipt. Unjust enrichment is a separate common law cause of action; the latter two are equitable causes of action: ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 SCR 261 at para 94. Three elements must be proven to establish unjust enrichment: (1) enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: ***Garland v Consumers' Gas Co.***, 2004 SCC 25, [2004] 1 SCR 629, at para 30.

3. Material Disputes Remain for Knowing Assistance, Knowing Receipt and Unjust Enrichment Claims

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[97] The appellants' position may be summed up this way. MCAP knew that RESG considered CSC to be the cost consultant for purposes of s. 14 of the *Act*. MCAP was aware of the terms of the purchase and sale agreements since it had required that those contracts be on terms agreeable to it. Those agreements contemplated a cost consultant as required under s. 14. At the time of closing of the transactions of purchase and sale, MCAP was on notice through the Deficiency Letter and later the Geological Testing Letter that individual units and related common property had not been substantially completed. Therefore, the proceeds of sale were subject to the statutory trust and holdback provisions mandated under the *Act*. MCAP took no steps to correct RESG's understanding of CSC's role. Indeed, MCAP instructed CSC not to act as a s. 14 cost consultant but never at any time disclosed this critical fact to RESG. Nor did MCAP make any inquiries after receiving RESG's warnings in September 2003 about substantial deficiencies in the Condo Project to determine whether there could be a misuse or misapplication of trust funds by 970365. Further, given the very short period of time between MCAP's receiving notice of the serious deficiencies and the actual closing of the transactions of purchase and sale, MCAP would have known that those deficiencies could not have been substantially completed. Thus, MCAP is liable for knowing assistance, knowing receipt and unjust enrichment.

[98] I have concluded that based on the record before this Court, there are genuine issues for trial with respect to all three claims.

[99] I begin with this. The Commitment Letter contemplated that the Condo Project would be registered with a new home warranty provider acceptable to MCAP: Funding Condition 16 of the Commitment Letter at AEE A19. Under the terms of the Commitment Letter, all purchasers and contracts of purchase and sale were required to be "satisfactory" to MCAP: Other Conditions 6 of the Commitment Letter at AEE A23. It appears from this record that the new home warranty provider was not intended to be one that would bring this Condo Project within the exception to s. 14 of the *Act*. If so, the statutory trust and holdback provisions under s. 14 would apply to the Condo Project. The contracts of purchase and sale appear to contemplate this as well since they provided in relevant part (AEE A131):

> **3. <u>Money in Trust</u>**
> All funds paid by the Purchaser ... shall be held in trust by the Vendor's solicitors pursuant to section 14 of the *Condominium Property Act* (the "Act") and released in accordance with the Act.... For the purposes of section 14 of the Act, a written statement of the Vendor's consulting engineer or architect for the Project confirming (as the cost consultant under the Act) that the improvements to the Property or any part of it or to the Common Property are substantially complete shall be proof of such facts and conclusively binding upon the Purchaser. The Vendor may act on the statement of the cost consultant in disbursing or using the Purchase Price.

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[100] Other evidence supports the appellants' position that there are genuine issues for trial with respect to both the knowing assistance and knowing receipt causes of action. The appellants point to the fact that on September 12, 2003, RESG sent the Deficiency Letter to CSC, copying MCAP, confirming that RESG had been "advised by counsel" that 970365 had failed to obtain the appropriate exemption from the cost consultant requirements under the *Act*. As noted above, the Deficiency Letter stated that RESG had been "further advised that CSC has been selected as the required cost consultant" for the purpose of determining the amount of the statutory holdback to be held in trust under s. 14 of the *Act*: AEE A150. The Deficiency Letter then went on to describe at considerable length the numerous and varied serious alleged deficiencies in the design and construction of the Condo Project.

[101] There is also evidence that prior to the Deficiency Letter, CSC had issued letters to 970365 certifying costs to complete common areas for the purpose of determining a holdback from purchaser funds for units that had closed. The appellants assert that both 970365 and 970365's lawyers represented that these certification letters were the certifications required under s. 14 of the *Act*.

[102] This evidentiary record suggests that 970365's lawyers also understood that CSC was acting as the s. 14 cost consultant under the *Act*. In their trust letters to purchasers' counsel, 970365's lawyers undertook to maintain a holdback in accordance with s. 14, stating that in doing so, "we shall be entitled to rely upon the advice of our client's cost consultant, currently Cuthbert Smith Chartered Quantity Surveyors, to determine the appropriate amount of such holdback from time to time": AEE A525. Further, 970365's lawyers have given evidence in this case that, in closing the transactions of purchase and sale, they believed that CSC was acting as the s. 14 cost consultant: see affidavit of 970365's lawyer, Gordon Van Vliet, at AEE A4C at line 13.

[103] This record reveals that Penner discussed the Deficiency Letter with Cuthbert of CSC on September 16, 2003. In addition, as noted above, RESG then sent the Geotechnical Testing Letter to CSC and copied MCAP. This was the Letter that asked that further development activity cease until geotechnical testing could be done at the site of the Condo Project. In the Geotechnical Testing Letter, RESG advised that it had been provided with the Commitment Letter on July 15, 2002 and pointed out that the Commitment Letter required a soils test and "construction in compliance with such conditions and with the recommendations". As also noted above, RESG then asserted that it had been assured by MCAP that the Commitment Letter would be enforced, stating (AEE A160):

> By telephone conversation on July 16.2002 with Mr. Michael Roulston, Assistant Vice-president of MCAP, we were assured that the terms of the commitment letter would be carefully monitored and upheld by Mr. John [*sic*] Cuthbert of CSC.

[104] As also discussed above, on September 23 and 24, 2003, 970365 and MCAP respectively wrote separate letters to CSC instructing CSC that it had not been retained as a s. 14 cost consultant and that neither consented to CSC's taking on such a role.

[105] Specifically, 970365's September 23 letter admonished CSC for what 970365 perceived to be "unauthorized communications" between CSC and RESG. The letter stated at AEE A570:

> We wish to make it expressly clear that your firm has been retained as the cost consultant for the purposes of the loan transaction between ourselves as developer and MCAP Financial as lender, and for no other purpose. Your firm has not been retained for any expanded role as alleged by RSG, nor do we consent to you taking on such a role. RSG is simply wrong in this regard.

[106] That letter went on to state that 970365 was taking the allegations advanced by RESG "very seriously" and had referred the correspondence to the architects, engineers and contractor. 970365 copied MCAP on this letter. It did not copy RESG and the appellants point to the fact that there is no evidence that 970365 or MCAP ever provided a copy of that letter to RESG.

[107] MCAP sent CSC a letter to the same effect on September 24, 2003 (AEE A36). In that letter, MCAP referred to the various allegations that RESG had made concerning the Condo Project and cautioned CSC, in words essentially identical to those used by 970365 in its September 22 letter, that CSC's role was as follows (AEE A36):

> [W]e wish to make it clear that your firm has been retained by our office as the cost consultant for the purposes of the loan transaction between 970365 Alberta Ltd as developer and ourselves as lender, and for no other purpose. MCAP Financial has not retained your firm for any expanded role as suggested in RSG's correspondence of September 12, 2003, nor do we consent to you taking on such a role.

[108] MCAP did not copy RESG with this letter and again, the appellants note that there is no evidence that MCAP ever provided a copy of this letter to RESG. They also observe that, on the current record before this Court, at no time did MCAP or 970365 ever write to RESG or Penner advising that CSC was not the s. 14 cost consultant under the *Act*.

[109] In addition, the appellants assert that both MCAP and 970365 knew full well the jeopardy that existed for each at the time that they sent their subject letters to CSC. According to the appellants, at this stage the exposure for both MCAP and 970365 was at its greatest since the outstanding loan amount would have been approaching the highest level. In the appellants' view, by not informing RESG that CSC was not the cost consultant for purposes of s. 14 of the *Act*, MCAP

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improperly reduced its own risk exposure to the significant detriment and harm of purchasers of units in the Condo Project.

[110] As noted earlier, on September 26, 2003, MCAP received $1,463,940 from the closing of a large number of sales transactions in the Condo Project. And then between October 6 and 8, 2003, it received another $2,891,439. MCAP applied all funds against the debt 970365 owed to MCAP.

[111] Intertwined in all of this is also the alleged threat by 970365 to cancel the contracts of purchase and sale and claim forfeiture of deposits paid, who knew what and when about these threats, whether they were used to force closings notwithstanding 970365's alleged failure to substantially complete specific units and related common property and what, if anything, turns on all this.

[112] All this being so, given the allegations contained in the Amended Amended Statement of Claim and the evidentiary record before this Court, I cannot say that the appellants' claims for knowing assistance and knowing receipt are without merit. There are genuine issues for trial as to whether MCAP knowingly assisted in a breach of trust or knowingly received monies impressed with a statutory trust.

[113] Similar considerations apply to the appellants' claim against MCAP for unjust enrichment. The chambers judge relied on the fact that there was a juristic reason as between 970365 and MCAP for the payments received by MCAP to summarily dismiss the unjust enrichment claim. But whether the subject proceeds had lost all identity as purchasers' funds once MCAP received them is very much in dispute on this record. The appellants' position is that when MCAP received the subject monies, these were payments from the purchasers, rather than being 970365's monies. Assuming only for the sake of argument that the appellants are correct, the analysis would then lead a different inquiry. The question would be whether MCAP had a juristic reason to retain monies received from the *purchasers* of the units. That is a different issue than what the chambers judge considered. The answer to it is also in dispute.

[114] I again caution that I make no findings on any of the matters discussed. Suffice to say that given this record, summary dismissal of these claims was not appropriate.

C. Why There is a Genuine Issue on Whether MCAP was a "developer" under s. 14 of the *Act*

1. Statutory Definition of "developer"

[115] Section 14(1)(c) defines developer as follows:

> "developer" includes any person who, on behalf of a developer, acts in respect of the sale of a unit or a proposed unit or receives money

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> paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement

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[116] The significance of the appellants' claim that MCAP falls within this definition in connection with the Condo Project is this. If MCAP were found to be a "developer" under the *Act*, it would have been subject to, and bound by, the statutory trust conditions under ss. 14(4) and (5) of the *Act* in its own right irrespective of any potential liability for knowing assistance, knowing receipt or unjust enrichment.

2. Appellants' Theory of Liability

[117] As noted, the relationship between MCAP, as lender, and 970365, as borrower, was governed by the Commitment Letter. Neither the Condo Corporation nor any condominium unit owner was a party to that Commitment Letter. Nevertheless, it is the appellants' position that when MCAP received monies from 970365's lawyers, these monies were captured by the wording of s. 14(1)(c) such that MCAP should properly be treated as a "developer" for purposes of s. 14 and the statutory trust and holdback provisions.

[118] The test for determining who is a "developer" for purposes of s. 14 of the *Act* has three parts. The person or entity in question must: (1) "receive money paid by or on behalf of a purchaser"; (2) "pursuant to a purchase agreement"; and (3) "on behalf of a developer".

[119] The appellants assert that when MCAP received the proceeds of sale, those funds had not lost all their identity as purchasers' monies. On their theory, these funds were subject to repayment if the required partial discharges of MCAP's mortgage security and caveat 022 293 886 relating to an assignment by 970365 of rents and leases in favour of MCAP (Caveat) were not provided as required. They assert that this is clear from the way in which the subject transactions were structured, documented and closed. In their view, MCAP knew the monies it received from 970365's lawyers were "monies paid by or on behalf of a purchaser" and also knew it had received the monies "pursuant to a purchase agreement" especially since MCAP had required that 970365 grant in its favour a general assignment of all agreements of purchase and sale made between 970365 and purchasers of units in the Condo Project.

[120] In the appellants' view, there are several reasons why MCAP should be found to have received the purchase monies "on behalf of a developer", namely 970365. They point out that the purchase and sale agreements themselves mandated that purchase monies be paid to MCAP "on behalf of the developer". Why? Because item 4 of Schedule I defines "Permitted Encumbrances" as including: "Registrations relating to the Vendor's financing requirements which are to be discharged out of and conditional upon receipt of the full Purchase Price". The appellants further submit that this is also consistent with the Commitment Letter, under the heading "Partial Discharge" which states: "Partial Discharges shall be provided in respect to each condominium unit upon payment to the Lender of 100% of the Net Closing Proceeds".

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[121] They also point out that the way in which the purchase and sale transactions were closed supports their position. In particular, they stress that 970365's lawyers did not pay the purchase proceeds to MCAP unconditionally. The purchase monies paid by purchasers of the condominium units were initially paid into the trust account of 970365's lawyers. Those lawyers in turn then paid those funds to MCAP but those payments were expressed to be conditional on receiving partial discharges of both MCAP's mortgage security and Caveat. Thus, according to the appellants, those funds were open to being returned to 970365's lawyers if MCAP failed to comply with its obligations to provide a partial discharge of both its mortgage security and Caveat. More important, on the appellants' theory, these funds remained the purchasers' funds until the purchasers received clear title. Accordingly, in their view, MCAP received those payments "on behalf of a developer", thereby making it a developer within the meaning of s. 14.

[122] I have concluded that there is a genuine issue for trial as to whether MCAP should, in the particular circumstances of this case, be properly characterized as a "developer" for purposes of s. 14 of the *Act*. Accepting, without deciding, that ordinarily, an interim financier would not be found to have received funds "on behalf of a developer" when it receives proceeds of sale of condominium units in repayment of the debt a developer owes to it, it does not follow that this will invariably be the case. Depending on the facts, there may well be instances in which an interim financier is properly included within the definition of "developer" under s. 14 of the *Act*. A trial judge considering this issue in this case will need to address and resolve a number of matters.

3. Material Disputes Remain on Whether MCAP was a "developer"

[123] First, there is the issue of the intended scope of the legislation and s. 14 in particular. Interpreting legislation is best done in context. It is a matter of statutory construction as to what the Legislature intended under s. 14 and in particular s. 14(1)(c), the definition of developer. This definition is special to s. 14; the *Act* contains another definition of "developer" for other purposes under the *Act*. Statutory construction assesses not merely the words of an act in their grammatical and ordinary sense; it does so in their entire context, harmoniously with the scheme of the act, its object and the intention of the Legislature.

[124] It is preferable for the development of the law that a trial judge consider the intended breadth and scope of s. 14 and the definition of "developer" thereunder. We have had no argument on the policy implications of different interpretations of the definition of "developer" contained in s. 14(1)(c). As noted, this is part of a parcel of consumer protection legislation designed to protect purchasers of condominium units from being unfairly taken advantage of by developers. But what precisely do the words "on behalf of a developer" in this section mean? Do the words simply mean "for the benefit of" and "in the interest of"? Or does this wording require that the developer or a third party to whom the developer may otherwise be accountable for those funds have retained some claim on those funds? And if so, what kind of claim will do for a court to conclude that the recipient of the purchase proceeds has received those monies "on behalf of a developer"?

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[125] Further, did 970365 retain an absolute or some lesser claim on the monies paid by its lawyers to MCAP? The payments that MCAP received from 970365 were paid in partial satisfaction of the debt 970365 owed to MCAP. But if so, does this necessarily mean that MCAP received those proceeds solely in its own right and for its own benefit? Also, since the limitation "on behalf of a developer" does not state "on behalf of a developer alone", could a recipient of purchase proceeds be found to be a developer where the recipient has arguably received funds on two grounds, namely "on behalf of a developer" and in the recipient's own right? And if so, what would be the consequences to the recipient?

[126] MCAP contends that it received the funds in question solely for its own benefit, pointing out that they were not sent to them in trust. While the funds received were not sent in trust in the sense of their being subject to lawyer's trust conditions, a trial judge will need to consider whether it follows that MCAP received the funds unconditionally and for its sole benefit. The record reveals that they were paid by 970365's lawyers on the "understanding" that MCAP would provide partial discharges of both its mortgage security and Caveat. This "understanding" is not a solicitor's trust condition and would not be enforceable as such. But the Commitment Letter imposed a contractual obligation on MCAP in certain circumstances to provide partial discharges on receipt of Net Closing Proceeds as defined therein. MCAP points out that if 970365 had been in default when MCAP received the Net Closing Proceeds, it would have had no obligation to provide even the partial discharges. Whether this is so and how it affects MCAP's contention that it received the Net Closing Proceeds unconditionally and for its sole benefit is also for the trial judge.

[127] Second, the basis on which, and circumstances under which, a lender receives funds may be relevant to this issue. Here, the structure of the transactions of purchase and sale may raise the question whether there was in fact any privity of contract as between MCAP and unit purchasers as a result of the security granted by 970365 to MCAP. Certain evidence may be relevant to this issue. While MCAP was not a party to any of the agreements of purchase and sale, nevertheless, in accordance with the Commitment Letter, those agreements were required to be on terms satisfactory to MCAP. The sales prices had to be not less than the amounts set forth in Schedule "C" in the Commitment Letter. Further, MCAP required that 970365 provide "satisfactory confirmation that each of the purchasers has qualified and accepted take out mortgage financing at a financial institution acceptable to" MCAP: Commitment Letter Funding Condition 2 at AEE A17. Of particular note, in accordance with the Commitment Letter, 970365 was required to deliver to MCAP a general security agreement registered under the *Personal Property Security Act of Alberta* granting a first general assignment of all Agreements of Purchase and Sale inclusive of purchaser's deposits. In addition, 970365 was required to pay the Net Closing Proceeds of sale of each condominium unit to MCAP: see Commitment Letter at AEE A14.

[128] Third, this issue is further complicated by reason of the appellants' outstanding claims against MCAP for knowing assistance and knowing receipt. If an interim lender to a developer is found to have received sale proceeds knowing, or being deemed to know, that the developer has

failed to comply with its statutory obligations under s. 14 of the *Act* and the funds in question are the proceeds of sale, then it may be open to a trial judge to conclude that those funds were then impressed with a statutory trust. If so, then the issue is whether they were *received* by the lender "on behalf of a developer" and were required to be returned for the benefit of the beneficiaries of the statutory trust. I am not suggesting that the dragnet of liability as a "developer" under s. 14 should be expanded to sweep within it all interim lenders. But where an interim lender is liable for knowing assistance or knowing receipt, then a trial judge must assess whether that lender properly falls within the definition of "developer" under s. 14. Simply because a lender is liable for knowing assistance or knowing receipt does not innoculate the lender from potential liability on another basis, that is as a "developer" under s. 14. It also goes without saying that any lender liable for knowing assistance or knowing receipt is not carrying on business in accordance with acceptable commercial practices.

[129] Fourth, public policy issues will no doubt factor into a trial judge's analysis of this issue. On the one hand, an interpretation of this legislation that seriously compromises the integrity of the commercial lending industry ought to be rejected. On the other hand, a court will need to consider how best to ensure that this legislation protects those whom it was intended to protect. This will include an assessment of whether claimed risks from the lender's perspective are valid or whether means exist by which any risks might be obviated.

[130] The trial judge may explore whether this situation is analogous to the builders' lien regime. Lenders require appropriate land titles searches to ensure that as advances are made, no builders liens are registered against the title to the lands. The concept underlying the builders' lien regime is that in certain circumstances, employees and suppliers of materials may gain priority over the interests of a secured lender. Prudence dictates therefore that lenders follow certain procedures to minimize the risk of this occurring by demanding that borrowers provide evidence of clear title as and when advances are made plus whatever additional assurances the lender may consider appropriate to ensure that workmen and suppliers are being paid as required.

[131] A trial judge will no doubt consider as part of this analysis the steps that may reasonably be available to a lender to mitigate the risk that it might lose priority over purchase proceeds if the developer has failed to substantially complete a unit and related common property at the time of sale. And what steps, if any, a lender is required to take to avoid the risk that it may be considered a developer for purposes of s. 14. In other words, is it possible for a lender to protect itself from being treated as a developer under s. 14 by the simple expedient of requiring an appropriate certificate of substantial completion from a cost consultant each time it receives purchase proceeds from the sale of units in a new condominium project to which the statutory trust and holdback provisions apply? And if a lender does not do so – if this degree of due diligence is not followed – then what consequences, if any, should properly flow from this? All of this is for a trial judge.

[132] For these reasons, I have concluded that whether MCAP is a developer for purposes of s. 14 of the *Act* is also a genuine issue for trial and ought not to have been summarily dismissed.

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IX. Conclusion

[133] In conclusion, the appellants have shown that there are a number of genuine issues for trial in connection with certain claims against MCAP. Therefore, for the reasons explained, I allow the appeal from the order of the chambers judge summarily dismissing the claims for negligent misrepresentation, knowing assistance, knowing receipt, unjust enrichment and the s. 14 developer

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issue. This case should go to trial on these various claims. However, the chambers judge was correct in summarily dismissing the negligence claim and thus, the appeal on this ground is dismissed.

Appeal heard on September 13, 2011

Reasons filed at Calgary, Alberta
this 27th day of January, 2012

Fraser C.J.A.

I concur:

Watson J.A.

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Reasons for Judgment Reserved
of the Honourable Mr. Justice McDonald
Dissenting in Part

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Introduction

[134] I have had the benefit of reading the Reasons for Judgment Reserved of the majority. While there is much with which I agree, I have respectfully come to a different conclusion regarding the issues of negligent misrepresentation (paragraphs 65 - 91) and whether or not MCAP is a developer within the meaning of section 14 of the *Act* (paragraphs 115 - 132).

[135] In particular, I agree with the comments contained in paragraph 43 of the Reasons for Judgment Reserved regarding the two-step process to be followed in a successful application for summary judgment. The first step involved requires the moving party to adduce evidence to show that there is no genuine issue for trial. This is admittedly a high threshold. If the evidentiary record establishes that either there are missing links in the essential elements of the cause of action, or that there is no cause of action in law at all, there will then be no genuine issue for trial. The fact that there is no genuine issue for trial must be proven; relying on mere allegations or the pleadings will not suffice: *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2008 SCC 14, [2008] 1 SCR 372 at para 11. Secondly, once the burden on the moving party has been met, the party resisting the summary judgment application may then adduce evidence to persuade the court that a genuine issue remains to be tried.

[136] Ultimately this devolves to the question as to whether there is "no merit to any of the alleged causes of actions".

Background

[137] The background to this appeal, including the facts of the case and the decision of the chambers judge below, is set out in paragraphs 1 through 37 of the Reasons for Judgment Reserved of the majority.

[138] That said, there are certain facts, or more accurately, a lack of any evidential basis, relevant to the points on which I diverge from my colleagues that I will need to highlight in the appropriate sections below.

Claim for Negligent Misrepresentation

[139] In paragraph 65 the majority, citing *Cognos*, identified the necessary elements for a claim in negligent misrepresentation. I repeat these again for convenience. In order to succeed in establishing negligent misrepresentation, the plaintiff must prove:

(i) a duty of care based on a "special relationship" between the representor and the representee;

(ii) the representation in question was untrue, inaccurate or misleading;

(iii) the representor acted negligently in making the representation;

(iv) the representee relied, in a reasonable manner, on the negligent misrepresentation; and

(v) the reliance was detrimental to the representee in the sense that damages resulted.

[140] I concede that there may be a genuine issue for trial with respect to whether, on the unique and specific facts of this case, there was a "special relationship" between MCAP and the appellants, in large part through the involvement of RESG, sufficient to give rise to a duty of care in this case. I further concede that, as noted in paragraphs 72 through 74 of the Reasons for Judgment Reserved, the question of whether there was in fact an implied representation made by MCAP that it would enforce the terms of the Commitment Letter may be a live issue. Consequently, there may be a genuine issue for trial as to whether such an implied representation was untrue, inaccurate or misleading, and furthermore whether it was made negligently. Finally, there is no question that the appellants suffered damages in this case. However, I respectfully disagree with the majority on the issue of reasonable reliance.

[141] The majority writes at paragraph 84, that "[t]he proposition that it was not reasonably foreseeable by MCAP that any prospective purchaser could reasonably rely on the alleged representation and that there is no evidence that any purchasers did so ignores the fact that these matters are tied up with a dispute on other material facts, namely the relationship between RESG and the appellants, on the one hand, and RESG and MCAP, on the other."

[142] With the greatest of respect, in my opinion, there is no evidence to support the argument that the appellants were aware of any alleged representation or that they reasonably relied on it if it was in fact made. Furthermore, there is no evidence of an agency relationship between RESG and the

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appellants, and therefore no basis upon which to impart any reliance by RESG to the appellants themselves.[1]

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[143] No where in the substantial affidavit evidence before the chambers judge was there any indication that RESG communicated its understanding of the alleged representations by MCAP to the purchasers, or that the purchasers themselves relied on MCAP's representations. The chambers judge expressly found that "there is no evidence that any such purchaser or plaintiffs did rely on the [sic] upon that alleged undertaking": ABD F101 at para 55. This court owes deference to the findings of fact of the chambers judge. I see no palpable and overriding error in his conclusion that there was no evidence of reliance by the appellants, and therefore, I see no basis for interfering with his conclusion on this point.

[144] The evidence is clear that RESG believed MCAP had represented it would enforce the terms of the Commitment Letter, and furthermore that RESG relied on that perceived representation when making recommendations to the purchasers. Penner, of RESG, deposed that "a critical factor that influenced RESG to recommend that purchasers enter into the Purchase Agreements, and subsequently close their transactions, was *RESG's reliance* on MCAP's assurances and representations that it intended to enforce the terms of the Commitment Letter": AEE A50 at para 31 [emphasis added]. See also AEE A95 at para 42. However, RESG's reliance is not the same as the appellants' reliance.

[145] Penner further deposed that "All [the potential purchasers] were prepared to enter into agreements based solely on the reputation of Bamber, Frey, and I. Nor did they enquire as to the exact nature of what they understood to be a co-venture relationship between RESG and the Developer Group. Rather, their only concern was that they were acquiring what was represented to them by the Developer Group and RESG": AEE A87 at para 30. There was no mention of any representations made by MCAP to the appellants. To succeed in establishing negligent misrepresentation the appellants must demonstrate that *they* relied on the alleged misrepresentation *by MCAP*; the absence of any evidence on this point is, in my opinion, fatal to their claim.

[146] Having failed to provide any evidence of an essential element of the cause of action of negligent misrepresentation, the appellant's claim was bound to fail and accordingly the chambers judge's decision summarily dismissing this aspect of the appellant's action was not unreasonable.

[147] The majority finds, at paragraph 85, that "... there is a genuine issue whether RESG was acting as an agent for the purchasers or in some other capacity such that knowledge by or

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[1]By virtue of a Letter Agreement dated May 8, 2008, between RESG and 970365, RESG was named as a "co-developer" and it was contemplated that it would have involvement as a financial participant in the Condo Project. AEE A85 at para 26.

representations that MCAP made to RESG, if any, could be held to be knowledge of the appellants." Again with the greatest of respect, I disagree with this conclusion.

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[148] The onus of establishing an agency relationship lies with the party alleging that the agency existed: *Tanouye v KJM Developments Ltd* (1980), 25 AR 200 (QB) at para 25 citing *Canadawide Investments Ltd v Muirhead* (1958), 15 DLR (2d) 526, 26 WWR 460 (Alta SC-AD). See also *Merchants Bank of Canada v Stevens* (1919), 30 Man R 46, 49 DLR 528 (CA) at page 561. In this case, if the appellants desire to establish the essential element of reliance through an agency relationship with RESG, they must lead evidence to establish the existence of such a relationship. Based on the record before us, there is no evidence capable of supporting an argument that RESG was agent for the appellants.

[149] The essential elements of a relationship of agency include (i) consent of both the agent and the principal, (ii) the ability of the agent to affect or alter the principal's legal relationship with third parties, and (iii) the principal's control over the agent's actions: *Royal Securities Corp v Montreal Trust Co*, [1967] 1 OR 137, 59 DLR (2d) 666 (HCJ) at page 684. Consent is particularly important because, in general, "[n]o one can become the agent of another person except by the will of that other person": *Johnson v Forbes* (1931), 26 Alta LR 268, [1932] 1 DLR 219 (SC -AD) at 222[2].

[150] The record in the present appeal provides no evidence of the appellants' consent or desire that RESG act as their agent; nor is there any evidence that RESG had authority to act on behalf of or bind any of the appellants by its own actions, or alter the appellants' legal relationships with other parties. In my opinion, in the absence of any evidence on these essential points, there can be no genuine issue whether RESG was acting as agent for the appellants. Therefore RESG's reliance on MCAP's alleged representation cannot be imputed to the appellants and one fundamental element of a claim in negligent misrepresentation is still lacking.

[151] In any event and regardless of the exact nature of the relationship between RESG and the appellants, it bears repeating that the Supreme Court of Canada decision in *Hercules Managements Ltd v Ernst & Young*, [1997] 2 SCR 165, makes clear the necessity of a party being able to satisfy the court that reliance on a statement actually occurred. La Forest J. stated, in part, at para 18:

> Needless to say, actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses; see: *Queen v Cognos Inc*., [1993] 1 S.C.R. 87 at p.110.

[2] There are, of course, exceptions to this general proposition (eg. agent by necessity) but none of these are applicable to the facts of this case. Unquestionably, a contract of agency requires the consent of both parties.

Although the above comment was strictly speaking *obiter*, it is a correct statement of the law. There being no evidence given by any plaintiff that MCAP's alleged representations were a factor in his/her purchase of a unit in the Condo Project, there can be no basis for a successful claim in negligent misrepresentation.

[152] Based on the reasons above, I conclude that there is no genuine issue for trial based on a claim in negligent misrepresentation. I would dismiss the appeal on this point.

Claim that MCAP is a "Developer" Under Section 14 of the *Act*

[153] I repeat here, again for convenience, the test for determining who is a "developer" for the purposes of section 14 of the *Act*, as stated in paragraph 118 of the Reasons for Judgment Reserved of the majority. A "developer" includes a person who:

(i) received money paid by or on behalf of a purchaser;
(ii) pursuant to a purchase agreement; and
(iii) on behalf of a developer.[3]

I concede that there may be genuine issues for trial as to whether the funds MCAP received through the purchase transactions of units in the Condo Project was money "paid on behalf of a purchaser" "pursuant to a purchase agreement". However, I cannot accept the suggestion that those funds were received "on behalf of a developer".

[154] The majority concludes that it is an open question what precisely the words "on behalf of a developer" in section 14 means: paragraph 124. However, in my opinion, whatever the scope of that phrase might be, it cannot be so broad as to include money received by MCAP, pursuant to a loan agreement, to pay off the debt owed by 970365. Money received in this way is fundamentally received by MCAP on its own behalf. The chambers judge clearly held that, based on the arrangement between the parties, the money received by MCAP was 970365's money, and it was paid *by* 970365, not *on behalf of* 970365.

[155] Again, I see no reversible error with respect to the chambers judge's finding on this point. Having concluded that one element of the definition in section 14 was not established, the chambers judge summarily dismissed the appellants' claim on this point; his decision to do so was not unreasonable.

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[3] The reference to a "developer" here is to the general definition contained in section 1(i)(j) of the *Act*, viz "a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction".

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[156] I respectfully disagree with the majority's position that the Legislature's failure to state "on behalf of a developer alone" opens the door to claims based on money paid by a developer that benefits both the developer and the recipient; after all, every payment, save for perhaps pure charity, provides some benefit to the payor in that it either relieves the payor of an obligation owed to the payee or creates an obligation that the payee owes back to the payor. Such an interpretation of section 14 is, in my opinion, too broad and unsupportable on the words of the legislation.

[157] As further support for the position that there is a genuine issue on the section 14 developer argument, the majority also concludes, at paragraph 127, that there remains an unanswered question as to whether there might be privity of contract in this case between MCAP and the appellants based on the security granted by 970365 to MCAP. Again, I respectfully disagree. I can see no evidential basis for this suggestion on the record before this court.

[158] Furthermore, the chambers judge expressly held that "[t]here was no contractual relationship between MCAP and the plaintffs [appellants] ... The only interest of MCAP in any purchase agreement between the developer and the plaintiffs is the enforcement of the covenant by the developer to ensure that the developer paid the net proceeds of the sales so received from a purchaser to MCAP": ABD F96 at para 26.

[159] This was part of the lending arrangement between MCAP and 970365. I see no basis upon which this court can disturb this factual finding. And in any event, I see no way such a finding could affect the nature of the money MCAP received from 970365; even if there was a contractual relationship between MCAP and the appellants, the specific money impugned in this appeal was still received by MCAP from 970365 in repayment of 970365's loan, and therefore was received on MCAP's own behalf and not on behalf of a developer.

[160] Further on this point, the majority notes that the issue of whether MCAP received money "on behalf of" 970365 is further complicated by the possibility that MCAP knowingly received trust funds. This reasoning flows from the fact that if a party receives money knowing that the developer has failed to comply with the *Act*, those funds may be found to be impressed with a statutory trust. If they are subject to a statutory trust, then the developer is liable to the purchaser for those funds, *i.e.* the purchaser can require that they be returned. As such, the money in question is not unconditionally available to the receiving party, but rather that party is in effect holding that trust money for the developer; therefore the receiving party received the money "on behalf of the developer".

[161] With the greatest of respect, this reasoning is flawed and I disagree with the majority on this point. As noted by the majority in paragraphs 93 and 95 of their Reasons for Judgment Reserved, a condition precedent to a finding that a party knowingly received trust property is a finding that the party was a *stranger* to the trust. With respect to a section 14 statutory trust, this means the party is *not* a "developer" for the purposes of section. In paragraph 95, the majority explains that "[t]he second category, knowing receipt, occurs where a *stranger* receives trust property *for its own use*

or benefit and with knowledge that the property was *transferred to it in breach of trust*" [emphasis added]. This requirement is essential because if the party was a trustee, as opposed to a stranger to the trust, it would not receive the trust property for its own benefit, but rather for the benefit of the trust's beneficiaries. Also, a transfer to such a party would not be a transfer in breach of trust; it would merely be a transfer from one trustee to another. Therefore, if MCAP is liable for knowingly receiving trust property, it cannot have been a developer under section 14. It begs the question to say that MCAP might have knowingly received trust property, based on the premise that MCAP is a stranger to the section 14 statutory trust, and subsequently use that finding to bring MCAP within the definition of "developer" and therefore within the ambit of the trust itself.

[162] Furthermore, with respect to section 14 holdbacks, that money is subject to a statutory trust. Therefore, if a party receives that money knowing it is subject to a statutory trust, that party would likely already be held liable to the beneficiary on that basis. It seems unnecessary to me to extend the analysis to the issue of whether the money is also held "on behalf of a developer", simply to engage the definition of "developer" in section 14 of the *Act*.

[163] There is no need to take the further step of categorizing the money as received "on behalf of" the developer and thereby bring the receiving party within section 14 if that party does not otherwise satisfy the criteria set out in the definition of "developer". In my respectful opinion, with this argument the majority is conflating, unnecessarily, the cause of action noted above (knowingly receiving trust property) with the meaning of "on behalf of a developer" in section 14.

[164] The majority recognizes that public policy issues will be a factor to consider when analyzing the scope of the definition of "developer " in section 14 of the *Act*. However, the majority believes this is a question that is best left to be decided at trial. With respect, I again diverge on this point. In my opinion, even opening the door at trial to an interpretation of section 14 that may include interim construction lenders in the definition of "developer" would clearly be inconsistent with the object of the *Act* and the intention of the Legislature.

[165] The *Act* is, admittedly, consumer protection legislation aimed at protecting the interests of purchasers and owners of condominiums. However, this is not the only objective of the legislation. The *Act* attempts to strike a balance between the need to protect the interests of purchasers and owners, and the need to enable developers to undertake and complete condominium projects in an efficient and effective manner.

[166] Section 14 is an example of the balance that the *Act* attempts to create. On the one hand, the definition of "developer" is directed at holding a larger group of persons accountable for the proper construction and completion of new condominium projects. In fact, the definition of "developer" presently set out in section 14 was only introduced in 2000 as part of a package of amendments to the *Act* (the "2000 Amendments").

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[167] Prior to that time, the applicable definition was the much narrower definition of "developer" applicable to the entire *Act*; the current general definition of "developer" in section 1(j), which was also amended in 2000 but for the purposes of this appeal is substantially the same as it was prior to the amendments, reads:

> "developer" means a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction.

[168] Clearly the section 14 definition encompasses a wider range of persons than the definition in section 1(j) of the *Act*, indicating a focus on consumer protection. On the other hand, the calculation of trust holdbacks under section 14 now seeks to allow developers easier access to sufficient funds to complete a condominium project, while at the same time maintaining sufficient holdbacks to ensure the completion of the units and related common property for which purchase monies have already been paid.

[169] Prior to the 2000 Amendments, 50 percent of the money paid to a developer or a person acting on the developer's behalf was required to be held in trust until the unit and related common property was substantially complete. As such, this money was not available to the developer to finance the completion of the remainder of the condominium project.

[170] Under the current section 14, however, the required holdback has been modified, and now the developer (as newly defined) is required to hold in trust that amount of money that is sufficient, when combined with the unpaid portion of the purchase price, to substantially complete the unit in question and the related common property.

[171] This modified method of calculation makes available to the developer more of the money paid by purchasers of units in a condominium project in order to complete the project, or an additional phase, while still ensuring there are sufficient funds to complete the immediate unit and related common property to which those purchase monies apply. This exemplifies the balance struck in the legislation.

[172] The Legislature clearly intended a balance in section 14 of the *Act*. When debating the 2000 Amendments in the Legislative Assembly, one of the noted effects of the changes was "to protect the rights of the condominium owners while allowing the builders to finance their projects more easily": Alberta, Legislative Assembly, *Hansard* (3 April 2000) at 662 (Hon. Mr. Gibbons). As noted, one objective of section 14 is to expand the group of persons who are accountable to the purchasers of units in a new condominium project for the completion of the project.

[173] However, in my opinion, the Legislature did not intend to cast the net so wide as to include interim finance lenders, since doing so will undermine the other objective of section 14, namely,

ensuring that construction financing is available and funds are accessible to allow developers to complete, with reasonable diligence, the construction of new condominium projects. Expanding section 14 to apply to interim construction lenders carrying on business in the ordinary course and through well-accepted and time-proven practices will doubtless have a detrimental effect on the availability of financing for new condominium developments. This cannot have been the intention of the Legislature when amending section 14.

[174] Of course, if the facts of a case are such that a lender clearly falls within the definition of a developer in section 14 – based on the particular financing arrangement or lending practices involved in that situation – the policy reasons just referred to will not be a sustainable basis for shielding that particular lender from the application of section 14. But where the lender has made use of commercially reasonable lending practices and one cannot reasonably fit the arrangement between the lender and the developer within the definition in section 14, these policy considerations support the conclusion that the definition should not be expanded unnecessarily to capture the interim lender in those circumstances.

[175] Based on the analysis above, and supported by the public policy considerations just articulated, I conclude there is no genuine issue as to whether MCAP is a developer within the meaning of section 14 of the *Act*. I would dismiss the appeal on this point.

Conclusion

[176] While I agree with the majority's conclusions that there is no genuine issue for trial based on a claim in negligence and that, on the particular facts of this case, there is a genuine issue for trial on a claim that MCAP knowing participated in a breach of a statutory trust and that MCAP was unjustly enriched, I am unable to agree with the balance of their conclusions. In my respectful opinion, there is no genuine issue for trial based on a claim in negligent misrepresentation, and there is no genuine issue with respect to whether MCAP qualifies as a "developer" within the meaning of

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section 14 of the *Act*. Accordingly, I would grant the appeal and allow to stand only the claims that MCAP knowingly participated in a breach of a statutory trust and that MCAP was unjustly enriched. I would dismiss the appeal on all other issues.

Appeal heard on September 13, 2011

Reasons filed at Calgary, Alberta
this 27th day of January, 2012

McDonald J.A.

2012 ABCA 26 (CanLII)

Appearances:

G. Vogeli and T. McDonald
for the Appellant

R.H. Haggett
for the Respondent

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TAB 32

Confederation Treasury Services Ltd. (Re)

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: April 9, 1997.

File No.: 25917

[1997] S.C.C.A. No. 229

Richter & Partners Inc., Trustee of the Estate of Confederation Treasury Services Limited, a bankrupt v. Ernst & Young, and George R. Albino, William H. Alexander, John D. Allan, William G. Benton, Bennett A. Brown, Patrick D. Burns, Paul G.S. Cantor, William D. Douglas, Mark E. Edwards, Kenneth E. Field, Nan-B Gaspé Beaubien, Irving R. Gerstein, Anthony E. Griffiths, Sir Anthony S. Joliffe, George E. Mara, Robert W. Martin, David R. Mc Camus, Daryl E. Mc Lean, André Monast, Michael D. Regester, John A. Rhind, Michael Rosenfelder, Borden D. Rosiak, Michael J. White, Adam H. Zimmerman, and The Commissioner of Insurance of the State of Michigan in its Capacity as Rehabilitator of the assets of Confederation Life Insurance Company in the United States, and The Superintendent of Financial Institutions (Canada) in its capacity as Liquidator of Confederation Life Insurance Company

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) May 26, 1997.

Catchwords:

Commercial law — Bankruptcy — Contingent claims — Foreign proceedings — Authorization to bring claim against bankrupt in ex juris proceedings — Proof of contingent claims in bankruptcy — Rule against double recovery — Test to lift statutory stay of proceedings.

Chronology:

1. Application for leave to appeal:

FILED: April 9, 1997.

2. Motion for a stay of execution dismissed May 7, 1997. Before: Sopinka J. S.C.C. Bulletin, 1997, pp. 883 and 927.

[La version française se trouve ci-dessous:]

This is an application to stay the Order of the Court of Appeal for Ontario dated January 14, 1997. The order grants leave to the respondent Ernst & Young (E & Y) and George R. Albino et al. (appellants in the Court of Appeal) to assert a claim against the applicant Trustee in proceedings in Michigan brought by the

respondent The Superintendent of Financial Institutions (Canada). The applicant has served and filed an application for leave to appeal from the Order referred to as well as from another order made the same day which allowed an appeal from an order disallowing proof of claim of the respondent E & Y in the bankruptcy proceedings.

The applicant's solicitor has requested an oral hearing in a letter to the Registrar but nothing in the material filed demonstrates why the usual practice in Rule 22(2) should not apply. The application for a stay is made pursuant to s. 65.1 of the Supreme Court of Canada Act (the Act) and Rule 27. By virtue of this recent amendment to the Act the court appealed from or a judge thereof is given concurrent jurisdiction. The rationale for this amendment was stated in Esmail v. Petro Canada (25095) (released February 8, 1996) as follows:

> The purpose of the amendment was to enable litigants to apply to the court that had recently dealt with the matter. Often the court appealed from is more conveniently located so as to permit the matter to be dealt with more expeditiously. It is only in special circumstances that successive applications to a judge of the court appealed from and a judge of this Court should be permitted.

For this reason a party applying in the first instance to a judge of this Court must provide a valid reason why the rationale for the new provision does not apply to the application.

In response to a query from the Registrar as to the absence of any such reasons in the material filed, the applicant responded in writing as follows:

(i) Firstly, in our stay motion we seek, by way of ancillary relief, an order expediting the hearing of the application for leave to appeal, and if leave is granted, the appeal itself. It does not appear that the Provincial Courts of Appeal have jurisdiction under the Supreme Court Act to grant that ancillary relief, whereas the Supreme Court certainly does. Further, it would not appear to be appropriate for a Provincial Court of Appeal to deal with a Supreme Court timetable.

(ii) Secondly, in the commentary to section 65.1 of the Supreme Court Act in Supreme Court of Canada Practice 1996, B. Crane and H. Brown, Carswell, 1995, the authors question (at page 115, first full paragraph) the likelihood of Provincial Court of Appeal issuing stays of their own orders "when a significant aspect of the decision is the likely merit in the proposed application for leave __ a matter the appeal courts have consistently held is for the Supreme Court of Canada to decide." It would seem somewhat strange for a court from which leave to appeal is being sought to be asked to say, or say inferentially, that it thinks that there is some merit in the application for leave to appeal its decision, i.e. this is not the same as seeking a stay where there is an unquestioned right of appeal and the sole question is the effect of the granting a stay.

With respect to the second point, this reasoning is at variance with the practice of this Court as set out in Esmail, supra. However, the applicant can be excused for not referring to the case since it appears not to have been reported. But I do not agree that the judges of the courts of appeal would not be objective in assessing whether an appeal raises a serious issue. There are numerous provisions which require judges to make a similar determination notwithstanding that a decision on the issue has already been made. For example, until comparatively recent times, leave to appeal to this Court was often granted by the court appealed from pursuant to s. 37 of the Act. That provision is still in the Act and fell into disuse because courts of appeal decided that this Court should determine its own workload and not by reason of any reluctance to reassess the merits for the purpose of identifying an issue fit to be decided by this Court.

The first reason referred to might in some circumstances be sufficient although there is usually no impediment to having the two applications proceed concurrently in different fora. In view of my disposition of the application, it is unnecessary to express any final conclusion on this point. I have concluded that the balance of convenience favours dismissal of the application subject to certain conditions. First, the hearing of the application for leave is to be expedited. I would grant the extension of time as requested. Second, the application for a stay is dismissed without prejudice to it being renewed before a judge of the Court of Appeal. Third, if leave to appeal is granted, the application may be renewed before me subject to any disposition that may have been made by a judge of the Court of Appeal.

In my opinion, the applicant will suffer no serious prejudice by the delay pending a decision on the application for leave. Unless the wheels of justice move much more quickly in Michigan than in Ontario, I doubt that the proceedings against the applicant will be advanced substantially pending a decision of this Court on the application for leave. In any event, if I am wrong in this respect, an application can be made to a judge of the Court of Appeal.

Accordingly, the application for a stay is dismissed and the applications for an expedited hearing of the application and for an extension of time with reference thereto are granted.

La version française:

Il s'agit d'une demande tendant à obtenir un sursis à l'exécution d'une ordonnance rendue par la Cour d'appel de l'Ontario le 14 janvier 1997. L'ordonnance autorise les intimés Ernst & Young ainsi que George R. Albino et autres (appelants en Cour d'appel) à présenter une demande contre le syndic requérant dans des procédures intentées au Michigan par l'intimé, le Commissioner of Insurance de l'État du Michigan. Le requérant a signifié et déposé une demande d'autorisation d'appel contre l'ordonnance en question et contre une autre ordonnance, rendue le même jour, par laquelle était accueilli l'appel formé contre une ordonnance rejetant une preuve de réclamation de l'intimée Ersnt & Young présentée dans les procédures de faillite.

Le procureur du requérant a demandé une audition orale dans une lettre adressée au registraire, mais les documents déposés n'indiquent pas pour quelles raisons la pratique usuelle prévue au paragraphe (2) de la Règle 22 ne devrait pas s'appliquer. La demande de sursis est présentée en vertu de l'art. 65.1 de la Loi sur la Cour suprême, L.R.C. (1985), ch. S-26 (mod. L.C. 1994, ch. 44, art. 101) et de la Règle 27. En vertu de la modification apportée récemment à la Loi, la juridiction inférieure ou l'un de ses juges exerce une compétence concurrente à celle de la Cour. Les raisons de cette modification ont été exposées dans l'arrêt Esmail c. Petro-Canada, no 25095, rendu le 8 février 1996, de la façon suivante :

> La modification visait à permettre aux plaideurs de présenter leur demande à la cour qui venait d'examiner l'affaire. Souvent, l'emplacement de la juridiction inférieure se prête mieux au jugement rapide de l'affaire. C'est seulement dans des circonstances spéciales qu'il devrait être permis de présenter successivement une demande à un juge de la juridiction inférieure et à un juge de notre Cour.

Pour cette raison, la partie qui présente d'abord une demande à un juge de notre Cour doit fournir des raisons valables pour justifier une dérogation à la nouvelle disposition.

En réponse à la question posée par le registraire quant à l'absence d'une telle explication dans les documents déposés, le requérant a répondu par écrit de la façon suivante :

(i) premièrement, dans notre requête, nous demandons, par la voie d'une mesure de redressement accessoire, une ordonnance hâtant l'audition de la demande d'autorisation d'appel, et si l'autorisation est accordée, celle du pourvoi lui-même. Les cours d'appel provinciales ne semblent pas avoir compétence en vertu de la Loi sur la Cour suprême pour accorder ce redressement accessoire, alors que la Cour suprême est certainement compétente. Par ailleurs, il n'apparaît pas judicieux qu'une cour d'appel provinciale prenne une décision ayant une incidence sur le calendrier des travaux de la Cour suprême.

(ii) deuxièmement, dans leur commentaire relatif à l'art. 65.1 de la Loi sur la Cour suprême,publié dans Supreme Court of Canada Practice 1996, Carswell, 1995, B. Crane et H. Brown mettent en doute (à la p. 115, premier paragraphe entier) la probabilité que les cours d'appel provinciales acceptent de surseoir à l'exécution de leurs propres ordonnances [traduction] lorsqu'un élément important de la décision est la vraisemblance du bien-fondé de la demande d'autorisation d'appel envisagée une question jugée de façon constante par les cours d'appel comme devant être tranchée par la Cour suprême. Il serait plutôt étrange de demander à la cour contre laquelle on cherche à se pourvoir qu'elle dise, ou statue implicitement, qu'elle croit que la demande d'autorisation d'appel présentée contre sa décision n'est pas dénuée de fondement; ce n'est pas comme si l'on cherchait à obtenir un sursis dans un cas où l'existence du droit d'appel est

incontestable et que la seule question à trancher est celle de l'incidence de la décision d'accorder le sursis.

En ce qui concerne le deuxième point, ce raisonnement n'est pas conforme à la pratique de notre Cour telle qu'elle est énoncée dans l'arrêt Esmail, précité. Toutefois, on ne peut reprocher au requérant de ne pas renvoyer à cet arrêt, étant donné qu'il paraît ne pas avoir été publié. Mais je ne souscris pas à l'opinion voulant que les juges des cours d'appel saisis de la question de savoir si l'appel soulève une question sérieuse manqueront d'objectivité. De nombreuses dispositions exigent que les juges rendent des décisions semblables en dépit du fait que la question a déjà été tranchée. Par exemple, jusqu'à une époque relativement récente, l'autorisation d'interjeter appel devant notre Cour était souvent accordée par la juridiction inférieure en vertu de l'art. 37 de la Loi sur la Cour suprême. Cette disposition, demeurée dans la Loi, est tombée en désuétude parce que les cours d'appel ont décidé que notre Cour devait déterminer elle-même sa charge de travail, et non parce qu'elles étaient réticentes à réévaluer le bien-fondé d'une décision afin de déterminer si elle soulevait une question qui méritait d'être tranchée par notre Cour.

La première raison invoquée pourrait, dans certaines circonstances, suffire, bien qu'il n'y ait habituellement aucun empêchement à ce que les deux demandes soient traitées en même temps par des tribunaux différents. Compte tenu de la façon dont je statue sur la demande, toute conclusion définitive sur cette question est inutile. J'ai conclu que la balance des inconvénients favorisait le rejet de la demande sous réserve de certaines conditions. Premièrement, l'audition de la demande d'autorisation doit être hâtée. Je suis d'avis d'accorder la prorogation de délai demandée. Deuxièmement, la demande de sursis est rejetée, sous réserve du droit de la présenter à nouveau devant un juge de la Cour d'appel. Troisièmement, si l'autorisation d'appel est accordée, la demande peut m'être soumise à nouveau, sous réserve de toute décision rendue par un juge de la Cour d'appel.

mon avis, le requérant ne subira aucun préjudice grave en raison de la période qui s'écoulera avant que soit rendue la décision tranchant la demande d'autorisation. moins que les rouages de la justice n'aillent beaucoup plus vite au Michigan qu'en Ontario, je doute que les procédures intentées contre le requérant avancent de façon substantielle d'ici à ce que notre Cour se prononce sur la demande d'autorisation. De toute façon, si j'ai tort sur ce point, une demande peut être présentée à un juge de la Cour d'appel.

Par conséquent, la demande de sursis est rejetée et les demandes tendant à obtenir une audition hâtive de la demande et la prorogation du délai qui s'y rapporte sont accueillies.

3. Application for leave to appeal:
SUBMITTED TO THE COURT: May 14, 1997. S.C.C. Bulletin,

1997, p. 914.

DISMISSED WITH COSTS: May 26, 1997 (without reasons).

S.C.C. Bulletin, 1997, p. 1033.

Before: L'Heureux-Dubé, Sopinka and Iacobucci JJ.

Procedural History:

Judgment on motion: Applicant's motion to disallow Ernst & Young's proof of claim granted.
Ontario Court (General Division), Farley J., April 3, 1996.

Judgment on motions: Motions by Ernst & Young dismissed:

inter alia, leave to assert claim against Applicant in ex juris proceedings denied and application to seek stay of ex juris proceedings denied.
Ontario Court (General Division), Farley J., April 8, 1996.

Judgment on motions: Motions by George R. Albino dismissed: inter alia, leave to assert claim against Applicant in ex juris proceedings denied and application to seek stay of ex juris proceedings denied.
Ontario Court (General Division), Farley J., July 4, 1996.

Judgment on appeal: Leave granted to Ernst & Young and George R. Albino et al. to bring a claim against Applicant in ex juris proceedings.
Ontario Court of Appeal, Catzman, Carthy and Moldaver JJ.A., January 14, 1997.
[1997] O.J. No. 66.

Judgment on appeal: Ernst & Young's proof of claim allowed and deemed proved upon valuation.
Ontario Court of Appeal, Catzman, Carthy and Moldaver JJ.A., January 14, 1997.
96 O.A.C. 75; *[1997] O.J. No. 67*.

End of Document

TAB 33

Court File No. M19800 (C24399)

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE BANKRUPTCY OF CONFEDERATION TREASURY SERVICES LIMITED, a corporation incorporated under the laws of the Province of Ontario having its head office in the City of Toronto, in the Municipality of Metropolitan Toronto, Province of Ontario, and

IN THE MATTER OF the Winding-Up Act, and

IN THE MATTER OF the Liquidation of Confederation Life Insurance Company

1997 CanLII 3544 (ON CA)

BEFORE: **CATZMAN, CARTHY and MOLDAVER JJ.A.**

COUNSEL: **Peter H. Griffin and Risa Kirshblum for Ernst & Young**

A. Sternberg for former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited

William G. Horton for the Rehabilitator of Confederation Life Insurance Company in the United States

R.N. Robertson and E. Lamek for the trustee of the estate of Confederation Treasury Services Limited, a bankrupt

HEARD: **December 19, 1996**

ENDORSEMENT

Ernst & Young ("E&Y") filed a proof of claim, dated February 21st, 1996, with the trustee of the estate of Confederation Treasury Services Limited ("the trustee"). In one of several orders made on April 8th, 1996, Farley J. granted a motion by the trustee disallowing E&Y's proof of claim. No appeal was taken from this order until its significance became apparent during the argument of the appeal from another order made by Farley J. on the same day. In that appeal, E&Y and the former directors and officers of Confederation Life Insurance Company and Confederation Treasury Services Limited ("the

directors and officers") sought an order that would entitle them to assert a claim against the trustee for relief arising out of their potential liability in an action now pending in Michigan. But only a creditor may seek such leave: see ss. 69 *ff.* of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("the *BIA*"). Section 2 of the *BIA* defines "creditor" to mean a person having a claim, preferred, secured or unsecured, provable as a claim under the *Act*, and defines "claim provable in bankruptcy", "provable claim" and "claim provable" to include any claim or liability provable in proceedings under the *Act* by a creditor. The trustee resisted the other appeal on a number of grounds, including the ground that, because E&Y's proof of claim had been disallowed, it was not a "creditor" entitled to the relief it sought.

E&Y immediately brought this motion for leave to extend the time to appeal from the order disallowing its proof of claim. The uncontradicted evidence of E&Y is that it always intended to appeal the whole of the disposition of Farley J. made on April 8th, 1996 which had the result of foreclosing its entitlement to assert a claim for contribution and indemnity from the trustee, and we are not satisfied that the trustee would suffer any prejudice from the granting of such leave. Leave to extend the time to appeal from the order disallowing the proof of claim is therefore granted.

We turn to the appeal itself. Section 121 of the *BIA* deems all 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

1997 CanLII 3544 (ON CA)

bankrupt becomes bankrupt to be claims provable in proceedings under the Act. Section 121(2) makes specific reference to contingent claims and unliquidated claims. The claim of E&Y is, on its face, a contingent claim and, because E & Y is subject to a claim for treble damages in the Michigan proceedings, is not the same as the claim asserted against the trustee in Ontario by the Rehabilitator and exceeds that claim to the extent that any such damages may be awarded over and above the amount that may be awarded against the trustee.

In so far as the cases of *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 and *Re Wiebe* (1995), 30 C.B.R. (3d) 109, relied upon by the trustee, articulate as a test for a valid contingent claim the need for probability of liability arising from the court proceedings in question, we believe that they impose too high a threshold for the establishment of such a claim. While there may be claims so remote and speculative in nature that they could not properly be considered contingent claims, the claim of E&Y in the present case for contribution and indemnity in respect of the relief sought against it in the Michigan proceedings does not fall into that category and, in our view, constitutes a valid contingent claim within the contemplation of sec. 121 of the *BIA*.

Accordingly, the appeal from the order disallowing E&Y's proof of claim is allowed and, in its place, a declaration will issue that E&Y's contingent claim is a claim provable in the bankruptcy of Confederation Treasury Services Limited. Pursuant to s. 121(2) of the *BIA*, the matter is remitted to the Ontario Court (General Division) to value

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E&Y's claim upon such evidence as may be adduced by the parties in respect of such valuation and E&Y's claim shall be deemed a proved claim to the amount of its valuation.

It has been common ground throughout the argument of these appeals that the directors and officers, who have not yet filed a proof of claim with the trustee, fall into the same category as E&Y with respect to the relief sought against them in the Michigan proceedings. Such a proof of claim, as and when it is filed by the directors and officers, is to be treated in the same manner as we have directed in respect of E&Y's proof of claim.

Having regard to the circumstances out of which the appeal from the disallowance of E&Y's proof of claim arose, we order that there should be no costs of this appeal except the usual order for payment of the costs of the trustee out of the estate of Confederation Treasury Services Limited.

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TAB 34

CITATION: In the Matter of the Proposal to Creditors of Conforti Holdings Limited, 2022 ONSC 3264
COURT FILE NO.: 31-2675583
DATE: 20220531

2022 ONSC 3264 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE PROPOSAL TO CREDITORS OF CONFORTI HOLDINGS LIMITED, A CORPORATION INCORPORATED UNDER THE ONTARIO BUSINESS CORPORATIONS ACT, R.S.O. 1990, C. B.16

BEFORE: Justice Cavanagh

COUNSEL: *R. Brendan Bissel* and *Joël Turgeon*, for Crowe Soberman Inc. in its capacity as trustee to the proposal to creditors of Conforti Holdings Ltd.

Clifton P. Prophet and *Thomas Gertner*, for the Moroccanoil, Inc.

Bobby Sachdeva and *Erin Craddock* for Conforti Holdings Limited

HEARD: March 15, 2022

ENDORSEMENT

Introduction

[1] Crowe Soberman Inc. in its capacity as proposal trustee to the proposal to creditors of Conforti Holdings Ltd. (the "Company") under the *Bankruptcy and Insolvency Act (Canada)* (the "*BIA*") (the "Proposal Trustee") brings a motion for advice and directions.

[2] Moroccanoil, Inc. (Moroccanoil") has filed a proof of claim with the Proposal Trustee for a claim against the Company based on alleged breaches of a settlement agreement made in U.S. litigation. Litigation in the U.S. in respect of this claim was brought and is pending. The Company has brought a cross-motion in the U.S. litigation claiming damages from Moroccanoil.

[3] The Proposal Trustee seeks an order:

a. advising and directing the Proposal Trustee to not undertake the adjudication of the Moroccanoil proof of claim and the Company's cross-motion under the *BIA* and, specifically, s. 135.

b. As a corollary, lifting the stay of proceedings such that Moroccanoil may seek and obtain a determination of the Moroccanoil Claim before the United States District Court for the District of New Jersey (the "New Jersey Court"), provided that any enforcement remain stayed and subject to the *BIA*.

c. Approving the Proposal Trustee's Sixth Report dated February 24, and the activities of the Proposal Trustee set out therein.

[4] Moroccanoil opposes the Proposal Trustee's motion. It submits that the Proposal Trustee is required to value the proof of claim under s. 135(1.1) of the *BIA*.

[5] For the following reasons, I dismiss the Proposal Trustee's motion.

Facts

Background

[6] The Company's business was the operation of 52 hair salons. The Company became insolvent due to reduced business caused by the pandemic and imposed restrictions. It filed a notice of intention to make a proposal on September 28, 2020 and a proposal on March 13, 2021. The proposal is a holding proposal because the Company cannot formulate a final proposal in the uncertain and ongoing pandemic circumstances.

Moroccanoil's claim in New Jersey

[7] The Moroccanoil proof of claim arises from a claim against the corporate predecessor of the Company, Salon Distribution, Inc. ("SDI"), in relation to allege counterfeiting of Moroccanoil's trademark and exclusive beauty products by the Company. This claim was the subject of litigation in the New Jersey Court that commenced in 2011. The litigation was settled on July 15, 2015 after the parties entered into a settlement agreement on that date (the "Settlement Agreement").

[8] At the time the Settlement Agreement was executed, SDI had been amalgamated with Conforti Holdings Limited to form the Company.

[9] Moroccanoil asserts that the Company breached the Settlement Agreement by reselling large quantities of Moroccanoil products to an unauthorized retail store and by failing to maintain required records. As a result of the alleged breaches of the Settlement Agreement, Moroccanoil moved before the New Jersey Court to enforce the Settlement Agreement in April 2015.

[10] The Company and its principal, Tony Conforti, deny that they breached the Settlement Agreement. The Company is defending the New Jersey proceeding and has made a cross-motion claiming $4,430,000 against Moroccanoil (the "Cross-Motion") for economic loss including lost profits during and after the term of the Settlement Agreement due to alleged faults and breaches by Moroccanoil.

[11] Discovery and multiple motions by both parties in the New Jersey litigation have been ongoing since 2015.

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Moroccanoil Proof of Claim

[12] Moroccanoil was not provided with notice of the NOI proceedings commenced by the Company in September 2020 for a number of months while the New Jersey litigation was ongoing. Moroccanoil discovered the existence of the NOI proceedings in or about June 2021 while its U.S. counsel was preparing for depositions in the New Jersey litigation.

[13] Upon discovering that the Company that commenced the NOI proceedings, Moroccanoil filed a proof of claim on August 19, 2021 in the amount of $2,807,478.12 (the Moroccanoil "Proof of Claim"). Moroccanoil alleges the following breaches of the Settlement Agreement:

a. Unfulfilled purchase obligations provided in the Settlement Agreement ($374,279.10).

b. The Company's diversion, that is, unauthorized sale, of Moroccanoil products, contrary to the Settlement Agreement ($860,000).

c. Legal fees under and related to the enforcement of the Settlement Agreement ($1,237,465).

d. Interest in accordance with New Jersey law ($336,013.12).

[14] Moroccanoil provided a documentary record in support of the Moroccanoil Proof of Claim.

[15] The Company provided the Proposal Trustee with a written response to the Moroccanoil Proof of Claim.

[16] In connection with the filing of the Moroccanoil Proof of Claim, Moroccanoil sought an order from the New Jersey Court staying the New Jersey litigation pending adjudication of the Moroccanoil Proof of Claim in the Canadian NOI proceedings. Moroccanoil's request for a stay was granted by the New Jersey Court on August 11, 2021, over the objection of the Company.

[17] Following receipt of the Moroccanoil Proof of Claim, the Proposal Trustee notified Moroccanoil that the Moroccanoil Proof of Claim will be valued at one dollar for the purposes of voting on the Company's request to extend the proposal proceedings.

[18] The Settlement Agreement provides that it is a New Jersey contract subject to and enforceable under New Jersey law and subject to the exclusive jurisdiction of the New Jersey Court. The matter is under case management by one magistrate judge and a trial judge.

[19] The New Jersey Court dismissed a Moroccanoil motion for summary determination in 2015 as premature. A judge was then assigned to oversee discovery and the parties have conducted documentary discovery and depositions over six years. A second Moroccanoil motion for adjudication is pending before the New Jersey Court since November 2020.

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Discovery and the New Jersey proceeding is now complete and the matter is ready to proceed to trial. *Viva voce* evidence from some witnesses (including expert witnesses) is likely to be necessary at trial.

[20] In a transcript of proceedings in the New Jersey court, the Magistrate advised the parties that the court intends to wait for adjudication of the proof of claim and, if it is referred back to the New Jersey Court for adjudication, a briefing schedule would be set on the motion to enforce settlement and the cross-motion, and that discovery would not be re-opened.

Documents submitted in relation to the Moroccanoil claim

[21] Moroccanoil relies upon documents that were provided with the Moroccanoil Proof of Claim consisting of a compilation of "certain evidence, briefs and other documents filed and/or obtained as part of the [New Jersey proceeding]", excluding some "marked for 'attorneys eyes only'" and some of which were sealed. Those documents include 17 Moroccanoil and Company briefs and memoranda, 10 declarations, 3 orders, 28 deposition transcripts, 63 "key documents", and one expert report.

[22] In connection with its response, the Company relies upon and has provided documents including for declarations, 3 orders, 2 transcripts of depositions, 59 "key documents", 4 expert reports, and 7 transcripts of court hearings in the New Jersey proceeding.

[23] The Moroccanoil documents amount to approximately 2,500 pages and the Company's documents represent another 2,500 pages, approximately.

[24] The Proposal Trustee served the Office of the Superintendent of Bankruptcy ("OSB") with its motion materials. The OSB has not appeared on this motion.

Analysis

[25] The issues on this motion are whether the Court has the jurisdiction to direct the Proposal Trustee to not undertake the determination and valuation of the Moroccanoil Claim under s. 135 of the *BIA* and, if so, whether such a direction should be given so that the Moroccanoil Claim and the Company's cross-motion would proceed to adjudication in the New Jersey proceeding.

[26] The Proposal Trustee submits that the circumstances at hand are such that the usual process in insolvency proceedings that claims be determined and valued in a single process should be displaced, and that a direction should be given that Moroccanoil's claim be determined by the New Jersey Court in the New Jersey litigation.

[27] The Moroccanoil proof of claim is a contingent or unliquidated claim in the Company's NOI proceedings.

[28] Subsection 121(2) of the *BIA* provides that such claim be determined as follows:

Contingent and unliquidated claims

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> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[29] The procedure for determining contingent or unliquidated claims applies not only in bankruptcies but in proposal proceedings under the *BIA*. See *Re FEA Griffiths Corp,* 1971 CarswellOnt 65, 15 C.B.R. (N.S.) 231 (Ont. S.C.).

[30] Section 135(1.1) of the *BIA* provides:

> **Determination of provable claims**
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[31] The Proposal Trustee submits that notwithstanding the apparently mandatory language in s. 121(2) and s. 135(1.1) of the *BIA* through the inclusion of the word "shall", the Court has discretion to direct the Proposal Trustee not to adjudicate the Moroccanoil Proof of Claim, in appropriate circumstances.

[32] Moroccanoil responds that s. 135(1.1), plainly read and understood, mandates the Proposal Trustee to determine and value Moroccanoil's Proof of Claim. To do so, the Proposal Trustee must consider and determine the Company's claim against Moroccanoil as a necessary component.

[33] The Proposal Trustee submits that its motion is not dissimilar in substance to a motion by a creditor under s. 69.4 of the *BIA* for an order lifting the stay of proceedings under the *BIA* to allow a claim made in another court to proceed to adjudication in that court where the creditor applying is likely to be materially prejudiced by continuation of the stay of proceedings or it is equitable on other grounds to lift the stay. Where a claim proceeds in another court and is determined, the amount of the claim is then imported into the *BIA* proceedings.

[34] Where a creditor seeks to lift a stay under the *BIA* and allow a claim in another court to proceed, the Bankruptcy Court is not asked to relieve a trustee of its statutory obligation to determine a claim made in a bankruptcy. The court is asked to lift the stay, at the request of the creditor or other person affected by the stay of proceedings, to allow a claim to proceed to adjudication in another court so that the claim, as so determined, can be filed with the trustee. The effect of such an order is to suspend the trustee's obligation under s. 135(1.1) with respect to a contingent or unliquidated claim until the claim has been determined and valued by another court.

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[35] In this case, there was no stay of proceedings that affected the New Jersey litigation when the NOI was filed. Moroccanoil, when it learned of the NOI proceeding, elected to file the Proof of Claim with the Proposal Trustee and it moved to stay the New Jersey action which, when granted, gave effect in New Jersey to the stay of proceedings under the *BIA* in Canada. Moroccanoil does not seek to lift a stay under the *BIA*. Section 69 of the *BIA* does not apply here and, in my view, the procedure that is available to a creditor to seek to lift a stay of proceedings does not assist me to decide the question of jurisdiction on this motion.

[36] In support of its submission that this Court has jurisdiction to direct that Moroccanoil's claim be determined by the New Jersey Court in the New Jersey litigation, the Proposal Trustee cites *Graham Mining Ltd., Re*, 2001 CanLII 28466 (ONSC).

[37] In *Graham*, a privately appointed receiver and the trustee in bankruptcy of Graham Mining Ltd., a bankrupt, moved for advice and directions respecting the trustee's decision to settle, subject to court approval, lawsuits in which Graham was a plaintiff and defendant by counterclaim in one action and a defendant in another action. Four preferred and unsecured creditors moved to reverse the trustee's decision to settle the litigation, subject to court approval, and expunge or reduce the proofs of claim filed by two other creditors. Justice Cameron authorized the trustee and the receiver to enter into the proposed settlement.

[38] In *Graham*, Cameron J. addressed the trustee's obligation under s. 135 of the *BIA* to value every contingent or unliquidated claim. Cameron J. was satisfied that the cost of analyzing the claim and any set-off alleged by the objecting creditors would be substantial, where the claims were complex and turned on credibility. He held, at para. 69, that in view of various factors including the lack of funds in the estate to pursue the Graham claim, "any breach of the obligation under *BIA* s. 135(1) to value the claim is moot". Cameron J. was satisfied that the trustee had acted honestly and in good faith and in a commercially reasonable manner in accepting the settlement proposal and he authorized the trustee to enter into minutes of settlement accepting the proposal.

[39] The facts in *Graham* are materially different from those on this motion because in *Graham*, the trustee determined the claims by the general contractor and the performance bond issuer by making the settlement, subject to court approval. The objecting creditors were not seeking to have their own claims determined. They moved under s. 135(5) of the *BIA* to reverse the trustee's decision to determine and value claims by settling the litigation involving Graham. The Court found that in so doing, the trustee had acted in good faith and reasonably in the discharge of its obligation under s. 135 of the *BIA*. *Graham* is not a case where, as here, the trustee asked the court to relieve it of an obligation to determine and value a creditor's claim, and direct that this be performed by a civil court in another jurisdiction.

[40] The Proposal Trustee cites s. 183(1) of the *BIA* in support of its submission that there is jurisdiction for this court to give the requested direction. Section 183(1) provides that the Superior Court of Justice exercising its jurisdiction under the *BIA* is "invested with such jurisdiction at law and in equity as will enable [it] to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act ...".

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[41] In *Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc. (Trustee of)*, 2006 ABCA 293 (CanLII), the Alberta Court of Appeal, at paras. 20 and 21, addressed the Bankruptcy Court's inherent jurisdiction at law and in equity under s. 183(1) of the *BIA*:

> Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at 480; *Wasserman Arsenault Ltd. v. Sone* (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th) 145 (Ont. CA).
>
> ...
>
> Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA:* [citations omitted]. It has also been used where there is no other alternative available: [citations omitted].

[42] The regime under the *BIA* provides for a summary procedure for (i) determination by the trustee of whether a contingent or unliquidated claim is a provable claim and, if so, (ii) for the trustee to value it. The *BIA* provides for an appeal of the trustee's determination and, although the appeal may be made to the registrar in bankruptcy, a judge of this court may exercise this jurisdiction under. 192(2) of the *BIA*. Insolvency proceedings under the *BIA* are subject to court supervision, and the court is able to give directions for the timely and efficient determination of claims.

[43] Although Moroccanoil's claim was commenced in the New Jersey Court as an ordinary civil claim to enforce a settlement agreement, the claim is now being made in the context of an insolvency proceeding that was triggered by the Company's NOI filing. Before the commencement of the NOI proceedings, Moroccanoil's claim, and the cross-motion by the Company, were proceeding in accordance with the civil procedures under New Jersey law for the adjudication of ordinary civil claims. However, in an insolvency context, where an unsecured creditor is unlikely to recover its claim as proven, the full procedural opportunities of normal civil litigation are often inappropriate. For this reason, the statutory regime in Canada under the *BIA* for summary determination of claims differs materially from the procedural rules for adjudication of civil claims.

[44] I read s. 135(1.1) of the *BIA* as unambiguously providing that the Proposal Trustee is required to determine whether Moroccanoil's claim is a provable claim and, if it is, that the Proposal Trustee value it. In *Re Nortel Networks Corporation et al.*, 2015 ONSC 1354,

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Justice Newbould, at para. 35, held, in the context of an insolvency under the *CCAA*, that a court should not lightly lose control of the process whereby claims against the debtor are to be determined. The requirement for claims to be determined and valued through a single claims process under the supervision of a single Bankruptcy Court is consistent with the scheme and objects of the insolvency process under the *BIA*.

[45] I conclude that the inherent jurisdiction of this Court under s. 183(1) of the *BIA* does not extend to displacing the claims process mandated by s. 135(1.1) of the *BIA*.

[46] If I am in error in this regard, I address whether this is one of the clear cases where the court's inherent jurisdiction should be exercised to displace the process for valuation of claims provided for in the *BIA*.

[47] The Proposal Trustee submits that adjudication of the Moroccanoil Claim through the *BIA* proceedings would be impractical, unreasonable and unworkable. The Proposal Trustee contends that the valuation exercise would be one of disproportionate difficulty, scale, time, and cost, which would be borne by the estate of the Company rather than the litigants to the private disputes. The Proposal Trustee cites the complexity of the issues, the voluminous evidentiary record, the existence of issues of credibility, the choice of law and jurisdiction provisions in the settlement agreement, the likelihood of an appeal, the need to determine the Company's cross-motion, and the stage of the New Jersey litigation as factors that support the requested direction.

[48] Morrocanoil submits that any appeal of the Proposal Trustee's valuation of its claim should proceed to a judge of the Commercial List under s. 192(2) of the *BIA* to be heard as a trial of an issue by way of a streamlined process based on largely paper record and supplemented by *viva voce* evidence, as needed.

[49] I accept that valuation of the Moroccanoil Proof of Claim may be an exercise of some complexity. It is expected that there will be an appeal of the Proposal Trustee's valuation. Nevertheless, on the materials before me, I am not satisfied that the adjudication of Moroccanoil's Proof of Claim cannot be completed in this Court through process that, with the benefit of case management, will not be materially longer, less efficient, or more costly than continuing the civil proceedings in the New Jersey Court.

[50] If there is jurisdiction for this Court to give the requested direction, I am not satisfied that the Proposal Trustee has shown that this is one of the clear cases that justifies the exercise of discretion to depart from the usual process for valuation of claims under the *BIA*.

[51] I conclude that the Proposal Trustee is required to determine and value Moroccanoil's Proof of Claim pursuant to s. 135(1.1) of the *BIA*. I decline to give the requested direction.

Disposition

[52] For these reasons, the Proposal Trustee's motion for an order directing the Proposal Trustee to not undertake the adjudication of the Moroccanoil Claim and the Company's cross-motion under s. 135(1.1) of the *BIA* is dismissed.

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[53] At the hearing of this motion, I did not receive oral submissions on the portion of the Proposal Trustee's motion for approval of the Sixth Report. I ask that counsel for the Proposal Trustee arrange an appointment before me to address this portion of the motion, which is adjourned.

[54] If the parties are unable to resolve costs, they may provide written submissions according to a schedule to be agreed upon and approved by me.

Cavanagh J.

Date: May 31, 2022

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TAB 35

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CORPORATION AGENCIES Ltd. v. HOME BANK OF CANADA.

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Judicial Committee of the Privy Council, Viscounts Haldane and Finlay and Lords Wrenbury, Darling and Warrington. January 18, 1927.

The judgment of the Board was delivered by

LORD WRENBURY: — The appellants, Corporation Agencies, Ltd. (hereinafter called the Company) are a limited company incorporated under the statutes of Canada. They carried on business in the City of Montreal as registrar and transfer agents for registering and transferring shares of the capital stock of certain commercial companies and agents and trustee and financial agents in reconstruction of certain companies. The Merchants Bank of Canada were their bankers. The president of the Company was one C. H. Cahan, Sr., one of His Majesty's counsel, a lawyer of wealth and position in Montreal. His son, C. H. Cahan, Jr., who was also one of His Majesty's counsel, was a director of the Company. One Bowler was secretary-treasurer. The respondents, the Home Bank of Canada, were the

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bankers of Cahan, Jr. Between the plaintiff Company and the defendant bank no relation, contractual, fiduciary or other, existed, save such as arose from the transactions presently mentioned.

This action was brought by the Company against the defendant bank, claiming payment of a sum of $209,028.12 (afterwards corrected to $205,960.37), being the amount of 94 cheques amounting to the sum last above-mentioned drawn upon the Company's account with the Merchants Bank, collected by the defendant bank through the Montreal Clearing House, and debited to the Company's account with the Merchants Bank. These 94 cheques were drawn at various dates between March 29, 1919, and December 20, 1919, and were as follows:—

In March, 1919—One cheque	$ 500.00
" April, 1919—Three cheques	1,096.89
" May, 1919—Nine cheques	4,728.75
" June, 1919—Seven cheques	9,680.00
" July, 1919—One cheque	3,500.00
" Aug., 1919—Two cheques	1,850.00
" Sept., 1919—Ten cheques	14,668.96
" Oct., 1919—Twenty-one cheques	46,445.00
" Nov., 1919—Twenty-six cheques	79,220.27
To 20th Dec., 1919—Fourteen cheques	44,270.50
Total—Ninety-four cheques	$205,960.37

Cahan, Jr., who, as already stated, was a director of the Company, was during 1919 engaged in very extensive speculative dealings in stocks and shares on his own private account, and he in fraud of the Company made use of the Company's account with the Merchants Bank to assist his operations.

There is a device known in Canada as "kiting," which is described as follows:—"Kiting is a term used with regard to obtaining money by cheques passed through banks without value being deposited against the cheque—that is, kiting is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another, and perhaps through many more."

To this Bowler, who was examined as a witness for the defendant bank, adds that kiting is a means of getting credit for the time it takes to clear a cheque from one bank to another bank. Cheques are passed from one bank account to another, and credit is obtained at the bank into which they are paid, for which they are debited at the bank on which they are drawn.

During 1919 Cahan, Sr., was much engaged in business which

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took all his attention off the proceedings of the Company. Cahan, Jr. and Bowler were substantially in complete control of the Company's affairs, and it was in that state of things that the frauds of Cahan, Jr., which it is necessary to describe, were perpetrated.

The Company's by-laws contained a by-law as follows:—

"54. Contracts and engagements on behalf of the Company may be made, and cheques, bills of exchange, promissory notes, drafts and other negotiable paper may be made, drawn, accepted or endorsed by the Secretary-Treasurer acting jointly with the Manager or with any Director of the Company, or by the Manager acting jointly with any Director of the Company; or by any two Directors acting together; provided, however, that cheques, drafts, bills of exchange, promissory notes or other negotiable paper may be endorsed for deposit only in the Company's bank account by either the Manager or the Secretary-Treasurer acting alone."

The following is a copy of the first of the cheques in question, that of March 29, 1919:—

"No. 6080. Montreal, Mar. 29, 1919.

"Corporation Agencies, Limited.

"Pay to the order of C. H. Cahan, Junior, $500.00

"Five Hundred Dollars.

"Corporation Agencies, Limited.

"C. H. Cahan, Junior, Director.

"B. F. Bowler, Secretary-Treasurer.

"To the Merchants' Bank of Canada, Montreal."

Of the 94 cheques, 67, amounting to $146,429.87, were drawn as above; six, amounting to $16,530.50, were similar, except that they were drawn payable to the order of the defendant bank. The rest, 21 in number, amounting to $43,000, were drawn in the same way and were made payable to Cahan, Jr. or to agents of his, or to bearer. A few of the cheques, some 18 in number, were cashed over the counter. In all other cases the cheques were duly endorsed and were paid into Cahan Jr.'s account with the defendant bank, and were collected in ordinary course by the defendant bank through the Montreal Clearing House from the Merchants Bank. In the case of six cheques, "E. Wright, Director," instead of B. F. Bowler, was the second signature in addition to that of Cahan, Jr. No importance is attributed to this fact.

On the night of December 26-27, 1919, Cahan, Jr. absconded, and his whereabouts were subsequently unknown. The facts of the frauds he had committed then came to light.

Cahan, Jr. held a power of attorney from his father to draw

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upon three banking accounts which his father had, in each of which there was a substantial credit balance. He had also power to draw on the banking accounts of several companies. He was thus in a position to draw on some twelve banking accounts or more and to carry on "kiting" operations, and did so to a very large extent. The general effect of his operations may be described as follows:—He and Bowler (who was throughout a party to his proceedings) drew a cheque on the Merchants Bank. Cahan, Jr. paid it into his own private account at the defendant bank. At the moment when they drew that cheque there was in most cases no sufficient balance at the Merchants Bank to meet it. But on the same day Cahan, Jr. paid into that account a cheque drawn by him on some of the other accounts on which he had power to draw, with the result that the plaintiffs' account with the Merchants Bank was or at any rate became by the end of the day in credit to an amount sufficient to meet the cheque in his favour. An illustration may be given by taking the case of the first cheque, that of March 29, 1919, for $500. On March 29 the credit balance at the Merchants Bank was only $61.74. The cheque of March 29 was cleared on March 31. On March 29, $270 and on March 31 $250 were paid by Cahan, Jr. into the credit of the account, with the result that on March 31 there was enough to meet the cheque for $500 and to leave a credit balance of $81.74. This is a fair sample of what was done throughout. The 94 cheques were never met by monies of the plaintiffs. Cahan, Jr. simply paid in and drew out money which he was obtaining by fraud from his father's accounts or the other accounts which have been already mentioned. The plaintiffs' account with the Merchants Bank was never overdrawn except on one or two occasions to very small amounts. The cheques that came in and went out always offset each other. From March to December, 1919, no more than $5,890.34 was paid into the Merchants Bank and $8,402.35 drawn out in respect of the regular business of the Company. The difference between these two sums came out of the funds irregularly deposited by Cahan, Jr.

During the whole of that time the Company was practically dormant. All the rest of the payments into the account and the whole of the amount which was by the 94 cheques drawn out of the account had nothing to do with the Company's business or the Company's monies. The trial Judge, Duclos, J., (1925), 64 Que. S.C. 161, at p. 168, found as a fact that none of the 94 cheques were paid out of the Company's funds.

Having thus sketched the facts upon which the question arises, their Lordships go on to consider what is the law appli-

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cable to the case. The question here is whether the defendants had notice or knowledge. This is question of fact. In *John* v. *Dodwell,* [1918] A.C. 563, at p. 569, Lord Haldane, in delivering the judgment of this Board, said:—"When an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is . . . . in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal." And again at p. 570:—"If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents." In *John* v. *Dodwell,* Williams, the manager for Dodwell & Co., who was authorized by Dodwell & Co., the plaintiffs (respondents) to draw, and who drew the cheques on the plaintiffs' account, employed the defendants (appellants) as his brokers and gave them cheques on the plaintiffs' account in payment for shares, and they received them with knowledge that Williams, without apparent authority, was drawing for his own purposes on the plaintiffs' funds. The case turned, as does the present case, on knowledge. If there was no knowledge, it has no application.

By virtue of art. 54 of the Company's by-laws Cahan, Jr. as a director, and Bowler as secretary-treasurer, were authorized to draw on the Company's account at the Merchants Bank, and they did so. Maclennan, J., the Judge before whom the action was first tried, considered, 57 D.L.R., at p. 356, that the form of the cheques on their face was notice of the fact that Cahan, Jr. was appropriating to his own use the Company's monies. Duff and Newcombe, JJ. (the minority Judges on the appeal), [1925] 4 D.L.R. 585, were of the same opinion. Their words (p. 595) are:—"Having notice, of which the cheques themselves were *prima facie* evidence, that Cahan, Jr., the defendant's endorser, was not entitled to the cheques." And again, at p. 602, " . . . . the cheque on its face is evidence of absence of authority, or the exercise of his powers for a purpose which is incompetent to him." Their Lordships do not agree. In their opinion Duclos, J., in the Superior Court was right in holding that the form of the cheques did not give notice and that the defendants had not notice.

For by way of illustration, take again the first cheque, that for $500, of March 29, 1919. When Cahan, Jr. paid that cheque into his account at the defendants' bank, suppose the bank had asked, "For what is this cheque given?" would he have been

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bound to answer? The cheque might have been for salary or for a sum due to Cahan, Jr. on any other account. The defendant bank had no duty to enquire as to the obligation in respect of which it was given. They would in ordinary course of business take the cheque and if on presentation to the Merchants Bank payment were refused, they would debit their customer with the amount.

During April three like cheques for $300, $498.74, and $298.15, were endorsed and handed to the defendant bank by Cahan, Jr. The practice of the Merchants Bank was not to issue a pass-book, but to render monthly accounts. Such monthly accounts were duly rendered for March and April, 1919, to the Company. These contained the cheques above referred to. Thus the plaintiffs knew (so far as the defendant bank had knowledge or reason to believe) that the March and April cheques, drawn as they were in favour of Cahan, Jr. were being accepted by the Company as being on their face in order. And so matters went on during the subsequent months, and *a fortiori* the defendant bank had every reason to believe, as successive monthly accounts were sent and no objection raised, that the cheques were legitimate and not in fraud of the Company. The Company were, unfortunately for them, in the hands of fraudulent agents, but the defendant bank had neither knowledge nor notice that that was so, and, in fact, from the unquestioned acceptance of the monthly accounts, were entitled to believe the contrary.

Moreover, the fact was that the plaintiffs' monies were not being appropriated and applied by Cahan, Jr. at all. His father's monies and the monies of the various companies on whose accounts he was entitled to draw and did draw were no doubt being misappropriated, but so far as the plaintiffs were concerned Cahan, Jr. was doing no more than paying into their account monies which did not belong to them and drawing out to the like amount monies with which the Company, in fact, had no concern. Neither the payments into nor the drawings out of the Company's account were authorized acts. The Company cannot repudiate the one and take the benefit of the other. They are, in fact, not concerned with either. The plaintiffs lost nothing by the kiting transactions. If they now recovered the $205,960.37 from the defendant bank they would be making that sum as a profit if they kept it, and if they did not keep it, but were compelled by action brought by those whom Cahan, Jr. defrauded to pay it over to Cahan, Sr. or others whom Cahan, Jr. defrauded, they would be giving effect to rights whose existence the Board cannot in this proceeding investigate or deter-

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mine, and with which in this proceeding they have nothing to do, for Cahan, Sr. and the companies concerned are not parties to this litigation.

Upon both grounds, *viz.*, that the defendant bank had not notice or knowledge and that, in fact, the Company have sustained no loss, their Lordships are of opinion that the majority in the Supreme Court are right, and that this appeal must be dismissed with costs.

They will humbly advise His Majesty accordingly.

Appeal dismissed.

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TAB 36

Dean v. Kociniak, 2001 ABQB 412

Date: 20010514
Action No. 9703-05500

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

SHANNON DEAN

Plaintiff

- and -

STANLEY KOCINIAK, YELLOW CAB LTD., CHECKER CABS LTD., CHECKER CABS LTD. OPERATING AS YELLOW CAB LTD., LAIDLAW INC., LAIDLAW TRANSIT LTD., THE CITY OF EDMONTON, AND XYZ CORPORATION

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE F. F. SLATTER

2001 ABQB 412 (CanLII)

APPEARANCES:

L. J. Boyd
for the Plaintiff

D. J. Boyer
for the Defendants

W. Slemko
for the Third Party

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[1] This Special Chambers application is an appeal from the Master, who declined to grant the Defendants leave to issue a Third Party Notice after the expiry of the six-month period provided for by R. 66(4). The arguments have now expanded beyond those presented to the Master, and other related motions have been brought.

Background

[2] This action arises out of an incident that occurred on June 25, 1995. On that date the Plaintiff, Shannon Dean, was attempting to enter a wheelchair-accessible taxi by ascending a ramp designed for that purpose. As she went up the ramp, her wheelchair flipped over backwards, allegedly causing injury to her.

[3] The taxi in question was a van which had been converted to make it accessible for wheelchairs by the proposed Third Party, Creative Carriage Ltd. The taxi had been purchased by the City of Edmonton in about March of 1992, and from about October of 1992 and at the time of the incident was leased to one of the corporate Defendants for operation in the City. The Defendant, Stanley Kociniak, was operating the taxi on the date of the incident. For convenience, I will refer to Kociniak and the various corporate Defendants as the "Yellow Cab Defendants".

[4] Dean retained counsel, and a claim on her behalf was issued on March 19, 1997 against the Yellow Cab Defendants, the City of Edmonton, and the Province of Alberta. The claim has since been discontinued as against the Province.

[5] The Yellow Cab Defendants retained counsel, and filed a defence on June 5, 1997. No Third Party Notice was issued by them before December 5, 1997, which marked the end of the six-month period for doing so provided for in R. 66(4).

[6] The Yellow Cab Defendants now allege that shortly after the first round of examinations for discovery, which were held on December 11, 1997, (six days after the time for filing a Third Party Notice had expired) they began to suspect that there might be a defect in the design of the taxi. This meant that the proposed Third Party, Creative Carriage Ltd., might bear some responsibility for the damages alleged by Ms. Dean. The Yellow

Cab Defendants sought out expert advice, and eventually were able to retain suitable experts in May of 1999. The wheelchair was inspected and tested on October 15, 1999, and the experts provided a written report dated November 27, 1999, apparently supporting the theory that the Third Parties might be liable.

[7] As a result of receiving the expert report, the Yellow Cab Defendants filed an application on December 14, 1999, seeking leave to issue a Third Party Notice against Creative Carriage Ltd., notwithstanding the expiry of the six-month limitation period in R. 66(4). The application first came before a Master on December 17, 1999, but was adjourned because the Yellow Cab Defendants had not served the proposed Third Party with the Notice of Motion. That service was effected, and the motion was finally argued on July 31, 2000. In a very short memorandum, the learned Master dismissed the application:

> As Ms. Boyd rightly points out, Yellow Cab had possession of the converted motor vehicle van at all times. Yellow Cab knew what the ramp was, physically, and if it thought that the ramp was not physically proper it had ample time to determine that and find out who the converter of the van was.
>
> Defendants cannot just lay by and later address a possible third party claim. The test is not as narrow as when the defendant in fact knows, but when the defendant should have known with reasonable diligence. Here the Plaintiff's pleading raises the physical aspects of the ramp as an issue so the Defendants should have been reasonably alerted at that time that the physical aspects of the ramp were in issue.
>
> The application is dismissed with costs to the Plaintiff and the proposed third party on Column 5. There will be no stay of the taxation and payment of those costs between the Plaintiff and the Defendants.

[8] Faced with this decision, the Yellow Cab Defendants did two things. Firstly, they filed an appeal against the decision of the Master, which is one of the applications presently under consideration. Secondly, on September 19, 2000, some of the Yellow Cab Defendants and the City of Edmonton issued a new Statement of Claim, being Action No. 0003-17884, claiming contribution and indemnity from Creative Carriage Ltd. with respect to any damages they might have to pay to Ms. Dean under the first action. The Yellow Cab Defendants apply now, in the alternative, to have the two actions heard together. Counsel for Creative Carriage Ltd. has brought a further application under R. 129, seeking to strike out this second claim on the basis that it discloses no cause of action.

[9] Both the appeal from the Master and the motion to strike were scheduled to be argued on December 20, 2000. Shortly before that date Mr. Justice Burrows suggested to the parties that the materials filed did not adequately deal with certain decisions of the Court of Appeal, and the impact of the various statutes of limitation on the proceedings. The parties were granted time to file further materials, and the applications came on for hearing on April 18, 2001.

[10] The following chronology summarizes the events to date:

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June 25, 1995	Date of incident
March 19, 1997	Dean claim issued
June 5, 1997	Yellow Cab defence filed
June 25, 1997	Two years from incident (limitation expires)
December 5, 1997	Six months from defence (time to issue Third Party Notice expires)
December 11, 1997	First Examination for Discovery of Plaintiff
March 1, 1999	New *Limitations Act* in force
May 1999	Defendants identify and retain experts
October 15, 1999	Wheelchair tested by experts
November 27, 1999	Expert report received
December 14, 1999	Notice of Motion filed
December 17, 1999	Notice of Motion returnable (adjourned by Master to allow service of proposed Third Party)
December 1999	Creative Carriage given notice of claim.
July 31, 2000	Motions heard by Master
August 2, 2000	Decision of Master
September 19, 2000	Yellow Cab Statement of Claim filed
October 17, 2000	Appeal from Master filed
December 20, 2000	Scheduled hearing of appeal (adjourned to permit further briefs)
February 28, 2001	Transitional period under *Limitations Act* expires
April 18, 2001	Appeal heard, with motion to strike Yellow Cab action
June 25, 2001	Six years from the date of the incident

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Issues:

[11] The issues to be decided are, accordingly, the following:

1. Is the claim of the Yellow Cab Defendants for contribution and indemnity from Creative Carriage Ltd. barred by statute? If it is, there is no point in allowing a late Third Party Notice, as it would immediately be the subject of an application for summary dismissal. A preliminary issue is which limitations statute applies to the claim.

2. If the claim is not barred by statute, should the late issuance of a Third Party Notice be permitted at this time? Alternatively, should the two actions that have been commenced be consolidated or otherwise tried together?

The Pleadings:

[12] The action commenced by Ms. Dean is a conventional tort action. She alleges that the Yellow Cab Defendants and the City of Edmonton negligently operated the taxi and its wheelchair ramp in such a way as to cause her damage. Her Statement of Claim provides particulars of negligence which include the following:

> 10(d) Failing to warn users of the entrance ramp to the taxi of the steep and uneven surface of the entrance ramp,
>
> (f) Acquiring, designing or installing entrance ramp equipment in the taxi that was unsafe for its intended purpose.

The original claim, accordingly, contains some suggestion that the design of the ramp may have contributed to her injuries, but it did not specifically mention the transition plate between the ramp and the van itself.

[13] The Third Party Notice that the Yellow Cab Defendants and the City propose to issue is more detailed. It contains the following allegations:

> 4. The Third Parties owed a tortuous [sic] duty of care to the Plaintiff and these Defendants including converting and/or selling the taxi that had a safe ramp generally and specifically that the Taxi's ramp and/or transition plate was not too steep for the reasonable circumstances intended.
>
> 5. The Plaintiff's wheelchair fell over backwards as a result of, or was materially contributed by, the negligence of the Third Parties, particulars of which include:

(a) converting and/or selling the Taxi with an unsafe entry ramp for the wheelchair and specifically an unsafe transition plate between the ramp and the van;

(b) converting and/or selling the Taxi which did not meet CSA/CAN D409 standards, as amended, as represented by the Third Parties;

(c) converting and/or selling the Taxi which had a ramp and/or transition plate which was too steep for the circumstances reasonably intended;

(d) such further and other particulars as are known to the Third Parties.

7. In the alternative, the Third Parties breached an express or implied contract or warranty to the Defendant, The City of Edmonton, to convert and/or sell a wheelchair assessable [sic] van to it constructed in a workman-like manner, free from defects in materials, fit for reasonable use, free from major structural defects, and constructed in accordance with reasonable manufacturing or conversion practice including specifically those set out in CSA/CAN D409 standards, as amended.

The proposed Third Party Notice accordingly sounds primarily in tort, although the City of Edmonton also alleges in Paragraph 7 a cause of action based on breach of contract.

[14] The new Statement of Claim issued by certain of the Yellow Cab Defendants and the City of Edmonton against Creative Carriage Ltd. is largely to the same effect:

11. The City of Edmonton agreed to purchase the Taxi from Creative Carriage Ltd. based on certain representations including that the Taxi complied with CAS/CAN D409 standards, including a standard for the Ramp characteristics and specifications.

12. Creative Carriage Ltd. owed a tortious duty of care to Shannon Dean and the Plaintiffs in this Action which included that Creative Carriage Ltd. would manufacture and/or convert the Taxi so that it had a safe Ramp generally and specifically that the Taxi's Ramp and/or transition plate was not too steep for the circumstances intended.

13. In the alternative, Creative Carriage Ltd. had an express or implied contract or warranty with Shannon Dean and/or the Plaintiffs, or any of them, in this Action to manufacture, convert and/or sell the Taxi constructed in a workmanlike manner, free from defects in materials, fit for reasonable use, free from structural defects and constructed in accordance with reasonable manufacturing or conversation practice including specifically those set out in CSA/CAN D409 standards, as amended.

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14. Shannon Dean's wheelchair tipped over backwards as a result of, or was materially contributed to by, the negligence and/or breach of contract or warranty of Creative Carriage Ltd. particulars of which include:

(a) Manufacturing and/or converting the Taxi with an unsafe Ramp for a wheelchair and/or a [sic] unsafe transition plate between the Ramp and the body of the Taxi;

(b) Manufacturing and/or converting the Taxi which did not meet CSA/CAN D409 standards, as amended, as represented by Creative Carriage Ltd.;

(c) Manufacturing and/or converting the Taxi which had a Ramp and/or transition plate which was too steep for the circumstances reasonably intended; and

(d) Such further and other particulars as are known to Creative Carriage Ltd.

[15] By Clause 11 the City of Edmonton alleges a claim in misrepresentation relating to the contract of purchase. Clauses 12 and 14 largely repeat the allegations in tort found in the proposed Third Party Notice. Clause 13 pleads a breach of contract. While this latter clause alleges that there might have been a contract with Ms. Dean or the Yellow Cab Defendants, the record is clear that the taxi was originally purchased by the City of Edmonton from Creative Carriage Ltd., and subsequently leased to the Yellow Cab Defendants. There is no suggestion of any contract between the Yellow Cab Defendants or Ms. Dean and Creative Carriage Ltd.

The Claim for Contribution and Statutes of Limitation

[16] There are, broadly speaking, two different kinds of claims for contribution and indemnity. The first kind is a claim for contribution and indemnity by one joint tort-feasor against another. This type of claim is purely a creation of statute. The other type of claim for contribution arises at common law where one person has a duty, usually contractual, to indemnify another.

[17] At common law, a Plaintiff who had been injured by the acts of a number of tort-feasors was under no obligation to sue all of them. The Plaintiff could sue any one of the tort-feasors, and recover 100 percent of his or her damages from that tort-feasor. The tort-feasor held liable then had no right to claim contribution from the other joint tort-feasors according to their relative responsibility. For example, a tort-feasor who was only 10 percent at fault might be found liable for 100 percent of the damages, but would then have no claim against the tort-feasor who was 90 percent at fault. All common-law jurisdictions have remedied this inequity by enacting statutes like the Alberta *Tort-Feasors Act*, R.S.A. 1980, c. T-6, which provide for a right of contribution. This right of contribution is purely statutory.

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[18] Other rights of contribution or indemnity can arise at common law. They depend on circumstances where one of the potential defendants owes a duty recognized by the common law to identify or contribute to the other potential defendants. The duty to indemnify may arise by contract. For example, in this action it is alleged that the Yellow Cab Defendants by contract must indemnify the City of Edmonton for any damages suffered by the Plaintiff. A common-law right to indemnify can also arise where the tort-feasor being asked to contribute owes a duty to the other tort-feasor which is independent of the duty owed to the Plaintiff. For example, an auditor may owe a duty to its corporate client not to be negligent. It may also owe a duty to other persons, such as directors, shareholders, or bankers which is independent of its duty to its corporate client. In these circumstances, the duty to contribute does not depend on the *Tort-Feasors Act*: ***Canada Deposit Insurance Corporation v. Prisco***, [1998] 3 W.W.R. 256, 54 Alta. L.R. (3d) 334, 206 A.R. 290 (C.A.) at paragraphs 7-8.

[19] From the pleadings quoted above, it is obvious that the claim of the Yellow Cab Defendants in both the Third Party Notice and the second action rest largely on the provisions of the *Tort-Feasors Act*, R.S.A. 1980, c. T-6 and largely on s. 3(1)(c) which reads as follows:

> 3(1) When damage is suffered by any person as a result of a tort, whether a crime or not,
>
> > (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability regarding which the contribution is sought.

This provision was interpreted by the Court of Appeal in another decision called ***Canada Deposit Insurance Corp. v. Prisco***, [1996] 7 W.W.R. 30, 181 A.R. 161, 38 Alta. L.R. (3d) 97, which I will refer to hereafter as "***Prisco***". The Court determined that the rights created by s. 3(1)(c) are derivative, in the sense that the claim of a Defendant tort-feasor for contribution from a Third Party tort-feasor is derivative of the claim of the Plaintiff against that Third Party. If the Plaintiff has no possible claim against the Third Party, neither does the Defendant tort-feasor. This rule applies, for example, if the claim of the Plaintiff against the Third Party is barred by a statute of limitations; in that event the Defendant tort-feasor can make no claim for contribution against the Third Party tort-feasor.

[20] In ***Prisco***, Kerans, J.A. made it clear that it is only claims for contribution under the *Tort-Feasors Act* that are derivative in nature. At paragraph 9 he pointed out that:

> The appellant Oland's third party notice pleads that those named by it as third parties share any duty Oland may have to the plaintiffs in this suit. The plaintiff's suit against Oland sounds in negligence, and he in his notice alleges that the third parties were fellow tortfeasors. **This is not a case where the defendant invokes a duty owed by the third party to the defendants; it is only a claim by the defendant of a breach of a duty owed to the plaintiff**. This

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> classification was made in an earlier order that was not the subject of appeal. I must now deal with the consequences of that classification.
>
> (emphasis added)

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This distinction must be kept in mind, because at least a portion of the claim for contribution and indemnity made by the City of Edmonton against Creative Carriage arises from contract, and not under the *Tort-Feasors Act*.

The Problem of the "Late Suing Plaintiff"

[21] As the Court of Appeal also pointed out in ***Prisco***, the derivative nature of the claim for contribution under the *Tort-Feasors Act* can create a problem for tort-feasors, particularly when the Plaintiff sues very late in the limitation period. In these circumstances the tort-feasor might not find out about the claim against it, and therefore might not be in a position to advance the claim for contribution, until the limitation period has already expired. The law of Alberta formerly provided two solutions to this problem of the "late suing Plaintiff":

(a) Rule 66(4) provides that a Defendant can issue a Third Party Notice within six months of filing its defence. A claim for contribution in such a Third Party Notice is deemed by the law to be within time, even if the primary limitation which runs against the Plaintiff has expired. This is a general remedial provision which applies to all types of claims;

(b) in addition, s. 60 of the *Limitation of Actions Act*, R.S.A. 1980, c. L-15 provided specific relief as follows:

> 60(1) When an action to which this Part applies has been commenced, the lapse of time limited by this Part for bringing an action is no bar to
>
> (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim, or
>
> (b) third party proceedings,
>
> with respect to any claims relating to or connected with the subject matter of the action.

As can be seen, the relief in s. 60 only applies to claims covered by Part 9 of the *Limitation of Actions Act* which are essentially tort actions for personal injury and damage to property. In the ***Prisco*** case the tort claim was one for pure economic loss, and therefore not covered by Part 9. This meant that the longer six-year limitation applied to the Plaintiff's claim, but even that longer limitation had run by the time the application was brought. Since six months had elapsed since the defence was filed, and the primary limitation period

against the Plaintiff had run, the Defendant tort-feasor in that action was unable to issue a Third Party Notice or a fresh claim for contribution. Since the claim for contribution was statute barred, there was no point in allowing a late Third Party Notice.

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[22] A brief history of these two remedial provisions is appropriate, to put the provisions of the new *Limitations Act* in context. The first attempt to deal with the problem of the "late suing plaintiff" was found in s. 101(2) of the *Vehicles and Highway Traffic Act*, S.A. 1941, Chapter 5. That provision applied only to motor vehicle accidents, and accordingly left all other tort claims unaffected. Tort-feasors outside the motor vehicle context had no protection if the Plaintiff sued some only of the tort-feasors very late in the limitation period, thus effectively preventing the Defendant from claiming contribution against any unnamed tort-feasors. When Part 9 of the *Limitation of Actions Act* was enacted in 1966, the relief previously provided by the *Vehicles and Highway Traffic Act* was carried forward into s. 60 of the new Part 9. Relief was now available for all tort-feasors covered by Part 9, although some tort-feasors, such as those who had caused pure economic loss, still had no relief.

[23] The Third Party Rule was not always helpful in filling in these statutory gaps. Prior to the new Rules coming into force in 1969, the relevant parts of old R. 81 read as follows:

> 81. . . .Such notice shall be stamped with the seal with which statements of claim are sealed and a copy filed with the clerk, and the same shall be served **within the time limited for delivering the defence**.
>
> (emphasis added)

Since the "time limited for delivering the defence" was 15 days after the service of the Statement of Claim, the Defendant had virtually no time in which to issue its Third Party Notice. Even if the Plaintiff indulged the Defendant and extended the time for filing a defence, that would not extend the time for filing a Third Party Notice. Rule 81 was largely procedural, not remedial.

[24] The 1969 Rules provided some relief in new R. 66(4):

> (4) A third-party notice should be sealed with the court's seal and shall, unless the court otherwise orders, be filed with the clerk of the court **before the defendant has filed his defence** or demand of notice, been noted in default, or has had judgment entered against him, and shall be served within 15 days from the filing.
>
> (emphasis added)

The time for filing a Third Party Notice was now extended to when the Defendant actually defended. By extending the time to defend, the Plaintiff could effectively extend the time to claim contribution. This was the form of the rule considered in ***J.R. Paine & Assoc. Ltd. v. Strong, Lamb & Nelson Ltd.***, [1979] 6 W.W.R. 353, 103 D.L.R. (3d) 579, 18 A.R. 112, 11 C.P.C. 215 (C.A.).

[25] ***J.R. Paine*** was one of the early cases that confirmed the derivative nature of a claim for contribution under the *Tort-Feasors Act*. In that case the owner had retained Woolfenden Architects to design a building. Woolfenden retained sub-consultants, including J.R. Paine & Assoc., and the proposed Third Party, Strong, Lamb & Nelson Ltd. When problems arose, the owner sued Woolfenden, J.R. Paine & Assoc., and others, but not Strong, Lamb & Nelson. As Laycraft, J.A. noted, at p. 355:

> The action was commenced on April 12, 1977. . .Paine filed its statement of defence more than a year after the statement of claim was issued. *A few days later* it obtained a fiat permitting it to issue the third party notice out of time.

Under the rule then in effect, the Third Party Notice could not be filed once the defence was filed. The Court confirmed that the time for J.R. Paine & Assoc. to claim contribution from Strong, Lamb & Nelson ran from when time ran against the Plaintiff. Fortunately for J.R. Paine & Assoc., s. 60 of the *Limitation of Actions Act* applied to permit the late Third Party Notice.

[26] Shortly after ***J.R. Paine*** was decided (and perhaps as a result of it) R. 66(4) was amended to its present form by Alta. Reg. 313/81:

> (4) A third party notice shall be sealed with the Court seal, filed with the Clerk of the Court **within 6 months** from the time the defendant has filed his defence or demand of notice, but before he has been noted in default or has had judgment entered against him, and served within 30 days of filing.
>
> (emphasis added)

The Defendant presently has six months from actually defending to issue a Third Party Notice.

[27] The trend in both the statutory provisions, and the Rules, has been to expand the relief available to tort-feasors in cases of "late suing plaintiffs".

<u>The New *Limitations Act* and Claims for Contribution</u>

[28] The new *Limitations Act*, S.A. 1996, c. L-15.1 came into force in Alberta on March 1, 1999. The new Act does not appear to affect the operation of R. 66(4), and accordingly claims for contribution can presumably still be brought within six months of the filing of the defence. (It is not necessary to decide in this case what effect the ten-year ultimate limitation in the new Act may have on R. 66.) Section 60 of the old *Limitation of Actions Act* is not carried forward. The new Act deals with the problem of a claim for contribution where the Plaintiff has sued late in the limitation period by the general application of the "discoverability" rule, and also in s. 6 which deals with "Claims Added to a Proceeding".

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[29] The new Act creates a general limitation period (which I will refer to as the "primary" limitation) of two years from discoverability, with an "ultimate" limitation of ten years from when the claim arises, regardless of discoverability. The primary limitation period is set out in s. 3(1):

> 3(1) Subject to section 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,
>
> (b) 10 years after the claim arose.

[30] Before proceeding further, it is appropriate to make some comment about the terminology used in the new *Limitations Act*. The Act very sensibly uses the neutral term "claimant" to describe the person seeking a remedial order, as opposed to the technical terms "Plaintiff", "Applicant", "Petitioner", or "Appellant". The latter terms are all terms of art used in the Rules of Court. Unfortunately, the Act does use the word "defendant" to describe the person against whom the remedial order is sought. This terminology is unfortunate, because "Defendant" is also a technical term under the Rules of Court. Under the terms of the *Limitations Act*, the "defendant" can in fact be a "Defendant", "Third Party", "Defendant by Counterclaim", or "Respondent". This terminology is confusing in a case such as this one, where the Defendant (Yellow Cab et al) is really the "claimant" under the Act (i.e., the person seeking a remedial order), and the proposed Third Party (Creative Carriage) is the "defendant" as that term is used in the Act.

[31] The broad meaning of the term "defendant" can be seen in s. 1(c) of the Act, which states: "'defendant' means a person against whom a remedial order is sought." This is in accordance with Report No. 55 of the Alberta Law Reform Institute which lead to the passing of the new Act, which stated at p. 50: "The word 'defendant', defined in clause 1(c), would include third party defendants."

[32] The new Act does not provide any specific guidance with respect to when the primary limitation starts to run on a contribution claim. With respect to the ultimate limitation period, s. 3(3)(e) reads as follows:

> (e) A claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking

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> to impose a liability upon which the claim for contribution can be based, whichever first occurs.

This provision relates to when the claim "arises" for the purposes of the ultimate limitation period. It specifically does not relate to the discoverability of such a claim, with respect to the primary limitation period. This is because the ten-year ultimate limitation does not depend on the discoverability of the claim, and indeed operates notwithstanding a lack of discoverability.

[33] Under the new Act, the primary limitation with respect to a claim for contribution depends on the general wording of s. 3(1)(a). To paraphrase, inserting the terminology as discussed in paragraph 30 (*supra*) the section would read as follows with respect to a contribution claim:

> If a defendant does not seek contribution within two years after the date on which the defendant first knew, or in the circumstances ought to have known, that *the injury for which the defendant seeks a remedial order* had occurred, then the third party is entitled to immunity from the claim for contribution.

The key is the definition of "the injury" in the case of a claim for contribution. Is a reference to "the injury" a reference to the injury suffered by the Plaintiff for which the Defendant now seeks contribution from the Third Party? Alternatively, is "the injury" the potential liability of the Defendant, which triggers the right to contribution from the Third Party?

[34] The new *Limitations Act* defines the term "injury" in s. 1(f):

> (f) "injury" means
>
> (i) personal injury,
>
> (ii) property damage,
>
> (iii) economic loss,
>
> (iv) non-performance of an obligation, or
>
> (v) in the absence of any of the above, the breach of a duty.

The definition is not too helpful in this context. If the word "injury" is read as meaning "personal injury", then it would suggest that the time begins to run from when the Defendant knew or ought to have known of the injury to the Plaintiff. However, if the "injury" is the non-performance of the obligation of the Third Party tort-feasor to contribute to the Defendant, or the breach of a duty of the Third Party tort-feasor in not

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contributing to the claim against the Defendant, that would suggest that the relevant time is when the Defendant knew or ought to have known that a claim had been advanced against him, and that the proposed Third Party tort-feasor was liable to contribute to any damages that might fall upon the Defendant.

[35] The first option, that the injury referred to is the injury to the Plaintiff, would appear to be consistent with the decision in ***Prisco***. ***Prisco*** decided that the claim for contribution is merely derivative of the Plaintiff's claim against the proposed Third Party. Since the *Limitations Act* does not purport to amend the *Tort-Feasors Act*, such an interpretation is possible. It would mean, however, that every claim for contribution would have to be made within two years of the underlying incident in cases like this where the Plaintiff immediately "discovers" her injury. In other words, the problem of the late suing plaintiff identified in ***Prisco*** would occur in every case, without the ameliorating affects of s. 60 of the old *Limitation of Actions Act*. Defendants would have to rely exclusively on R. 66(4), and successful applications for late Third Party Notices would be rare.

[36] Assuming the new Act applied, this interpretation of the new Act would mean that the Yellow Cab claim for contribution would have to have been made: (a) within a separate action within two years of the incident, which would have meant before June 25, 1997, or (b) under R. 66(4) within six months of the Defence, which would have meant before December 5, 1997. As can be seen, both the new Yellow Cab action, and the proposed Third Party Notice are out of time on this interpretation.

[37] This might also trigger s. 6 of the new Act, which reads:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsections 2, 3 or 4 are satisfied.
>
> (4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,
>
> (a) the added claim must be related to the conduct, transaction of events described in the original pleading in the proceeding, and
>
> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

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If the claim for contribution is "derivative" and the "added claim" relates to the original injury to the Plaintiff, the Yellow Cab Defendants would only be entitled to add the Third Parties under s. 6 of the new Act if they could demonstrate that the proposed Third Parties had received knowledge of the claim within three years of the incident. To give an example, assume that a Plaintiff in a personal injury action issued the Statement of Claim a few days short of the two-year limitation period, naming only one tort-feasor as a Defendant. Assume further that for some reason the Plaintiff does not then serve the Statement of Claim on the named Defendant until the very end of the one-year period provided for in R. 11. The named Defendant might well first receive notice of the claim very shortly before the expiry of the three-year period provided for in s. 6, essentially making it impossible to assert any claim for contribution, except under R. 66. This example is not farfetched. Some Plaintiff's counsel deliberately delay issuing and serving the Statement of Claim as long as possible, as it allows them to control the medical records relating to the Plaintiff's condition for the first three years after the accident. A late service of the pleadings in this way prevents the Defendant from having access to the medical records of the Plaintiff, and from conducting any medical examinations under R. 217. Assuming that the new Act, and particularly s. 6, does not affect the operation of R. 66(4), the Defendant would still have six months from defending to claim contribution.

[38] Alternatively, one could argue that the real "injury", complained of by the Defendant is the failure of the proposed Third Party joint tort-feasor to contribute to the damages. It is this injury that warrants the Defendant bringing proceedings against the Third Party, and this interpretation fits more easily with the wording of Clause 3(1)(a)(iii) of the new Act. This does not mean that the new Act has amended the *Tort-Feasors Act*. The claim under the *Tort-Feasors Act* remains derivative. This interpretation simply means that the new *Limitations Act* operates more like R. 66(4), which allows the claim for contribution to be made even if the primary limitation has run against the Plaintiff. The new Act would effectively be read as providing in all cases the relief that old s. 60 provided only in some cases.

[39] The new *Limitations Act* arose from a report prepared by the Alberta Law Reform Institute on limitations. This report was issued in December 1989, several years before the decision of the Court of Appeal in ***Prisco***. The Institute proceeded on the assumption that the "injury" in the case of a claim for contribution was the failure to contribute (not the injury to the Plaintiff) and that it would arise only when the Defendant was held liable to the Plaintiff. The Institute appears to have proceeded on the assumption (Report No. 55, page 72, paragraph 61 and page 87, paragraph 31(b)) that this was the existing state of the law, although as ***Prisco*** later confirmed, this was only the case in claims for contribution arising otherwise than under the *Tort-Feasors Act*. Of course, if the limitation on a claim for contribution does not arise until the Defendant is actually found liable to the Plaintiff, the Defendant will seldom, if ever, lose the claim for contribution to a limitation period even if the Plaintiff has commenced the action very late. It is for this reason that the Institute recommended (Report No. 55, page 71) the inclusion of Clause 3(3)(e), which I have set out in paragraph 32 above. This clause has the effect of starting the running of the ultimate limitation period somewhat earlier, and helps prevent the potential Third Party tort-feasor from being exposed to stale claims for contribution. The Institution's assumptions about the law also would mean that there was no particular reason to save a clause like s. 60 of the old *Limitation of Actions Act*, as the operation of a new Act would actually be quite generous to defendants who might seek contribution.

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[40] This assumption by the Institute may also explain the apparently narrow scope of s. 6 of the new *Limitations Act*, which relates to "Claims Added to a Proceeding", and which I have set out in paragraph 37 above. This provision might well come into play in the situation that arose in the ***Prisco*** case, or indeed the circumstances of this case. When the time provided for in R. 66(4) has expired, and a Defendant wishes to make a claim for contribution, that claim might be advanced either by adding the unnamed tort-feasor as a Defendant, or else by issuing a late Third Party Notice against it. (It must be recalled that the term "defendant" as used in the Act includes a "third party"). In these situations, the claim for contribution will generally be related to the "conduct, transaction or events" which comprise the main claim, as required by s. 6(4)(a). The difficulty will generally be that the unnamed tort-feasor may not have acquired knowledge about the "added claim" during the primary limitation period (two years from discoverability) plus the time for service of process (one year, under R. 11). In this particular case it may have required that Creative Carriage, the proposed Third Party, have received knowledge about the claim within three years following the actual incident on June 25, 1995, assuming that the "added claim" is the derivative claim under the *Tort-Feasors Act*. If the "added claim " is the claim for contribution, time would run from discoverability of the claim for contribution. The Institute (Report No. 55, page 88, paragraph 31(b)) assumed the latter and so concluded that s. 6(4) would only be applicable, in practical terms, to a claim for contribution when the ten-year ultimate limitation was involved.

[41] The *Limitations Act* must of course be interpreted in accordance with its terms, using the traditional methods of statutory interpretation. The report of the Institute is a helpful guide, but it cannot affect the plain meaning of the words of the statute, even if the proper statutory meaning as interpreted by the Court differs from the meaning intended by the Institute: P.-A. Côté, *The Interpretation of Legislation in Canada* (3d ed.), at p. 418.

[42] I have concluded that the proper interpretation of the new *Limitations Act* as it applies to a claim for contribution is that the "injury" referred to in s. 3(1)(a) is the failure of the Third Party to contribute to the Defendant as called for in the *Tort-Feasors Act*. In other words, the limitation on the claim for contribution under the *Tort-Feasors Act* does not begin to run when the limitation begins to run as against the Plaintiff. The new *Limitations Act* operates instead the same way as R. 66(4).

[43] This is more consistent with the plain wording of the statute. To hold otherwise would deprive s. 3(3)(e), which sets out the ultimate limitation period for claims of contribution, of virtually any meaning, at least in the case of claims for contribution under the *Tort-Feasors Act*, as few claims would ever survive the primary limitation period. Under the interpretation I have found, there is still room for the operation of s. 6, which relates to adding claims to a proceeding. This section would still be effective where, for example, the Plaintiff sues "XYZ Ltd.", but it should have sued "XYZ Co.". In these misnomer cases, the real tort-feasor often has actual knowledge of the claim, and is relying on the limitation statute in a manner not intended. Section 6 will allow them to be added late. The section would also have some application where discussions are underway with a tort-feasor who is not a party to the action, but is fully aware of the claim. Such tort-feasors would not be entitled to immunity, even if they are not added to the proceedings in a timely way. Under the previous law, this situation was dealt with by arguing that the tort-feasor was estopped from relying on the limitation period, or that the tort-feasor had entered into a "standstill" agreement. (Of course, s. 6 would have

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no application if no claim whatsoever had been started against any tort-feasor, as it only applies to claims added to existing proceedings.)

[44] I also find this interpretation to be more consistent with the overall remedial intent of the new Act, as the opposite interpretation would exacerbate the previous problem of claims for limitation becoming statute barred before the Defendant even finds out he has a need to claim contribution. I have outlined above the history of R. 66 and s. 60 of the *Limitation of Actions Act*. The legislative history shows a trend towards making relief for the "late suing plaintiff" problem more general. The interpretation of the new *Limitations Act* that I have identified is consistent with this trend. I believe it would be inconsistent with the intention of the Legislature to adopt a narrower interpretation of the remedial provisions for this particular problem.

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[45] This interpretation has the added advantage that the limitation period applicable to contribution claims at common law and under the *Tort-Feasors Act* would begin to run at the same point. The problem of the "late suing plaintiff" is most particularly a problem with the derivative claim for contribution under the *Tort-Feasors Act*. It did not arise with respect to contribution claims recognized by common law, because the previous law was that time did not run against such claims until judgment had been obtained against the Defendant seeking contribution. Under the new Act, time in all cases will run from when the Defendant knew or ought to have known that there was a claim for contribution. The philosophy of the new Act is to provide general limitation periods applicable to all circumstances; one of the objectives of the new Act was to sweep away the myriad limitation periods and exceptions to them found in the old statutory regime. It is consistent with that objective to find there is only one limitation period applicable to claims for contribution and indemnity of all kinds. I do not necessarily concur with the assumption of the Institute that the injury only arises when the Defendant is actually found liable to the Plaintiff (as opposed to when the Defendant knew or ought to know of the claim and the right to contribution), but I need not consider that point, and I make no further comment on it.

Which Act Applies?

[46] As the new *Limitations Act* deals with claims for contribution differently, it is necessary to examine which statute applies to these facts. The new *Limitations Act* was proclaimed in force on March 1, 1999. In s. 16 it provides that the *Limitation of Actions Act* is repealed. Section 2(1.1) of the Act provides for the transition between the old regime and the new regime.

> (1.1) Subject to sections 11 and 13, if, before this Act comes into force, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of
>
> (a) the time provided by the Limitation of Actions Act that would have been applicable but for this Act, or
>
> (b) 2 years after the coming into force of this Act,

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

The section essentially says that a proposed claimant has to bring an action within the time limited by the old *Limitation of Actions Act*, or two years after the coming into force of the new Act, whichever is earlier. This provision had the effect of cutting short limitations under the old statute which might have extended beyond March 1, 2001.

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[47] The new Act provides for its general scope of operation as follows:

> 2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced after this Act comes into force, whether the claim arises before or after the coming into force of this Act.

The new Act does not define what a "proceeding" would include. It would clearly seem to apply to any new action, such as the second action commenced by the Yellow Cab Defendants on September 19, 2000. That action is clearly governed by the provisions of the new Act.

[48] The first question is whether the Notice of Motion filed on November 14, 1999 to issue a Third Party Notice out of time, and presumably the resulting Third Party Notice, are "a proceeding commenced after this Act comes into force".

[49] The parties all assumed that the Third Party Notice was covered by the new Act, based on *Manufacturers' Life Insurance Co. v. Husky Oil Marketing Co.* (1999), 249 A.R. 305. This case involved damage caused by leakage from some underground gasoline storage tanks, which had been installed in approximately 1979. An action was commenced in 1996 as a result of this damage. Lands Happy Marts, one of the parties in this litigation, filed a Defence to Third Party Notice on January 18, 1998. It then issued a Fourth Party Notice on March 12, 1999 against Keller Construction Ltd. The Fourth Party Notice was issued more than six months after the Defence to Third Party Notice and Keller brought an application to strike it out on the basis that the Fourth Party proceedings were barred by the *Limitation of Actions Act*. The Court held, *inter alia*, that the Fourth Party Notice was a "proceeding" within the meaning of s. 2(1) of the new *Limitations Act*, without setting out the reasoning by which it came to this conclusion. This finding also appears to be *obiter*, because the Court determined that the action in question was governed by the old *Limitation of Actions Act*, as it fell within the transitional period provided for in s. 2(1.1)(a). As a result, the Court applied the six-year limitation period found in the old Act, and did not have to consider the impact of the "two year from discovery" limitation provided in the new Act. The Court also did not have to consider the impact that s. 6 of the new Act might have had on the Fourth Party Notice. Since the Third Party Notice in this action also falls in the transitional period, it is not necessary for me to consider this point further. Either the Third Party Notice is not a "proceeding" and so outside the new Act and covered by the old Act, or it is covered by the old Act because of the transitional provisions of the new Act.

[50] This leads to the interesting result that the new action commenced by the Yellow Cab Defendants is governed by the new Act, but the proposed Third Party Notice they wish to issue, and which covers essentially the same substantive claims, is governed by the old Act. This is a natural result of the operation of the transitional provisions in the new Act which on the facts of this case essentially provide that during the transitional period the old Act applies.

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The Position Under the two Statutes

[51] To summarize, when the *Limitation of Actions Act* was in force, the claim of a Defendant for contribution under the *Tort-Feasors Act* was derivative of the Plaintiff's claim against the Third Party. When time ran against the Plaintiff, it also had run against the Defendant. While the general limitation period for personal injury was two years, s. 60(1) provided that the two-year limitation did not apply to Third Party proceedings. Since the time "limited by this Part" did not run, that brought into play the general six-year limitation found in s. 4(1)(g) of the statute. Accordingly, the Defendant had the ability to make a separate claim for contribution within six years of the Plaintiff's injury, or to add the joint tort-feasor as a Third Party within six months of filing its defence under R. 66(4).

[52] In this particular case, the Plaintiff's injury occurred and would have been discoverable on June 25, 1995. Six years from that date is June 25, 2001, which would have been the limitation period under the old s. 60, excepting that it was truncated to February 28, 2001 by the transitional provisions of the new Act. The application to add the Third Party was filed on December 14, 1999, and is within the statutory limitation, although the Third Party Notice is outside the six-month period in R. 66(4). As I have previously mentioned, one factor to be considered in allowing a late Third Party Notice is whether the underlying limitation period has expired. If it has, there is no point in permitting a late Third Party Notice, as it will be subject to summary dismissal. However, if the underlying limitation has not run, it is possible to permit a late Third Party Notice if the circumstances are otherwise suitable. I will discuss those circumstances later in these reasons. There is, however, no limitations impediment to a late Third Party Notice.

[53] The second action commenced by the Yellow Cab Defendants is governed by the new Act. Under the new *Limitations Act*, the time runs against the Defendant seeking contribution from when the Defendant knew or ought to have known that the injury had occurred, that the injury was attributable to the conduct of the proposed Third Party, and that the injury warranted the bringing of proceedings. The limitation period would be two years from that date.

[54] As I have previously outlined, the "injury" for the purposes of a claim for contribution is the time when the Defendant knew or ought to have known that the Third Party had a duty to contribute to any damages suffered by the Plaintiff, for which the Defendant might be held jointly liable with the proposed Third Party. On the facts of this case there are a number of dates when one might argue that the Yellow Cab Defendants "ought to have known" that Custom Carriage had a duty to contribute to the injuries of the Plaintiff:

(a) the very date of the incident, being June 25, 1995. Counsel for the Plaintiff argues that this is the date, because the Defendant, Kociniak noted that the wheelchair tipped over at the very top of the ramp where the transition plate is located. The Plaintiff argues that this should have identified defective design as being a possible cause of the accident. The Defendants note that Kociniak actually identified other factors as being the cause of the accident;

(b) a possible intermediate point between the date of the incident and the date of the service of the Statement of Claim. There is nothing on the record as it stands to indicate whether or not the possibility of defective design was brought to the attention of the Yellow Cab Defendants within this period. Since the Plaintiff was asserting a claim, the Defendants would at least have discovered in this period that the "injury [i.e. the duty to contribute] warranted" a claim for contribution.

(c) the date that the Statement of Claim was served on the Yellow Cab Defendants. The record is not entirely clear when this happened, although it appears that a courtesy copy of the Statement of Claim was sent to counsel for the Yellow Cab Defendants on March 19, 1997, the day that it was issued. The Plaintiff alleges that at the latest the Yellow Cab Defendants should have been aware of the possibility of defective design at this point, because of the paragraphs in the Statement of Claim that I have quoted in paragraph 12 above. The Defendants argue that such pleadings are rather *pro forma* in nature, and do not necessarily indicate that there is any evidence in support of them, and that the evidence from Kociniak pointed to other causes;

(d) the date of the first round of examinations for discovery, which was December 11, 1997. Counsel for the Yellow Cab Defendants acknowledges that at this time he began to suspect that the transition plate between the ramp and the body of the taxi may have caused or contributed to the injuries of the Plaintiff. Counsel's knowledge must obviously be attributed to his client, and vice versa, in deciding discoverability;

(e) November 27, 1999, which was the date that the expert retained by the Yellow Cab Defendants provided a report which substantiated the theory that the transition plate caused or contributed to the injuries. The Yellow Cab Defendants argue that time should not begin to run against them until this date, as to hold otherwise would encourage litigants to "sue first and investigate later". The other parties respond that the issuing of pleadings to stop a limitation is an accepted, prudent, and often necessary step, and that knowledge of or certainty as to legal liability is not a part of discoverability.

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[55] It is not possible, on this record, to decide which of these five dates is applicable, and that issue will have to be tried, if necessary. The first four of the dates identified above passed before the new Act came into force. If any of those four possible dates are the date at which "the claimant knew, or in the circumstances ought to have known, of a claim", then the new action would fall into the transitional provisions in s. 2(1.1). This would mean that the new Yellow Cab action had to be issued on the earlier of the time prescribed in the old *Limitation of Actions Act*, and the end of the transitional period in the new Act. The new claim was clearly issued before the end of the transitional period. The limitation period under the old regime for claiming contribution is derivative of the claim of the Plaintiff against the Third Party. This limitation period is two years under Part 9 of the *Limitation of Actions Act*, unless that period is extended by s. 60. However, s. 60 by its terms only extends the limitation period with respect to counterclaims or "third party proceedings". The new action commenced by the Yellow Cab Defendants is not a "third party proceeding". The effect is that under the new *Limitations Act* the new Yellow Cab Statement of Claim had to be issued before June 25, 1997 (two years after the incident), over three years before when it was actually issued, if any of the first four identified dates are the date of discoverability.

[56] If the proper date of discoverability is the last one that I have identified, namely November 27, 1999, the date that the expert report was received, then the circumstances are different. Since this discoverability date is after the coming into effect of the new *Limitations Act*, then the general limitation period in s. 3(1)(a) would apply. The Yellow Cab Defendants would have had two years from November 27, 1999 to issue the second claim. The claim issued on September 19, 2000 is accordingly in time.

[57] The effect of this analysis is that the limitation period for issuing Third Party proceedings against Creative Carriage has not expired. On the other hand, there would appear to be some substantial risk that the limitation period for issuing the new action that was issued by the Yellow Cab Defendants had expired before that claim was issued. As a result, the Yellow Cab Defendants might successfully be able to pursue their claim for contribution under a late Third Party Notice, but not under the new action they have commenced. Therefore, if the Yellow Cab Defendants are not given leave to issue a late Third Party Notice, they may well suffer substantive prejudice, in that they will lose their right to contribution.

[58] The relative prejudice that will be suffered by the parties if a late Third Party Notice is allowed, is one of the factors that the Court considers in exercising its discretion to permit such a late pleading. A number of the cases dismiss applications for late Third Party Notices, on the basis that the Defendants are still at liberty to issue a new claim for contribution. Compare ***E.S.M. Transport Ltd. v. Western Mack Truck (Edmonton) Ltd.*** (1988), 59 Alta. L.R. (2d) 115, 90 A.R. 321, 28 C.P.C. (2d) 282 (C.A.) with ***Sherritt Gordon Ltd. v. Dresser Canada Inc.***, [1993] A.J. 600 (C.A.). If it appears that there is some risk that the Defendants have lost the right to commence a new action for contribution, that is a factor that the Court would consider in favour of allowing a late Third Party Notice. It is accordingly necessary to examine all of the facts and circumstances surrounding this action, to determine whether a late Third Party Notice should be permitted at this time.

Prejudice and Delay

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[59] Since it appears that the claim to be asserted in the late Third Party Notice is not barred by statute, the last question is whether the Court should exercise its discretion in allowing the late issuance of the Third Party Notice.

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[60] The Notice of Motion to issue the Third Party Notice was filed approximately 33 months after the Statement of Claim was issued, and approximately 30 months after the Yellow Cab Defendants filed their defence. This was approximately 4 ½ years after the incident in question. The Plaintiff accordingly argues that notwithstanding any limitation issue,
the Defendants should not be permitted to issue a Third Party Notice at this time. The Plaintiff alleges prejudice, in that she suggests the eventual trial of her action will be delayed by the Third Party proceedings. She alleges further prejudice because the Third Party Notice will add new issues regarding the design of the taxi, which she alleges will lengthen the trial, and make it more complex.

[61] The Yellow Cab Defendants, on the other hand, argue that they will be prejudiced if they are not permitted to add their claim for contribution. Firstly, it appears that the Yellow Cab Defendants will lose their substantive right to advance a claim for contribution, because the second action they have commenced may well be out of time. Secondly, they allege that they cannot be faulted for the lateness of their application, as it was not reasonable for them to commence the Third Party proceedings until they had their expert report in hand. The Defendants also point to the desirability of having all the issues arising from this incident decided at once, thereby avoiding multiplicity of proceedings. The Defendants cite s. 8 of the *Judicature Act*, which reads:

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined *and all multiplicity of legal proceedings concerning those matters avoided.*
>
> (emphasis added)

[62] The learned Master did not discuss any of the limitations issues in his brief Memorandum of Decision. Because of the procedural history of this application, I assume that these arguments were not pressed before him. He accordingly decided against the issuance of the Third Party Notice primarily on the balance of convenience. He appears to have assumed that there were no limitation issues preventing the Defendants from making a claim for contribution in other proceedings. As such, he did not have to weigh the loss of the Defendants' substantive rights if a late Third Party proceeding was not allowed.

[63] In support of her position, the Plaintiff cited ***Kaptian v. Hardy*** (1999), 251 A.R. 291, 36 C.P.C. (4th) 49, 45 M.V.R. (3d) 19. This too was an application for issuing a late Third Party Notice. Moore, C.J.Q.B. set out the following test at paragraph 16:

> The length of any delay is relevant as it relates to: the reasonableness of an excuse for the delay, prejudice because of the delay, third party procedure benefits. The test can therefore be subsumed in two parts.
> 1. Reasonable Excuse
>
> A defendant has the burden of proof on an application to extend the time limit of Rule 66(4). The 6 month time frame open to a defendant to file a third party notice gives the defendant an opportunity to consider potential third parties. Any delay after the expiry of the 6 months requires a reasonable excuse. If a defendant has no reasonable excuse for the delay then leave to add a third party will be denied.
>
> 2. Prejudice
>
> If a defendant has a reasonable excuse for the delay, then the court must balance the potential prejudice to the third party and the plaintiff because of the delay against the benefits of adding the third party. If the prejudice outweighs the benefits of third party procedure, then leave to add a third party will be denied.

The Plaintiff argues that the Yellow Cab Defendants must meet this two-part test. Firstly, they must provide a reasonable explanation for the delay. If they cannot provide a reasonable explanation, leave should be denied. Only if some explanation for the delay is provided can the Court move on to consider prejudice. The Plaintiff argues that ***Kaptian*** merely applies the rule set out by the Court of Appeal in ***Lister v. Calgary (City)*** (1997), 47 Alta. L.R. (3d) 14.

[64] The Yellow Cab Defendants argue that the test is more fluid. They suggest that the length of the delay, the reason for the delay, and the relative prejudice should be considered concurrently before the Court exercises its discretion one way or the other.

[65] This issue was examined extensively by Moreau, J. in ***Flight v. Dillon***, [2001] A.J. No. 329. Moreau, J. reviewed the case law on late Third Party Notices up to the decision in ***Kaptian v. Hardy***, and noted at paragraph 18:

> It would appear that prior to *Kaptian*, *supra*, the approach to time extensions for third party proceedings was to weigh the nature of the delay, whether there was a reasonable excuse for it and prejudice, except in circumstances which might be described as the "worst cases" where the delay, as in *Lister*, *supra*, is significant and the need to establish a credible excuse becomes the single strongest consideration and actual proof of prejudice, given the passage of time, becomes superfluous. *Kaptian*, however, requires that any delay beyond the six month time frame must have a reasonable excuse before an extension of time can be considered.

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Having considered the facts of that case, Moreau, J. went on at paragraph 28 to state:

> However, if I am in error in concluding that there was here a reasonable excuse for the delay, I am of the view that the proper test for an application to strike a third party notice is as suggested by the authorities which preceded *Kaptian*, *supra*, and that prejudice is still a factor to be weighed along with the nature of the delay and whether it can be reasonably excused, unless the delay is significant. In that event, the absence of a reasonable excuse for the delay effectively overpowers any need on the part of the third party to demonstrate actual prejudice.
>
> I therefore respectfully disagree with my former colleague that every case of delay beyond the six month time frame contemplated by Rule 66(4) requires the defendant to advance a reasonable excuse before any consideration of prejudice comes into play. I would agree with the approach taken in *Grandwood Flooring*, *supra*, namely that a short delay would result in a different weighing exercise, focusing primarily on the existence of any prejudice. As one moves further away from the six month deadline, the weighing exercise will focus more on whether the delay is excusable. In the case of a significant delay, as in *Lister*, *supra*, failure to advance a reasonable excuse for the delay will, without more, be fatal to an application to extend time.

[66] With respect, I agree with the decision in ***Flight v. Dillon*** that the sequential test set out in ***Kaptian v. Hardy*** is not inflexible. The length of the delay, the explanation for the delay, and the relative prejudice to the two parties are to be considered concurrently when the Court exercises its discretion to allow or reject a late Third Party claim. Obviously, the longer the delay, the more the Court might assume prejudice from the mere passage of time, as memories will tend to weaken, the litigation will tend to advance further, and the Third Party might increasingly be prejudiced by the passage of time. However, the mere fact that there is no satisfactory explanation for some or all of the delay is not fatal to the application.

[67] This litigation has proceeded at a rather leisurely pace. The Plaintiff chose not to issue her Statement of Claim until 21 months after the incident. She undoubtedly had tactical or other considerations for doing so, but having allowed the better part of two years to expire before the action was even commenced, she cannot now argue with much force that the matter is urgent.

[68] The Plaintiff argues that the Defendants should have been alerted to the condition of the ramp and the transition plate from the earliest moment, because the Defendant, Kociniak, noted that the accident happened at the point where the ramp met the van. This is true, but in fairness Kociniak's statement attributes the accident entirely to the speed at which the Plaintiff mounted the ramp. If anything, Kociniak's statement distracts attention from any problem with the ramp. Likewise, while it is true that the Plaintiff's pleading does mention negligent design, that does not appear to have been the major focus of her claim; rather she appears to claim that Kociniak should have warned her about the ramp or assisted her in entering the van. This is certainly not a case like ***E.S.M. Transport Ltd. v. Western Mack Truck (Edmonton***) (*supra*) where the Defendants knew of the potential Third Party and made a deliberate tactical decision not to join them.

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[69] While the first round of examinations for discovery were held on December 11, 1997, the Yellow Cab Defendants suggest that they are not yet completed, and that there are certain undertakings outstanding. All of the parties should bear some responsibility for allowing undertakings to remain outstanding for lengthy periods of time. The party who gave the undertaking has a duty to fulfill it, and the party who received the undertaking has an obligation to enforce it. Discoveries of the officers of some of the corporate Defendants have not yet taken place, apparently because the Plaintiff has not decided if she will pursue all of them.

[70] There were certainly delays experienced by the Yellow Cab Defendants in obtaining their expert report. Part of this delay is explained in that the Yellow Cab Defendants indicate that they had some difficulty identifying an expert in wheelchair ramps who was available to provide an opinion. There were also some delays in coordinating the Plaintiff's schedule, so as to allow a testing of the wheelchair. The Yellow Cab Defendants argue that it was not enough to have the ramp and the van in their possession; it was necessary to have the wheelchair as well to properly evaluate how the accident occurred. The testing occurred on October 15, 1999, and the expert provided his report in a timely way on November 27, 1999. However, counsel for the Yellow Cab Defendants admitted that he first became aware that there might be a design issue with the ramp at the discoveries on December 11, 1997. It appears that nothing was done about this until January of 1999, when the search for experts began. The entire 1998 calendar year appears to have slipped by without any progress having been made. The Defendants state that they had trouble identifying the manufacturer of the ramp and the van, but the record is clear that this information was readily available from the City of Edmonton. The Defendants must accept primary responsibility for this delay, for which no satisfactory explanation has been provided.

[71] The Court was also advised that the officer of the Yellow Cab Defendants who was produced for examinations for discovery has since died. This will not prejudice the Plaintiff, as she can still read-in from his transcript, while the Defendants are, of course, denied his testimony at trial. The Yellow Cab Defendants would have to produce another officer for examination by the proposed Third Party, if it is added. Any prejudice from the death of this party can be remedied by permitting the Third Party to read-in from his examinations for discovery, and to conduct an independent examination of a second officer of the Yellow Cab Defendants.

[72] At this time it would appear that the parties are not ready to sign a Certificate of Readiness. The production of documents by, and the examination for discovery of the Third Party will undoubtedly consume some time. However, given the leisurely pace that the parties have allowed in this litigation to date, I do not regard this as an overriding consideration, particularly when weighed against the possible loss of the substantive rights of the Defendants.

[73] The proposed Third Party did not file an affidavit alleging any prejudice by the delay in issuing the Third Party Notice.

[74] With respect to the suggestion that the Third Party proceedings will add to the complexity of the trial, this is undoubtedly true. However, I do not think it is safe to assume that without the Third Party proceedings the design issues will not be raised. On this application the Plaintiff took the position that her pleadings themselves raised the issue of negligent design. The Yellow Cab Defendants and the City of Edmonton might

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well raise the issue of negligent design in the main action, in order to show that they were wholly innocent of any negligence that caused or contributed to the Plaintiff's losses. Therefore, the issues about the design of the ramp are likely to arise whether or not the Third Party proceedings are added.

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[75] On the other hand, it is highly desirable that the interlocking issues between the parties be decided in one action. In the first action, the responsibility of the various parties will have to be decided. This decision may encompass the contributory negligence of the Plaintiff, the negligence of the Yellow Cab Defendants, and the possible effect of negligent design. If separate proceedings for indemnity are to be prosecuted, those same issues will have to be tried again. This is to be avoided, because the possibility of inconsistent verdicts undermines confidence in the legal system. Having two trials on the same issue is also inefficient, and results in a waste of the resources of the legal system. The Yellow Cab Defendants may end up having to pay for two trials instead of one, although it can be argued that this is their own fault. Creative Carriage, the proposed Third Party, may well feel obliged to monitor the first trial, if only to assist in the defence of the second one.

[76] In balancing the prejudice, one overwhelming factor is that the Yellow Cab Defendants might well lose their right to contribution if the late Third Party Notice is not permitted. As I have indicated previously, there is a significant risk that the second action commenced by the Yellow Cab Defendants is statute barred. The proposed Third Party alleges no prejudice by reason of the lateness of the Third Party Notice. As between the Defendants and the Third Party, justice clearly favours permitting the late Third Party Notice. As between the Defendants and the Plaintiff, there may be some prejudice in the form of delay or added complexity, but these matters can be dealt with by the trial judge in an award of interest, or costs, or both.

[77] Having taken into account the explanations provided by the Defendants for at least part of the delay in bringing the Third Party proceedings, having reflected on the conduct of all the parties with respect to the urgency of this litigation, and having weighed the prejudice to the Plaintiff, the Defendants and the proposed Third Party, I have come to the conclusion that this is an appropriate case for the Court to exercise its discretion and permit the late filing of the Third Party proceedings. I do so on terms that the Third Party proceedings be issued and served on the proposed Third Party within 30 days of the date of these reasons. The Third Party may read-in from the discovery of the deceased officer of the Defendants, and also conduct its own examination of an officer.

[78] As I have allowed the late filing of the Third Party Notice, the second action commenced by the Yellow Cab Defendants becomes somewhat redundant. That action should be stayed until further order of the Court. It is, accordingly, unnecessary at this time to consider the application under R. 129 to strike out that Statement of Claim. It is also unnecessary to consider the application to have that action tried concurrently with the main action.

[79] Without making any specific directions or setting any specific deadlines, I note that the parties should speed up the pace of this litigation. They may resort to the Rules of Court or other procedures available to them as they may be advised.

[80] While the Yellow Cab Defendants have been largely successful in this application, the very need for this application is, to some considerable extent, their own fault. While I have concluded that the delay caused by the Defendants is not sufficient to disentitle them to the relief they seek, it is appropriate to grant that relief on terms. I therefore am inclined to deny the Defendants the costs they would otherwise be entitled to for this application and the application before the Master. However, if any party wishes to speak to costs, they may do so within 30 days of the date of these reasons.

HEARD on the 18th day of April, 2001.
DATED at Edmonton, Alberta this 14th day of May, 2001.

_____
J.C.Q.B.A.

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TAB 37

Immigration and
Refugee Board of Canada

Immigration Division

Commission de l'immigration
et du statut de réfugié du Canada

Section de l'immigration

ID File / Dossier de la SI: 0003-C3-00807-01 AH
UCI / IUC: 97962260

2025 CanLII 49485 (CA IRB)

Reasons and Decision – Motifs et decision

Public proceeding / Procédure publique

Between	The Minister of Public Safety and Emergency Preparedness	**Entre**
and		**et**
Person(s) Concerned	Harmeet Singh DHALIWAL	**Intéressé(e)(s)**
Date(s) of Hearing	January 31, 2024, February 1, 2024, February 2, 2024, (Held in-person) February 15, 2024, and March 6, 2024 (Held via virtual hearing)	**Date(s) de l'audience**
Place of Hearing	Toronto, ON	**Lieu de l'audience**
Date of Decision	January 3, 2025	**Date de la décision**
Panel	Maleeka Mohamed	**Tribunal**
Counsel for the Minister	Karan Paul	**Conseil du (de la) ministre**
Counsel for the Person(s) Concerned	Vineet Kaushal	**Conseil(s) de l'intéressé(e)/les intéressé(e)s**
Designated Representative(s)	N/A	**Représentant(e)(s) désigné(e)(s)**

Canada

REASONS FOR DECISION

IN THE MATTER OF the *Immigration and Refugee Protection Act* and an Admissibility Hearing concerning Harmeet Singh DHALIWAL.

2025 CanLII 49485 (CA IRB)

INTRODUCTION

[1] This is a record of reasons for a decision made under the provisions of the *Immigration and Refugee Protection Act* ("the IRPA") concerning Harmeet Singh DHALIWAL ("Mr. Dhaliwal") following an admissibility hearing conducted pursuant to subsection 44(2) of IRPA.

[2] Mr. Dhaliwal entered Canada on December 23, 2016 and was issued a study permit upon entry.[1] He applied for and received extensions to this permit until the end of November of 2020, and was thereafter issued a work permit.[2] On September 20, 2021, Mr. Dhaliwal was reported under subsection 44(1) of the IRPA, for being inadmissible to Canada pursuant to subsection 37(1)(a) of the IRPA.[3] The report was referred to the Division on October 11, 2021.[4]

[3] The Minister submits the evidence establishes there are reasonable grounds to believe that Mr. Dhaliwal, as a foreign national, was a member of a criminal organization or engaged in activity that was part of a pattern of criminal activity with the organization. Specifically, they allege that Mr. Dhaliwal engaged in a "cheque kiting" scheme with at least 5 other individuals. This scheme involved taking advantage of the period between the time a cheque is deposited, and those funds are made available to the owner of the account, to when the bank verifies that there are sufficient funds to support that cheque. In this case, the Minister alleges Mr. Dhaliwal wrote several NSF cheques which were then deposited by various individuals, who dispersed these funds prior to the NSF cheques being flagged by Scotiabank, which resulted in a substantial financial loss to the bank. The Minister requests the Division to issue a deportation order against Mr. Dhaliwal.

[4] Mr. Dhaliwal submits that the Minister has not met their burden to establish that he is a person described under subsection 37(1)(*a*). He asks the Division to find he provided credible and reliable evidence that his cheque book was stolen by his former roommates, Mr. Pawandeep Dhindsa ("Mr.

[1] Exhibit M-1, "Study Permit", at p. 10.
[2] Ibid., at pp. 8-10. See also Exhibit M-1, "Work Permit", at p. 7.
[3] Exhibit M-1, "Report under Subsection 44(1) of the Immigration and Refugee Protection Act", at pp. 4-5.
[4] Exhibit M-1, "Referral Under Subsection 44(2) of the Immigration and Refugee Protection Act", at p. 2.

Dhindsa") and Mr. Jaspreet Singh Khaira ("Mr. Khaira"), whom he submits were heavily involved in the scheme. Mr. Dhaliwal states he had no knowledge or acquaintance with the other individuals alleged to be part of the scheme, and that he was not involved in the writing of the NSF cheques. Mr. Dhaliwal therefore requests the Division to issue a favourable order.

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DECISION

[5] After reviewing and carefully considering the totality of the evidence, submissions, and relevant jurisprudence and legislation, I do not find there are reasonable grounds to believe that Mr. Dhaliwal is a person described in subsection 37(1)(a) or the IRPA, thus I am issuing a favourable decision.

ISSUES

[6] Section 37(1)(*a*) of the IRPA reads as follows

> 37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for
>
> (*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern;[5]

[7] For an inadmissibility finding to be made under s. 37(1)(*a*), the Minister must establish the following elements:

(i) That Mr. Dhaliwal is a permanent resident or a foreign national, not a Canadian citizen;

(ii) There existed an organization that was engaged in activity that is part of a pattern of criminal activity; and

[5] Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 37(1)(a) [IRPA].

(iii) That Mr. Dhaliwal was either a member of that organization OR that he was engaged in activity that is part of a pattern of criminal activity with that organization.

[8] Pursuant to section 33 of the IRPA, the facts that constitute inadmissibility are required to be proven on the standard of "reasonable grounds to believe that they have occurred, are occurring, or will occur".[6]

[9] This standard of proof has been described as something more than mere suspicion, but less than the civil standard of a balance of probabilities. The Supreme Court of Canada has stated that, "reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information".[7]

[10] Section 173(d) of the IRPA allows me to base my decision on evidence I find to be credible or trustworthy in the circumstances.[8]

[11] The evidence at the hearing consisted of Exhibits M-1 through M-4, Exhibit P-1, and the testimony of Detective Constable Valerie Sibley ("Detective Sibley"), Mr. Dhaliwal, and Mr. Bhupinder Singh Gurm ("Mr. Gurm").

ANALYSIS

Issue I: Is Mr. Dhaliwal a permanent resident or foreign national?

[12] Mr. Dhaliwal testified that he is neither a permanent resident of Canada, nor a Canadian citizen. He stated that he is a citizen of only India.[9] This testimony is supported by the documentary evidence, including the copy of his passport provided as part of Exhibit M-1.[10] Thus, I find there are reasonable grounds to believe that Mr. Dhaliwal is a foreign national, and citizen of India, not a Canadian citizen.

[6] Ibid., at s. 33.
[7] *Mugesera v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 39 (CanLII).
[8] IRPA, *supra,* footnote 5, at s. 173(d).
[9] Transcript of Proceedings, dated January 31, 2024, at pp. 36-37.
[10] Exhibit M-1, "Indian Passport Copy", at p. 6.

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Issue II: Is there sufficient evidence of a criminal organization?

[13] The Minister submits that the evidence supports a finding of a criminal organization as there were more than three individuals involved in a pattern of criminal activity that was conducted over an extended period of time. They allege that at least six individuals, fitting the profile of international students in Canada on a temporary basis, were involved in writing and depositing "NSF" cheques and subsequently withdrawing those non-existent funds from their accounts.[11] They submit the manner in which this scheme was carried out necessitated planning and organization amongst the members of the group. The Minister submits these actions led to a direct financial benefit for the members of the group and resulted in a substantial loss to Scotiabank. The Minister thus argues that the evidence meets the definition of criminal organization under the *Criminal Code of Canada*, and guidance provided by the jurisprudence in the interpretation of this term under the IRPA.

[14] Mr. Dhaliwal does not contest that there was a criminal organization.

[15] The term "criminal organization" is not defined under the IRPA, but guidance has been provided by the Federal Court of Appeal as to how to interpret and apply this term.

[16] In *Sittampalam*, the Court stated that "organization" is to be given a broad and unrestricted interpretation in order to ensure that the purpose of the IRPA to protect the security of Canadians is upheld.[12] The Courts have found that the assessment must be conducted in a flexible manner, taking into consideration a number of factors that may assist in determining whether there is a criminal organization, such as identity, leadership, a loose hierarchy, basic organizational structure, occupied territory or regular meeting locations.[13] However, the Court emphasized that these factors are non-exhaustive and there is no one factor that is essential for the finding of a "criminal organization" to be made out.

[17] In 2015, the Supreme Court in the case of *B010* considered the definition of "criminal organization" in the context of a s. 37(1)(*b*) human smuggling allegation. The Supreme Court of Canada stated that, while "organized criminality" and "criminal organization" as defined in the *Criminal Code*, are not identical phrases, "they are logically and linguistically related and absent countervailing considerations, should be given a consistent interpretation." Thus, the Court found that

[11] Minister's Submissions, dated April 18, 2024, at p. 31.
[12] *Sittampalam v. Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2006 FCA 326.
[13] Ibid, at paras. 38-39; See also *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 349 (CanLII).

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"criminal organization" is to be interpreted harmoniously with the *Criminal Code*'s definition, found in s. 467.1(1).[14]

[18] The Minister relies on the case of *Danaj*[15], a recent Federal Court decision that found the findings in *B010* are not applicable to s. 37(1)(*a*). While I am bound by decisions made by the Federal Court, the Court itself has been split as to the applicability of *B010* to s. 37(1)(*a*). For example, in *Saif* they found the findings from *B010* apply equally to both subsections (*a*) and (*b*). In coming to their decision, the Court considered the underlying reasoning conducted by the Supreme Court of Canada and their finding that s. 37(1)(*b*) must be read in accordance with "organized criminality" due to the need to consider the section as a whole and not two separate and distinct parts.[16]

[19] The Honourable Justice Barnes in *Saif* quoted and assessed the Supreme Court of Canada's findings at paragraph 37 of *B010*, where the Court stated,

> The first contextual consideration is the relationship between s. 37(1)(*b*) and the rest of s. 37(1). Subsection (1) introduces the concept of inadmissibility on grounds of organized criminality. Paragraphs (*a*) and (*b*) are instances of organized criminality.
>
> Section 37(l)(*a*) makes membership in criminal organizations one ground of inadmissibility, while s. 37(1)(*b*) makes "engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering" another. Read in the context of s. 37(1) as a whole, it is clear that the focus of s. 37(l)(*b*), like that of s. 37(l)(*a*), is organized criminal activity.[17]

[20] If the entire section is to be read harmoniously, then it would be more legally sound for the term "organized criminality" to be applied in a consistent manner between the subsections. Respectfully, the Federal Court in *Danaj* did not engage in an assessment of the Supreme Court's decision and only distinguished the decision on the basis that it was made with respect to s. 37(1)(*b*), without considering the above-mentioned paragraph or overall reasoning of the Supreme Court. For these reasons, I prefer the reasoning and conclusion reached in *Saif*, that being that the *Criminal Code* definition of "criminal organization" applies to s. 37(1)(*a*) and should be used in assessing this

[14] *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 [*B010*].
[15] *Danaj v. Canada (Public Safety and Emergency Preparedness)*, 2024 FC 402 (CanLII), at para. 45 .
[16] *Saif v. Canada (Citizenship and Immigration)*, 2016 FC 437 (CanLII).
[17] *B010*, *supra*, footnote 14.

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element. However, I note that my finding that there are reasonable grounds to believe a criminal organization existed in this case would be the same under the *Sittampalam* principles.

[21] Section 467.1(1) of the *Criminal Code* defines "criminal organization" as a group, however organized, that (a) is composed of three or more persons in or outside of Canada; and (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit including a financial benefit by the group or by any of the persons who constitute the group. It does not include a group of persons that forms randomly for the immediate commission of a single offence.[18]

[22] "Serious offence" is defined as an indictable offence under an Act of Parliament for which the maximum term of imprisonment available is at least five years or is a prescribed offence.[19]

Credibility and Reliability of the Minister's Evidence

[23] The most significant portion of the evidence with respect to the cheque kiting scheme comes from Scotiabank. The Scotiabank Investigation Documents consist of a redacted affidavit with the accompanying bank statements and copies of cheques alleged to be part of the scheme.[20] They have also provided copies of video surveillance photos captured by their system.[21]

[24] While I note that the affidavit of the employee from Scotiabank is redacted to the point that there is no signature or name of the affiant or commissioner, I still find the accompanying documents, that being the bank account summaries and copies of cheques, to be credible and trustworthy evidence, with the few exceptions noted hereafter. The documents include on the bottom the link from which the document was printed, the account summaries include information identifying the individuals which correlates to the information provided in the Waterloo Regional Police Service reports, and the statements of account have the Scotiabank logo and contact information included therein.[22] The cheques also contain stamps indicating the date and time they were deposited and a printer ID, which further supports the credibility and reliability of these copies.[23]

[18] *Criminal Code of Canada*, R.S.C., 1985,c. C-46, at s. 467.1(1) [Criminal Code].
[19] Ibid.
[20] Exhibit M-3, "Scotiabank Investigation Documents".
[21] Exhibit M-4, "Video Surveillance Photos".
[22] Exhibit M-3, "Scotiabank Investigation Documents", at pp. 26-206; See also, Exhibit M-1, "Waterloo Regional Police Services Major Fraud Unit WA19-112656", at pp. 27-29.
[23] Exhibit M-3, "Scotiabank Investigation Documents", at pp. 26-206.

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[25] I also consider that Mr. Dhaliwal has provided copies of some of the cheques drawn from his account and his account statement which show similar characteristics as the documents provided by the Minister, and in some cases are the exact same.[24]

[26] Detective Sibley has extensive experience as a police officer as she has been employed with Waterloo Regional Police Service ("WRPS") for approximately 25 years. She also has significant experience in conducting fraud investigations as at the time of testimony she was working with the Organized Financial Crime Unit and prior to that worked with the Commercial Fraud unit, for a total of approximately five to six years.[25]

[27] Overall, I find Detective Sibley to have been a credible witness. However, I acknowledge that there appears to have been very little independent investigation conducted by the WRPS. According to the police report provided, the police were contacted by Scotiabank and advised of the cheque kiting scheme and provided copies of the relevant account documents and summaries through the Scotiabank investigation team. The only independent investigation that was conducted was identifying the citizenship and immigration status of the individuals, running an inquiry through MTO to obtain copies of their drivers' licences, and verifying through their systems whether any of the individuals were the subjects of other police reports.[26] After the decision was then made not to lay any criminal charges, the documents were passed on to CBSA to pursue inadmissibility investigations.[27]

[28] For these reasons, and given Detective Sibley's extension experience in fraud investigations, I find her evidence regarding the definition of cheque kiting, the overall scheme and the level of planning and *modus operandi* of the group to be credible and reliable. I place significant weight on this portion of her evidence in coming to my decision. With respect to any evidence provided by her regarding the description of the independent investigation that was conducted by Scotiabank, in which the WRPS was not directly involved, I place little weight and prefer the documentary evidence provided by Scotiabank.

[24] Exhibit P-1, "Updated PC Disclosure Package", at pp. 3-17.
[25] Transcript of Proceedings, dated January 31, 2024, at p. 7.
[26] Ibid., at p. 12.
[27] Exhibit M-1, "Waterloo Regional Police Services Occurrence Report", at pp. 36-41.

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Criminal Organization

[29] Based on the evidence I have found to be credible and trustworthy before me, I find there are reasonable grounds to believe a criminal organization existed. In the Scotiabank Investigation Documents, there is evidence of the involvement of more than three individuals in the depositing of cheques and distributing or receiving funds. The following individuals were identified, along with Mr. Dhaliwal, by Scotiabank as being involved in scheme through their account statements, summary of e-transfers, and copies of the deposited NSF cheques: Ajayveer Singh Bhatti ("Mr. Bhatti"), Sehaj Preet Dhillon ("Ms. Dhillon"), Bhavjeet Singh, Sehajbir Singh Walia ("Mr. Walia"), and Ashwani Singh.[28] As will be discussed in further detail, I accept Mr. Dhaliwal's evidence that Mr. Dhindsa and Mr. Khaira were involved in the scheme, as their names and emails are found throughout the disclosure both as recipients of some of the NSF cheques as well as recipients of some of the electronic money transfers ("EMTs") sent from the accounts the NSF cheques were deposited into.[29]

[30] While the organization does not appear to have a name, symbol, or formal organizational structure, I find the organization consists of individuals who committed the offences together on a well-established *modus operandi*. The evidence shows that one of the main purposes of the group was to conduct a cheque kiting scheme that resulted in a financial benefit to the persons who constituted the group. "Cheque kiting" was defined in the documentary evidence as,

> Carried out within the banking system, kiting typically involves passing a series of cheques at two or more banking institution, using accounts that have insufficient funds. Relying on the float time required for a cheque deposited at before the cheque clears, they then withdraw the funds from the second bank account and deposit the funds back into the first. The process may then be repeated in opposite order, sometimes repeatedly. The net result is a series of fraudulent withdrawals that rely on being a step ahead of the fraudulent cheque on which they are based having cleared.[30] (emphasis added)
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> …
>
> Cheque kiting consists of drawing cheques on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn. Just before the cheques are returned for payment to the first bank, the kiter covers them by depositing cheques drawn on the account in the second bank. Due to the delay created by the collection of funds by one bank

[28] Exhibit M-3, "Scotiabank Investigation Documents".
[29] Ibid., at pp. 60-61, 84, 112-114, 127-141.
[30] Exhibit M-1, "Kiting Definition", at pp. 43-44.

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> from the other, known as the "float" time, an artificial balance is created.[31]
> (emphasis added)

[31] The definition of cheque kiting and the evidence of how this scheme unfolded demonstrate that planning and organization was required for the commission of this offence to have been successful. The scheme involved several individuals coordinating the passing of cheques to each other, as well as the deposit and subsequent dispersion of the non-existent funds within a short period of time, prior to the bank catching the insufficient funds of the originating account. Detective Sibley agreed with the Minister that this type of fraud requires planning and organization and testified that, "organization and knowledge certainly go hand in hand in a fraud of this type. You need to know how the banking system works and organize the funds in such a way that it is not going to be immediately detected."[32]

[32] There was overlap between the individuals as Mr. Bhatti, Mr. Walia and Mr. Ajayveer Singh received cheques from Mr. Bhavjeet Singh, who had deposited cheques written from Mr. Dhaliwal's account.[33] There was also some evidence that Mr. Bhatti and Mr. Dhillon shared an address at the same time of the investigation, and this address had been associated at some point in time to Mr. Walia.[34]

[33] I find the activities engaged in by the parties constitute serious offences. While none of the individuals were charged with any criminal offences, the police reports indicate that the following offences would have been available to the police to charge them with based on the facts: (i) fraud over $5,000; (ii) conspiracy to commit an indictable offence; (iii) possession of proceeds of crime; (iv) possession of property obtained by crime; and (v) laundering proceeds of crime.[35] While Detective Sibley commented that she would not categorize these offences as serious, and would not have proceeded with laying a charge of "participating in a criminal organization" under the *Criminal Code*,[36] for the following reasons I am satisfied that the remaining offences are serious offences when considering the guiding principles and interpretation of s. 37(1)(*a*) under the IRPA.

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[31] Exhibit M-1, "Cheque Kiting", at p. 49.
[32] Transcript of Proceedings, dated January 31, 2024, at p. 8.
[33] Exhibit M-1, "Case Review and Recommendation of Examining Officer", at pp. 19-20.
[34] Transcript of Proceedings, dated January 31, 2024, at pp. 18-19.
[35] Exhibit M-1, "Waterloo Regional Police Services Occurrence Report", at pp. 36-41; See also, Transcript of Proceedings, dated January 31, 2024, at p. 12.
[36] Transcript of Proceedings, dated March 6, 2024, at p. 21.

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[34] I agree with counsel that both the total loss amount, and the amount of loss attributable to each individual, provided by Scotiabank are unreliable. There is insufficient evidence as to how these amounts were calculated or reached, two of the documents provide different loss totals,[37] and Detective Sibley did not have any knowledge of how the total loss was calculated by Scotiabank or whether the total number provided is accurate, except to say that she believed it was well over $5,000.[38]

[35] However, I do not find the failure of the Minister to present credible and reliable evidence as to the exact amount of loss suffered by Scotiabank impacts the strength of the Minister's case, or undermines the overall investigation, as counsel has alleged it does. The Minister is not required to prove that Mr. Dhaliwal himself caused the loss to Scotiabank for a finding under s. 37(1)(*a*) to be made. If the individual is found to be a member or engaging in a pattern of activity with the criminal organization, it is sufficient for the Minister to show that serious offences were committed by the group and, as a result, a financial or material benefit was incurred by some of the members of the group.

[36] I find the evidence establishes that Scotiabank suffered a loss of over $5,000. The copies of the cheques and statements of account for all six accounts clearly show that a loss was suffered by Scotiabank, and it was not a nominal amount.[39] As I am satisfied that the total amount is over $5,000, the offences listed above are indictable offences each subject to maximum terms of imprisonment of more than five years and are thus considered serious offences.[40]

[37] Based on the number of transactions conducted and the time period over which these offences were committed (February 9, 2019 – June 17, 2019[41]), I do not find this group was formed randomly for the immediate commission of a single offence, rather it was formed to partake in an ongoing pattern of criminal activity. As emphasized recently by the Supreme Court,[42] there appears to have

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[37] Exhibit M-1, "Money Movement Chart", at p. 34; See also, Exhibit M-1, "Case Review and Recommendation of Examining Officer", at p. 22.
[38] Transcript of Proceedings, dated February 15, 2024, at p. 26; See also, Transcript of Proceedings, dated March 6, 2024, at pp. 13,17.
[39] Exhibit M-1, "Scotiabank Will Say", at p. 42. While I question the reliability or accuracy of the exact numbers that have been provided by Scotiabank, I accept that there are reasonable grounds to believe the total amount of loss suffered by Scotiabank was over $5,000. This is based on the copies of the cheques and account statements found in Exhibit M-3, which show the amount of money that was withdrawn or transferred from the accounts in question after the NSF cheques were deposited.
[40] Criminal Code, *supra*, footnote 18, at ss. 354(1), 355, 380(1), s. 462.31, 463.
[41] Exhibit M-1, "Money Movement Chart", at pp. 30-35.
[42] *R. v. Abdullahi*, 2023 SCC 19.

been a level of "structure and continuity" to these organized offences by the same or similar group of individuals over a period of time.

[38] For the reasons stated above, I find the Minister has established there are reasonable and probable grounds to believe a criminal organization existed for the purposes of s. 37(1)(*a*) of the IRPA.

Issue III: Was Mr. Dhaliwal a member of this organization, or engaged in activity that is part of a pattern with the organization?

[39] The Minister submits there are reasonable grounds to believe that Mr. Dhaliwal was a member of the organization and was engaged in the cheque kiting scheme with the five other individuals named above. They submit that there is ample evidence that Mr. Dhaliwal issued cheques from his account which had insufficient funds, and these were distributed to other individuals as part of the scheme. They allege that Mr. Dhaliwal meets the profile of the group, and at the very least, he was wilfully blind to the organization's criminal activities. The Minister further submits that Mr. Dhaliwal's evidence that he was a victim of the scheme, not a member, was neither credible nor trustworthy and no weight should be placed on it.

[40] Mr. Dhaliwal submits that he was a victim of the scheme as his former roommates, Mr. Dhindsa and Mr. Khaira, stole his cheque book and used the cheques within it for their criminal activity. Mr. Dhaliwal submits that he provided credible and reliable testimony and evidence to support his submissions that he did not write the cheques and does not know any of the other five individuals alleged to have been involved in the scheme. He submits that the Minister's evidence is not credible or reliable as there are evidentiary gaps in the investigation conducted by the WRPS and CBSA and asks the Division to find the Minister has not met their burden to prove that he is a member of the organization or engaged in any criminal activity with the organization.

Credibility and Reliability of Mr. Dhaliwal's evidence

[41] The Minister submitted that no weight should be placed on Mr. Dhaliwal's testimony that he was not a member of the organization and did not have knowledge of the activities of the group, including the use of his cheque book.

[42] The Minister asks the Division to find Mr. Dhaliwal not to be credible or reliable for the following reasons:

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- Mr. Dhaliwal has a direct and crucial interest in the outcome of the proceedings;
- The documentary evidence contradicts Mr. Dhaliwal's statement that the bank had not asked him about the other NSF cheques during their phone call in February 2019;
- Mr. Dhaliwal's testimony regarding how many cheques he removed from his cheque book changed throughout the hearing, demonstrating that his answers and explanations "seemed to evolve and broaden, and take up life of their own as the case progressed"[43];
- Mr. Dhaliwal's statement that he did not know the other "co-accused" is contradicted by the evidence that he had written cheques to Mr. Bhavjeet Singh;
- Mr. Dhaliwal's evidence that he does not change his signature, is contradicted by the documents contained in Exhibits M-1 and M-2, which show different signatures being used by him in the past;
- Mr. Dhaliwal's evidence regarding when he noticed the missing cheque book contradicts the evidence provided by Mr. Gurm on this point;
- Mr. Dhaliwal was unable to provide any documentary evidence, such as a police report, to support his evidence that he attended at the police station;
- The testimony regarding the confrontation with Mr. Himatveer Singh and Mr. Khaira's maternal uncle was vague, unclear, and inconsistent. They submit it is concerning that despite feeling threatened, he did not take any action to report these individuals; and
- Mr. Dhaliwal's evidence that he approached Scotiabank on multiple occasions is contradicted by the evidence from Scotiabank in Exhibit M-3, and in any event even if this did happen as Mr. Dhaliwal testified, the timing indicates that he only approached the bank once his role in the group was completed.

[43] Each of the concerns raised by the Minister will be discussed further below; however, I will first address two areas of the evidence I find to be significant in concluding that Mr. Dhaliwal was a

[43] Minister's Submissions, dated April 18, 2024, at p. 35.

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credible, reliable and trustworthy witness. The first is with respect to the involvement of Mr. Khaira and Mr. Dhindsa in the scheme, and the second involves the obvious difference in handwriting in the cheques written from Mr. Dhaliwal's account that were alleged to be used in the scheme.

Involvement of Mr. Khaira and Mr. Dhindsa

[44] I find Mr. Dhaliwal's evidence that Mr. Dhindsa and Mr. Khaira were involved in the scheme is amply supported throughout the documentary evidence. While the Minister did not initially allege that Mr. Dhindsa and Mr. Khaira were involved, and no investigation was conducted by the WRPS with respect to these two individuals, the Minister submitted that Mr. Dhindsa and Mr. Khaira were in fact part of the organization.[44]

[45] Mr. Dhaliwal testified that he resided with Mr. Dhindsa and Mr. Khaira until the second week of February. This was confirmed by Mr. Gurm in his testimony. He stated that his cheque book was kept in his soft-shell luggage bag, which did not contain a lock, along with his other paperwork. The suitcase was kept in the room he was renting, which both Mr. Khaira and Mr. Dhindsa had access to until he moved out.[45]

[46] The involvement of Mr. Dhindsa and Mr. Khaira does not preclude Mr. Dhaliwal from being involved as well. However, for the following reasons, I find Mr. Dhaliwal's testimony that Mr. Khaira and Mr. Dhindsa were perpetrators of the scheme is supported by the evidence presented by the Minister. Both Mr. Khaira and Mr. Dhindsa had access to Mr. Dhaliwal's cheque book prior to him moving and received benefits from using Mr. Dhaliwal's cheque book.

[47] The NSF cheques that were drawn from Mr. Dhaliwal's account were written out to Mr. Dhindsa, Mr. Khaira, Mr. Gurkirat Singh, Ms. Simranjeet Kaur, and Mr. Bhavjeet Singh.[46] Mr. Dhaliwal testified that Simranjeet Kaur was the name of Mr. Khaira's girlfriend.[47] Both Mr. Khaira and Mr. Dhindsa were the recipients, or intended recipients, of several electronic money transfers ("EMTs") that were sent from Mr. Bhavjeet Singh.[48] Mr. Dhindsa was the recipient of numerous EMTs from Mr. Bhatti and Mr. Ashwani Singh as well.[49]

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[44] Ibid., at p. 14.
[45] Transcript of Proceedings, dated February 2, 2024, at p. 14.
[46] Exhibit M-3, "Scotiabank Investigation Documents", at pp. 96, 102-109, and 127-154.
[47] Transcript of Proceedings, dated February 1, 2024, at p. 7.
[48] Exhibit M-3, "Scotiabank Investigative Documents", at pp. 84, and 113-114. There are a number of e-transfers that were sent to pawandhindsa1345@gmail.com and jass777kha@gmail.com, however some of these were cancelled.
[49] Ibid., at p. 84.

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[48] Additionally, Mr. Dhaliwal testified that the video surveillance photographs captured by Scotiabank show Mr. Dhindsa and Mr. Khaira conducting several transactions on the accounts of the other named individuals.[50] Mr. Dhaliwal also testified that the white vehicle that is seen in the photographs in Exhibit M-4 belongs to Mr. Dhindsa.[51] This evidence was uncontested as Detective Sibley testified that no positive identification was made with respect to the individuals depicted in the surveillance photos, nor of the vehicle that was captured by the system.[52] While Detective Sibley testified that there were reports of Mr. Bhatti operating a white Camero that was registered to Ms. Dhillon, these reports were not disclosed, nor was it confirmed by the police that the vehicle in the photographs was in fact Ms. Dhillon's vehicle, not Mr. Dhindsa's.[53] Detective Sibley could not exclude the possibility that it was Mr. Khaira and Mr. Dhindsa accessing the accounts in some of the photographs.[54] Furthermore, none of the surveillance videos and photographs showing the perpetrators engaged in the fraud were alleged to depict Mr. Dhaliwal.

[49] This makes Mr. Dhaliwal's evidence that Mr. Khaira and Mr. Dhindsa were the individuals using his cheque book to carry out this scheme plausible and reasonable on the evidence before me.

Handwriting on the cheques

[50] The evidence I consider to be very significant in supporting Mr. Dhaliwal's credibility, is that on examining the copies of the cheques, it is apparent that the handwriting and signatures on the cheques differ from each other, and importantly, from Mr. Dhaliwal's handwriting.[55]

[51] Mr. Dhaliwal did not present a handwriting expert, but I do not think one is necessary in this case for the panel to arrive at the following conclusions, as the difference in the handwriting and signatures is so plainly obvious on its face, as was acknowledged by Detective Sibley. In response to counsel's question as to whether a handwriting expert was employed to match the handwriting in the various cheques written from Mr. Dhaliwal's account, Detective Sibley testified that,

> So many of the signatures that have been compared, both from the original application and MTO, when looking at the cheques are clearly different. And any

[50] Transcript of Proceedings, dated February 1, 2024, at pp. 11-13; See also, Exhibit M-3, "Scotiabank Investigation Documents", at p. 208.
[51] Transcript of Proceedings, dated February 1, 2024, at p. 13.
[52] Transcript of Proceedings, dated January 31, 2024, at pp. 21-22.
[53] Transcript of Proceedings, dated March 6, 2024, at p. 11.
[54] Ibid.
[55] For examples of Mr. Dhaliwal's handwriting, see Exhibits M-1 and M-2, specifically the immigration applications completed by him, as well as cheque #003, found at Exhibit M-3, at p. 125.

> reasonable person could see that, so I do not believe an expert would be necessary.[56]

[52] Detective Sibley agreed that it could therefore be possible that individuals other than Mr. Dhaliwal and more than one person were writing the cheques.[57]

[53] The handwriting on the cheques that were written to Mr. Bhavjeet Singh, Mr. Khaira, Mr. Dhindsa, Mr. Gurkirat Singh, and Ms. Kaur, are all written in various styles of handwriting. I note that Ms. Simranjeet Kaur's name is even spelled differently, as on cheque numbers 037 and 038, her name is spelled "Simranjit", versus cheque numbers 034, 035, 036, 039 and 041 where it is spelled "Simranjeet".[58] The fact that the two cheques it was spelled differently on fall in the middle of the other cheques in terms of numbering, supports the conclusion that these cheques were written by at least two different people who had access to Mr. Dhaliwal's cheque book at various times.

[54] I also note that the cheques were not used consecutively. For example, a cheque dated February 9, 2019, is numbered 028, while a cheque dated February 10, 2019, is numbered 004.[59]

[55] If Mr. Dhaliwal himself were in possession of his cheque book and involved in the fraud, it would stand to reason the cheques would all be written in more or less the same handwriting, and the signatures would more or less match each other and more or less match other provincial and federal government documents in which Mr. Dhaliwal's genuine signature appears. In fact, signature and handwriting matching is often a strong piece of corroborative evidence used in linking documents.

[56] In the immediate case, both the handwriting and signatures appearing on the cheques demonstrate the contrary. They evidence that the deposited cheques likely originated from multiple people, none of whose handwriting and seemingly forged signatures match that of Mr. Dhaliwal. This weighs heavily in support of Mr. Dhaliwal's version of events.

[57] Furthermore, if Mr. Dhaliwal was involved in the scheme himself, it is more likely he would have simply written and signed his own cheques himself. At a minimum, it would have behooved the group to ensure the signatures were at least a plausible or passable iteration of Mr. Dhaliwal's signature as it was in their interest for the cheques to be deposited without undue attention or

[56] Transcript of Proceedings, dated February 15, 2024, at p. 22.
[57] Ibid., at pp. 35-36.
[58] Exhibit M-3, "Scotiabank Investigation Documents", at pp. 145-155.
[59] Ibid., at pp. 127-129.

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suspicion. However, as it stands, it appears whoever signed the cheques had no knowledge of what Mr. Dhaliwal's true signature appears to be or even the name Mr. Dhaliwal uses to sign documents.

[58] Detective Sibley emphasized that Mr. Dhaliwal was in possession or control over an "intangible piece of property" and is thus presumed to be in constructive possession of his account.[60] While this is true with respect to his bank account, the cheque book itself is a tangible piece of property. The role Mr. Dhaliwal is alleged to have played by the Minister is that he, "allowed his account to have funds drawn upon."[61] This is a different *modus operandi* to the other individuals involved, as four of them were alleged to have used their accounts to deposit and disperse funds from, and one used their account to receive the fraudulent funds. Mr. Dhaliwal is the only individual for whom access to his bank account was not necessary for the offences to have been committed, the perpetrator only need have had access to Mr. Dhaliwal's physical cheque book.

Mr. Dhaliwal's vested interest in the outcome of the proceedings

[59] The Minister relied on the reasoning in the decision of *Faryna v. Chorny* to submit that Mr. Dhaliwal has a direct and crucial interest in the outcome of the admissibility hearing, and that should be taken into consideration in determining his credibility.

[60] In *Faryna v. Chorny*, the British Colombia Court of Appeal discussed that consideration should be taken of the interest a witness has in the outcome of the proceeding when assessing their overall credibility. The Court stated,

> 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 the conviction of 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 a 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.[62]

[61] Mr. Dhaliwal's self-interest in the outcome is not reason alone to discount his credibility. If this was the case, no person who is facing proceedings before the Immigration Division could be found to be credible as they all have an interest in the outcome of the proceedings. The Federal Court

[60] Transcript of Proceedings, dated February 15, 2024, at p. 22.
[61] Minister's Submissions, dated April 18, 2024, at p. 29.
[62] *Faryna v. Chorny*, [1952] D.L.R. 534.

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in the recent case of Tong discussed the application of *Faryna v. Chorny* in the context of IRB hearings, affirming that the Immigration Division ("the Division") is not authorized to undermine the credibility of a person subject to an allegation of inadmissibility *solely* because they have a "vested interest" in the outcome of the proceedings.[63] Rather, their evidence must be assessed with respect to the totality of the evidence before the Division, taking into consideration any self-interest, to determine whether it is credible and how much, if any, weight should be placed upon it. Thus, Mr. Dhaliwal's vested interest alone is not a reason to find him not credible or reliable but is one factor to consider when assessing the evidence on the record.

The phone call with Scotiabank on February 15, 2019

[62] Mr. Dhaliwal testified that around January 2019, he was residing with Mr. Dhindsa and Mr. Khaira in Brampton, Ontario. Around February 8, 2019, he attended a party with these two individuals where they got into an argument. He stated the argument was a result of him telling Mr. Dhindsa and Mr. Khaira that he was going to tell their parents that they were using illicit drugs. The next morning, they continued to argue, and Mr. Dhaliwal decided to move out of the residence he shared with them. He found a room with another friend that was available to rent and was advised by the landlord that he had to provide payment in cheque for the first and last months' rent and security deposit.[64]

[63] As Mr. Dhaliwal did not have the money for the rent at that time, he was planning to borrow the money from his friend, Mr. Gurm, whom he believed would e-transfer him $1595 he needed for the deposit.[65] Mr. Dhaliwal stated that he wished to transfer that money to his savings account to avoid that money being withdrawn for other purposes. He therefore wrote a cheque to himself from his chequing account in the amount of $1590 on February 10, 2019. He stated he accidentally deposited it into his chequing account on that same date as he was not familiar with the process of depositing cheques as he had never done so before.[66]

[64] Mr. Dhaliwal testified that he was contacted by a representative of Scotiabank on February 15, 2019, and asked about the cheque he deposited into his chequing account, which he explained was deposited into that account in error. He stated that he was not asked about any other NSF cheques that

[63] *Tong v. Canada (Public Safety and Emergency Preparedness)*, 2023 FC 625 (CanLII), at paras. 24-25.
[64] Transcript of Proceedings, dated January 31, 2024, at pp. 42-45; See also, Transcript of Proceedings, dated February 1, 2024, at pp. 42-43.
[65] Transcript of Proceedings, dated January 31, 2024, at p. 47.
[66] Ibid., at pp. 42, and 45-46.

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had been drawn against his account. This evidence is contradicted by the "Intralink Customer Notes" in Exhibit M-3, which show the bank representative did ask him this question.[67] I accept and prefer the Minister's evidence that Mr. Dhaliwal was asked about both his own cheque that was deposited into his chequing account along with the other NSF cheques that were deposited into other accounts during this phone call.[68] I accept as well that the bank employee found that Mr. Dhaliwal was not responsive to the question regarding the other cheques, and simply repeated his response with regards to his own cheque deposit being in error.[69]

[65] The Minister submits this speaks to Mr. Dhaliwal's lack of credibility in that it shows that he tailored his testimony to minimize his knowledge of the events and/or actions of the group. Although I accept the evidence of the bank, I do not find I can draw any negative credibility inference on this basis. His lack of response to the question by the bank with regards to the other NSF cheques is not evidence itself of guilt or culpability. The fact that he repeated what he had told the bank about his own cheque could support Mr. Dhaliwal's testimony that he was unaware of any other of his cheques being used and only recalls being asked about his own cheque. It could also, however, support the Minister's version that Mr. Dhaliwal was avoiding answering the bank. As it could reasonably be interpreted both ways, this point alone does not weigh heavily one way or the other.

Mr. Dhaliwal's testimony regarding the removal of cheques from his cheque book

[66] Mr. Dhaliwal initially testified that he removed two cheques, one for himself and one for the landlord, prior to leaving the cheque book with his items at the house he was residing in with Mr. Dhindsa and Mr. Khaira.[70] Later in his testimony, when asked why the cheque written to himself was numbered "003" if he only removed two cheques, he stated that the first cheque tore when removing it from the book, therefore he ripped it up and took out the following two cheques to use.[71] When asked about this discrepancy, Mr. Dhaliwal stated that he testified that, "when I took the cheques from my cheque book, I have only two (2) loose cheques. Apart from that, I do not have any other cheque."[72]

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[67] Transcript of Proceedings, dated February 1, 2024, at p. 18; See also, Exhibit M-3, "Scotiabank Investigation Documents", at p. 120.
[68] Ibid.
[69] Exhibit M-3, "Scotiabank Investigation Documents", at p. 120.
[70] Transcript of Proceedings, dated February 1, 2024, at p. 18; See also, Transcript of Proceedings, dated February 2, 2024, at p. 7.
[71] Ibid., at pp. 7-8.
[72] Ibid., at p. 9.

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[67] I agree with the Minister that Mr. Dhaliwal's evidence on this issue changed in his testimony, however I do not agree that from this sole discretion the Division can infer that Mr. Dhaliwal's "answer and explanation for events seem to evolve and broaden and take up life of their own as the case progressed".[73] Rather, the evidence must be assessed in context of the totality of the evidence to determine whether it is in harmony with the preponderance of probabilities.

Mr. Dhaliwal's association with the other individuals identified by Scotiabank

[68] The Minister submits that the cheques written to Mr. Bhavjeet Singh from Mr. Dhaliwal's account is evidence that contradicts Mr. Dhaliwal's testimony that he did not know any of the other five individuals named as part of the scheme. I find the evidence shows that Mr. Bhavjeet Singh was in receipt of cheques written from Mr. Dhaliwal's account; however, given Mr. Dhaliwal's testimony that he did not write these cheques, I cannot discredit Mr. Dhaliwal's testimony that he did not know Mr. Bhavjeet Singh by relying on cheques he testified he did not write.

[69] When examining the cheques written to Mr. Bhavjeet Singh, it is evident that the handwriting on these cheques differs greatly from Mr. Dhaliwal's handwriting as witnessed through Exhibit M-1, M-2, and from the cheque he acknowledged writing in Exhibit M-3.[74] The handwriting on all the cheques deposited by Mr. Bhavjeet Singh appears however to be consistent.[75]

[70] Additionally, I note that the cheques written to Mr. Bhavjeet Singh were dated in March 2019, and were numbered 008, 011, 013, 015, and 016.[76] On the other hand, the cheques written in February 2019, were numbered 004 through 007, 028, 031 through 039, and 041.[77] The difference in the handwriting of the cheques to Mr. Bhavjeet Singh versus those written to Mr. Dhindsa, Mr. Khaira, Mr. Gurkirat Singh, and Ms. Kaur, and the out-of-place numbering, suggests that these cheques may have been removed from the cheque book and provided to another individual to write.

[71] There is no other evidence on the record linking Mr. Dhaliwal to Mr. Bhavjeet Singh or the four other individuals noted by Scotiabank and the WRPS to have been involved in the scheme. I note Mr. Dhaliwal did not have any of the other five individuals on his e-transfer contact list, neither was he on any of theirs.[78] On the other hand, most of the other individuals do appear to have some

[73] Minister's Submissions, dated April 18, 2024, at p. 35.
[74] Exhibit M-3, "Scotiabank Investigation Documents", at p. 125.
[75] Ibid., at pp. 102-109.
[76] Ibid., at pp. 102-110.
[77] Ibid., at pp. 125-154.
[78] Ibid., at pp. 156-158.

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connection between them. Mr. Bhavjeet Singh sent multiple e-transfers to an email address with Mr. Walia's name on it[79], Mr. Bhatti sent e-transfers to Ms. Dhillon[80], and Ms. Dhillon's contact list appears to contain both Mr. Bhatti's and Mr. Walia's e-mail addresses.[81]

[72] For these reasons, I do not find these cheques provide evidence that Mr. Dhaliwal knew of, or was associated with, Mr. Bhavjeet Singh.

Use of multiple signatures by Mr. Dhaliwal

[73] Detective Sibley in testimony, and the Minister in their submissions, pointed to the copy of Mr. Dhaliwal's passport, and the signatures contained in Exhibit M-2, to show that Mr. Dhaliwal has used different signatures in his legal documents in the past.[82] I accept the Minister's submissions that Mr. Dhaliwal had used two different signatures between his passport, immigration application, and CBSA form, as this can be seen in the documents in Exhibit M-2.[83] However, when asked about this Mr. Dhaliwal provided a reasonable explanation, that while he used two different signatures, one was his name written out, the other was done in a hurry, neither signature includes his last name "Dhaliwal", which he states he never uses when signing documents.[84] His testimony that these are the two signatures he uses is supported by the document entitled, "Authority to Release Personal Information to a Designated Representative" located in Exhibit M-2, which contains both of these signatures used together.[85]

[74] There are however multiple different signatures that were used to sign the backs of the cheques in dispute. These signatures either include "Dhaliwal", or only "Harmeet", or "Harry Dhaliwal". None of the signatures contain "Singh", which is the name Mr. Dhaliwal uses in his signatures. These signatures all significantly differ from Mr. Dhaliwal's signature on the documents referred to in Exhibit M-2 and the cheque he wrote in his own name, which is more akin to the signature depicted in his passport and immigration application form.[86] The signatures on the cheques as well as the handwriting will be discussed in further detail below.

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[79] Ibid., at p. 113.
[80] Ibid., at pp. 60-61.
[81] Ibid., at p. 203.
[82] Transcript of Proceedings, dated February 15, 2024, at p. 36.
[83] See Exhibit M-2, "Change of Address Notification", at p. 2; "Copy of Passport", at p. 3; and "Documents submitted with Study Permit Application S302672550", at p. 28.
[84] Transcript of Proceedings, dated February 1, 2024, at pp. 7-8.
[85] Exhibit M-2, at p. 1.
[86] Exhibit M-3, "Scotiabank Investigation Documents", at p. 125; See also, Exhibit M-2, "Copy of Passport", at p. 3, and "Documents Submitted with Study Permit Application S302672550", at p. 28.

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Timing of discovering the missing cheque book

[75] The Minister submits that Mr. Gurm's evidence as to when Mr. Dhaliwal realized his cheque book was missing and began looking for it does not align with Mr. Dhaliwal's testimony that he discovered his cheque book was missing some time in March,[87] casting doubt on Mr. Dhaliwal's credibility. I do not find this submission is supported by the evidence. The Minister quoted Mr. Gurm's testimony where he stated, "So when he moved to our place, then he came to know that his cheque book is missing. And then, he started looking for his cheque book."[88] The Minister submits this must mean that it was only a short period of time after moving in with Mr. Gurm in mid-February that Mr. Dhaliwal began looking for his cheque book. If true, this would contradict Mr. Dhaliwal's testimony that he did not discover it missing until approximately mid-March.

[76] However, this is not a proper representation of Mr. Gurm's evidence on this point as he was asked further questions about this by both the panel and the Minister's counsel after providing the quoted response. In response to the panel's question, Mr. Gurm stated that he did not remember the date they began looking for the cheque book. However, when the Minister asked approximately how long it was in relation to when Mr. Dhaliwal moved in with him, he stated, "I think it is after almost one (1) month he started looking for the cheque book."[89] As Mr. Dhaliwal moved in with Mr. Gurm in mid-February 2019, this does in fact align with Mr. Dhaliwal's testimony.[90] Therefore, there is supporting evidence from Mr. Gurm that Mr. Dhaliwal did not discover his cheque book was missing until sometime in March.

Lack of a police report to corroborate his testimony that he attended the police station

[77] The Minister submits that Mr. Dhaliwal's evidence regarding the steps he took after discovering his missing cheque book and the usage of his account to be vague and lacking support in any documentary evidence. They rely on Detective Sibley's testimony that no police report or complaint was found in the system from him attending at the police station and submit Mr. Dhaliwal has not provided any credible evidence corroborating his testimony.[91] While Mr. Dhaliwal did not

[87] Transcript of Proceedings, dated January 31, 2024, at p. 47.
[88] Minister's Submissions, dated April 18, 2024, at p. 36; See also, Transcript of Proceedings, dated February 2, 2024, at p. 40.
[89] Ibid., at p. 41.
[90] Transcript of Proceedings, dated January 31, 2024, at p. 45.
[91] Transcript of Proceedings, dated March 6, 2024, at pp. 17-18.

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provide any corroborating evidence of his attendance at the police station, the impact of this, if any, needs to be viewed in the context of the entire situation.

[78] Mr. Dhaliwal testified that after he realized his cheque book was missing around mid-March, he attended the bank and the police station. He stated that when he went to the bank, he was told to lay a complaint with the police. However, when he attended at the police station, he stated he spoke with the receptionist who asked him whether he had lost any money, and he stated no. He testified he was told since he did not have any documents with him, they could not write a report, and he should go back to the bank and speak with them about cancelling his cheques.[92] Mr. Dhaliwal thus provided an explanation as to why he could not provide a copy of the report, being that since he had minimal information to provide the police with at that time, and had not suffered any loss, no report was written.

[79] Mr. Dhaliwal further testified that he followed the instructions of the police and went to the bank where he was provided with the copies of the cheques and his account statement. As will be discussed, Mr. Dhaliwal has provided corroborative evidence on this point.

[80] Mr. Dhaliwal stated he was told by Scotiabank when he went to speak with them on March 18, 2019, that they were conducting an investigation into this matter, that he need not take any action of his own, and they will advise if there was any amount owing by him.[93] He stated that he called them twice to follow up and they advised him both times that he did not owe them any money, and his account balance was $0.[94] Mr. Dhaliwal's testimony as to what he was advised by Scotiabank is supported by the other evidence on record.

[81] Specifically, the customer account summaries show that Mr. Dhaliwal's bank accounts were closed with the "amount due from customer" being $0.[95] Detective Sibley also stated in her testimony that the individuals were not asked to pay restitution, and it was not expected that any restitution would be made, which is one reason why criminal charges were not laid.[96]

[82] Detective Sibley testified that, "if somebody either suspects that their account has been compromised or they have been a victim of such offences as fraud, typically, you would contact your

[92] Transcript of Proceedings, dated February 1, 2024, at p. 31-32.
[93] Transcript of Proceedings, dated January 31, 2024, at p. 42; See also, Transcript of Proceedings, dated February 1, 2024, at pp. 6, 29.
[94] Ibid., at p. 5, 30.
[95] Exhibit M-3, "Scotiabank Investigation Documents", at pp. 115-117, 159.
[96] Transcript of Proceedings, dated January 31, 2024, at p. 16.

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financial institution *and/or* police. You would contact Equifax or TransUnion and just ensure that your credit has not been affected" (emphasis added).[97]

[83] Mr. Dhaliwal did contact the financial institution, as Detective Sibley testified one would expect someone to do if their account was compromised or they were a victim of such an offence. He was advised that they were investigating the matter and ultimately, he was told that he did not owe the bank any money. If Mr. Dhaliwal was under the impression that the matter was taken care of by Scotiabank and there was no liability to him, I find it reasonable that he would not reattend at the police station to file a report. I note that neither CBSA nor the WRPS ever interviewed Mr. Dhaliwal, nor was he charged with any criminal offences in relation to this matter, thus any consequence of the misuse of the cheques was not made aware to him until July 28, 2023, when the inadmissibility package was mailed to him.[98]

Evidence of the confrontation with Mr. Himatveer Singh and Mr. Khaira's maternal uncle

[84] The Minister submits that Mr. Dhaliwal's testimony regarding the threat he received from Mr. Himatveer Singh and Mr. Khaira's maternal uncle is not credible. They submit his evidence is vague and not corroborated by any credible evidence, and further, that if Mr. Dhaliwal was in fact threatened, it is not credible that he would not have reported this event either to the police or his lawyer at the time.

[85] Mr. Dhaliwal testified that once he believed it was Mr. Dhindsa and Mr. Khaira who had taken his cheque book he tried to confront them, however he was unable to get a hold of them.[99] He therefore reached out to Mr. Khaira's cousin, Mr. Himatveer Singh, to discuss the matter and they decided to meet in a Tim Hortons.[100] Mr. Gurm as well as Mr. Khaira's maternal uncle were present for this conversation along with Mr. Dhaliwal and Mr. Himatveer Singh.[101] Mr. Dhaliwal testified the uncle advised him that if there are any losses that he suffers they would repay him the money, however if he tried to go to the police and place allegations on them, that they would retaliate.[102]

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[97] Ibid., at p. 12.
[98] Exhibit M-1, Letter dated July 28, 2023, notifying Mr. Dhaliwal that a s. 44(1) report written against him had been referred to the Immigration Division.
[99] Transcript of Proceedings, dated February 2, 2024, at p. 3.
[100] Transcript of Proceedings, dated February 1, 2024, at pp. 5-6.
[101] Ibid, at p. 54. Note, neither Mr. Gurm nor Mr. Dhaliwal could provide a name for Mr. Khaira's uncle, thus he was referred to as Mr. Khaira's "maternal uncle".
[102] Ibid., at p. 6.

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[86] Mr. Dhaliwal did not report this conversation to the police, nor did he advise his lawyer who was representing him on an unrelated matter.[103] When asked why he did do so, Mr. Dhaliwal stated he was concerned as he had an outstanding criminal matter in court and was worried about getting into further trouble.[104] He additionally testified, that he did follow up with the bank however, to ensure there was no loss or liability to him, which they confirmed.[105] For these reasons, Mr. Dhaliwal chose not to pursue this matter further.

[87] There is evidence from Mr. Gurm supporting Mr. Dhaliwal's testimony regarding this meeting. The Minister submits that Mr. Gurm's testimony should be given little weight as he was able to offer very little detail regarding his overall knowledge of the events.

[88] I respectfully disagree. I find Mr. Gurm to have been a credible and reliable witness with regards to the aspects of his evidence that he was present for and witnessed firsthand. I found that he testified in a straightforward manner and freely admitted when he did not have knowledge or was not present for an event, for example whether Mr. Dhaliwal spoke with the police or the bank.[106] Overall, I did not find that he embellished any portions of his evidence even where it would have benefited Mr. Dhaliwal for him to do so.

[89] I do not find the fact that Mr. Gurm knew very little about the overall scheme to be a negative factor, rather I find it to be positive, in that it suggests that Mr. Gurm did not tailor his testimony to reduce Mr. Dhaliwal's liability as he was not aware what the overall issue was at the admissibility hearing. I find it less likely that a third party who is a non-citizen would perjure themselves before the IRB, at the risk of criminal and potential immigration liability, solely to assist a friend. It is more likely that Mr. Grum testified credibly regarding the aspects of the case of which he had firsthand knowledge. This includes, most critically, the meeting with family members of Mr. Khaira and the threats that were issued at that time.

[90] Thus, I find Mr. Dhaliwal has provided some credible evidence of this meeting and what was discussed during it.

[103] Transcript of Proceedings, dated February 2, 2024, at p. 5.
[104] Transcript of Proceedings, dated February 1, 2024, at pp. 5-6.
[105] Ibid.
[106] Transcript of Proceedings, February 2, 2024, at pp. 28, 37, 41.

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Mr. Dhaliwal's interactions with Scotiabank

[91] The Minister submits that the only documented interaction with Scotiabank is from February 15, 2019, per the "Intralink Customer Notes", thus Mr. Dhaliwal's testimony that he attended Scotiabank on other occasions is not credible or reliable.[107] However, this submission is contradicted by the evidence, as I find there is credible evidence that Mr. Dhaliwal attended at Scotiabank on March 18, 2019.

[92] Specifically, the "Intralink Customer Information" document contained within the Minister's evidence, shows that Mr. Dhaliwal's driver's license was verified by the bank on March 18, 2019.[108] Additionally, the copies of the cheques Mr. Dhaliwal provided in Exhibit P-1, show that these were printed on March 18, 2019, by Scotiabank. The copies provided by Mr. Dhaliwal appear to be obtained from the same server as the copies in the Minister's evidence, as both versions state "BNS Online Image Retrieval Services:: Requests" at the top of the page, and have similar web links listed on the bottom from which these cheques were printed.[109]

[93] I therefore find the "Intralink Customer Notes" document is not a credible recollection of *all* the interactions Mr. Dhaliwal had with Scotiabank as although there is evidence within Scotiabank's documents that he attended the bank on March 18, 2019, this interaction is not included in this document.

[94] The Minister submits that it was only after his involvement in the scheme was completed, that being after all the cheques had been deposited, that Mr. Dhaliwal attended at the bank.[110] While this is true, I note that the involvement of Mr. Dhaliwal's account was only for a period of five weeks, which is a relatively short period of time. Furthermore, I find it is less likely that someone who was actively engaged in a fraud scheme would present themselves to the bank to inquire about the fraud. It is more likely that a genuine victim would seek further information from the bank in person, than an offender would voluntarily return to the 'scene of the crime' as it were.

[95] I therefore find there is credible evidence corroborating Mr. Dhaliwal's testimony that he contacted Scotiabank on at least March 18, 2019, to address the concerns surrounding his bank

[107] Exhibit M-3, "Scotiabank Investigation Documents", at p. 120.
[108] Ibid., at p. 119.
[109] See for example, Exhibit P-1, at p. 3; See also, Exhibit M-3, "Scotiabank Investigation Documents", at p. 105.
[110] Minister's Submissions, dated April 18, 2024, at p. 36.

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account. This further supports his contention that he was in the dark regarding the use of his cheque book and attended the bank to inquire into the matter.

[96] In assessing Mr. Dhaliwal's evidence against all the credible and reliable evidence before me and taking into consideration his vested interest in the outcome of this proceeding, I find Mr. Dhaliwal to be a credible and reliable witness. Contrary to the Minister's submissions, there is credible evidence that supports the important aspects of Mr. Dhaliwal's version of events. Overall, I find his story is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" based on the entire record before me. I therefore place significant weight on Mr. Dhaliwal's evidence in coming to my decision.

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Membership in the organization

[97] In *Chiau*, the Federal Court of Appeal explained that the term "member" was not limited to a person who actively participated in criminal acts, or to one with a membership card whose name appeared on a membership list. Rather, it should be understood more broadly to mean simply a person who "belonged to" the criminal organization in question."[111] In *Poshteh*, the Court confirmed that "member" must be interpreted in a broad and unrestricted manner given the importance of public safety and national security in the underlying principles and purpose of the IRPA.[112]

[98] In *Sinnaiah*, the Court found that, "to establish 'membership' in an organization, there must at least be evidence of an 'institutional link' with, or 'knowing participation' in, the group's activities"[113] Section 37(1)(a) also encapsulates individuals who may not be found to be a "member" of the organization, but can be found to have "engaging in activity that is part of such a pattern".[114]

[99] I find the Minister has established that Mr. Dhaliwal's account was being used as part of the cheque kiting scheme. The Minister's evidence establishes that a total of 17 NSF cheques were written and deposited against Mr. Dhaliwal's bank account to various individuals between an eleven-day period from February 11, 2019 to February 22, 2019.[115] One of these NSF cheques was written by Mr. Dhaliwal to himself and was both withdrawn from, and deposited into, his chequing

[111] *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (F.C.A.), at para. 25.
[112] *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 F.C.J. No. 381 C.A. (CanLII).
[113] *Sinnaiah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576 (CanLII), at para. 6.
[114] *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122, at para. 30.
[115] Exhibit M-1, "Check Chart – 5 Individuals", at p. 34.

account.[116] Six cheques were also written from Mr. Dhaliwal's account and deposited by Mr. Bhavjeet Singh in March 2019.[117]

[100] Based on the Minister's evidence, there are reasonable grounds to believe that Mr. Dhaliwal's cheque book and bank account were being used to commit the offences listed above in conjunction with the organization. However, after assessing all the evidence I have found to be reliable and credible, I find Mr. Dhaliwal's explanations as to the misuse of his cheque book by individuals other than himself along with the evidence in support of that explanation, provide sufficient doubt to the Minister's allegations of Mr. Dhaliwal's involvement, such that they do not rise past a mere suspicion.

[101] For the reasons stated above, I accept Mr. Dhaliwal's testimony and find there is insufficient evidence before me to support reasonable grounds to believe that Mr. Dhaliwal wrote the NSF cheques to the individuals other than himself. There are significant deficiencies in the evidence presented by the Minister; most notably, this includes the fact the cheques that form the primary evidence against Mr. Dhaliwal contain various handwriting and signatures, none of which match that of Mr. Dhaliwal.

[102] The only cheque I can find reasonable grounds to believe was written by Mr. Dhaliwal is the one he testified to having written out to himself. As quoted above, cheque kiting "consists of drawing cheques on an account in one bank and depositing them in an account in a second bank when neither account has sufficient funds to cover the amounts drawn."[118] For this scheme to be successful, two different bank accounts are required. I consider that no loss would have been suffered by Scotiabank by the depositing and withdrawal of his own cheque to and from his own account, as Mr. Dhaliwal's own account would have been both debited and credited. During this time, Mr. Dhaliwal only transferred $50 to his savings account, then $20 from his savings back to his chequing account, and then withdrew that $20 from his chequing account.[119] This does not follow the pattern of the cheque kiting scheme and does not allow for any benefit to have been received by anyone.

[103] The Minister, relying on jurisprudence of the Federal Court, submits that, "even if actual knowledge is denied, it is sufficient that there be reasonable grounds to believe the person either

[116] Exhibit M-3, "Account Summary of Mr. Dhaliwal", at pp. 122-125.
[117] Exhibit M-1, "Check Chart – 5 Individuals", at p. 35.
[118] Exhibit M-1, "Kiting Definition", at pp. 43-44.
[119] Exhibit M-3, "Scotiabank Investigation Documents", at p. 122.

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knew of the criminal nature of the organization or of the criminal nature of the activities or was willfully blind to the criminal nature of the organization or activities."[120]

[104] Wilful blindness applies where the person is said to be a member of the organization, or having committed activities with the organization, but submits that they had no knowledge of the criminal activities or criminal nature of the organization. The cases cited by the Minister are significantly different on the facts to that before the panel. In *Chung*, the person concerned was a member of the Hells Angels organization, but argued, unsuccessfully, that he was not aware of the criminal nature of the organization.[121] In *Chen*, the person concerned was reported after the police raided a marijuana grow operation at the house which she was residing.[122] And finally, in *Wang*, the person concerned acknowledged having contributed to illicit activities while working for the immigration consultants who were found committing fraud.[123] She argued unsuccessfully that she was unaware of the fraudulent nature of her activities.

[105] I do not find the Minister has established on reasonable grounds to believe that there was an "institutional link" between Mr. Dhaliwal and the organization, or a "knowing participation in the group's activities", such that Mr. Dhaliwal would be found to be a member or engaging in a pattern of activity with the criminal organization. Thus, the question of whether Mr. Dhaliwal was aware of, or willfully blind to, the criminal nature of the organization is not applicable.

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[120] Minister's Final Reply, dated June 28, 2024, at p. 3.
[121] *Chung v. Canada (Citizenship and Immigration)*, 2014 FC 16 (CanLII).
[122] *Chen v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 13 (CanLII).
[123] *Wang v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 226 (CanLII).

ORDER

[106] For the reasons stated, while I find Mr. Dhaliwal is a foreign national and that a criminal organization existed, I do not find the Minister has demonstrated reasonable grounds to believe that Mr. Dhaliwal was a member of, or engaged in a pattern of activity with, the criminal organization. I therefore find Mr. Dhaliwal is not a person described in s. 37(1)(a) and issue a favourable decision.

(signed) *Maleeka Mohamed*

Maleeka Mohamed

January 3, 2025

Date

Right of Appeal – Pursuant to subsection 63(5) of the *Immigration and Refugee Protection Act*, the Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

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TAB 38

In the Court of Appeal of Alberta

Citation: Driving Force Inc v I Spy-Eagle Eyes Safety Inc, 2022 ABCA 25

Date: 20220121
Docket: 2103-0005AC
Registry: Edmonton

2022 ABCA 25 (CanLII)

Between:

The Driving Force Inc.

Appellant/Cross-Respondent

- and -

I Spy-Eagle Eyes Safety Inc. and Loretta Juneau

Respondents/Cross-Appellants

The Court:

The Honourable Justice Jack Watson
The Honourable Justice Frans Slatter
The Honourable Justice Frederica Schutz

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice N.J. Whitling
Dated the 15th day of December, 2020

(2020 ABQB 785, Docket: 1703 15571)

Memorandum of Judgment

The Court:

[1] The appellant The Driving Force obtained judgment against the corporate respondent I Spy-Eagle Eye Safety Inc. for amounts due under a number of vehicle leases: ***Driving Force Inc. v I Spy-Eagles Eyes Safety Inc.***, 2020 ABQB 785. It appeals the dismissal of its parallel claim against the individual respondent Juneau, the sole shareholder and director of I Spy. It also appeals the denial of its claim for the solicitor and client costs of the litigation.

[2] The respondents cross-appeal the findings of fact of the trial judge and his conclusions regarding the nature of the contractual arrangements between the parties.

Facts

[3] The Driving Force leased nine trucks to I Spy. It alleged that I Spy had stopped making payments on six of those trucks in August 2017 and had failed to return the trucks. It sued for the outstanding balances owed under the leases and for conversion of its trucks.

[4] The respondent Juneau is the sole shareholder and director of I Spy. She testified that she negotiated the leases on behalf of I Spy with Ms. Bergeron, a representative of The Driving Force. She testified that she had negotiated "leases to own" with Ms. Bergeron, and that after a 36-month lease term, I Spy had an option to buy the trucks for about $4,000. However, the respondents acknowledged that the lease documents signed with respect to the six disputed trucks had no such right to purchase in them. The trial judge found that the respondent Juneau was not a credible witness: reasons at para. 18. He concluded that there was no collateral agreement giving I Spy an option to purchase: reasons at paras. 38, 50.

[5] The trial judge found that I Spy was in breach of the six disputed lease agreements by failing to make the monthly payments after about August 2017, and by failing to return the trucks as required by the lease agreements. He rejected the respondents' arguments that their non-payment was justified a) by an agreement that one of the trucks was provided on a promotional basis, b) because I Spy was entitled to credit for "equity" it had built up in the trucks, or c) because The Driving Force had failed to provide adequate documentation respecting the leases: reasons at paras. 54, 60, 62. When I Spy failed to return the trucks at the end of the terms of the leases, The Driving Force continued to send monthly invoices, and the trial judge concluded that the leases had been extended on a month-to-month basis: reasons at para. 70.

[6] The trial judge concluded that I Spy was liable to The Driving Force in contract, but that it was also liable for the tort of conversion:

> [64] Driving Force also sues the Defendants for the tort of conversion.

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> [65] The tort of conversion involves a wrongful interference with the goods of another, such as taking, using, or destroying the goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability, and although the dispossession must arise as a result of the defendant's intentional act, it is no defence that the wrongful act was committed in all innocence (*Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para. 31; *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81 at para. 8). In Fleming's *The Law of Torts* (10th ed., 2011) at pp. 66-67, the following definition of conversion is found:
>
> > Conversion may be defined as an intentional exercise of control over a chattel which so seriously interferes with the right of another to control it that the intermeddler may justly be required to pay its full value.
>
> [66] In *Clow v Gershman Transport International Ltd*, 2000 ABQB 360 at para 13, Paperny J. (as she then was), adopted the following four essential features of conversion from G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed., (Toronto: Carswell, 1989) at p. 95: (1) a wrongful act; (2) involving a chattel; (3) consisting of handling, disposing or destruction of the chattel; (4) with the intention or effect of denying or negating the title of another person to such chattel.
>
> [67] I find that I Spy is liable to Driving Force in conversion. The conduct which constitutes the conversion is the same conduct which constitutes the breach of contract. By refusing to return the trucks beyond the cessation of its monthly rental payments, I Spy took and used the trucks in a manner inconsistent with Driving Force's right of possession. This exercise of control over the trucks has so seriously interfered with Driving Force's right to control the trucks that I Spy may justly be required to pay the trucks' full value. (Emphasis added)

The trial judge did not examine whether I Spy's right to have possession of the trucks under the leases constituted a defence to the claim in conversion.

[7] The trial judge concluded that the proper measure of damages in both contract and tort was the fair market value of the trucks on the date that they were not returned: reasons at paras. 70, 72. Neither party has appealed the somewhat unorthodox quantification of the damages.

[8] The Driving Force also sought judgment against the respondent Juneau, on the theory that as the sole shareholder and director of I Spy, she was equally complicit in the conversion of the trucks. The trial judge rejected this argument:

> [85] In the present case, it the requirements of the *Kosmopolous* [*v Constitution Insurance Co*, [1987] 1 SCR 2] test are not met. I Spy is not a sham corporation created to shield Ms. Juneau from personal liability. Rather, it is a company that

> carried on business providing medical services to oilfield companies. Driving Force is a sophisticated commercial actor, and all of its documentation establishes that Driving Force understood that it was dealing with a corporation and not with Ms. Juneau in her personal capacity. Ms. Juneau's conduct, while intentional, was not fraudulent or deceitful. She mistakenly believed that I Spy was not required to pay the buyout prices demanded by Driving Force, and openly asserted those mistaken views to Driving Force.

The trial judge noted that the conduct said to constitute conversion (the failure to return the trucks at the end of the lease) was governed by the contracts between the parties: reasons at para. 89. This served to distinguish those cases where directors and officers of a corporation had been held liable for the torts of the corporation.

[9] The Driving Force claimed costs on a "solicitor and his own client basis", pursuant to a covenant in the lease agreements. The trial judge declined to award enhanced costs, meaning The Driving Force was only entitled to assessed costs on a party and party basis, doubled after the date certain offers were made: reasons at paras. 98-101; ***Driving Force Inc. v I Spy-Eagles Eyes Safety Inc.***, endorsement of Jan. 28, 2020. The Driving Force appeals the award of costs.

Issues and Standards of Review

[10] 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; see also ***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.

In this case, (a) the test for the tort of conversion, and (b) the test for when a director is concurrently liable for the torts of a corporation, present questions of law that are reviewed for correctness. The trial judge's findings of fact are entitled to deference, but whether those facts disclose, for example,

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the tort of conversion is a question of law reviewed for correctness. The decisions on other issues in this appeal are only reviewable for palpable and overriding error.

[11] The appeal raises two issues:

(a) Is the respondent Juneau jointly liable with the respondent I Spy for conversion? This raises the threshold question of whether the respondent I Spy is liable for conversion.

(b) Was The Driving Force entitled to solicitor and client costs?

[12] The cross appeal argues that the trial judge erred:

(a) by finding a series of unilateral contracts renewed month by month;

(b) by not drawing an adverse inference from the Appellant's failure to call Erin Bergeron and Brian Hogg at the trial;

(c) by misapprehending or overlooking the evidence of Ms. Juneau;

(d) by not finding a collateral agreement; and

(e) in the alternative, by not finding that I Spy was induced to contract on Ms. Bergeron's misrepresentations.

It is convenient to discuss the issues on the cross appeal first, as they go directly to the nature of the arrangements between the parties, something that underlies the other issues.

Challenges to the Findings of Fact

[13] The grounds of the cross-appeal to a large extent challenge the findings of fact made by the trial judge. Those findings will only be interfered with on appeal if they disclose palpable and overriding error.

[14] The Driving Force continued to send monthly invoices after the terms of the leases ended, and I Spy paid some of them. The trial judge found that when the trucks were not returned at the end of the terms of the leases, I Spy retained possession of them on a month-to-month basis. The respondents challenge this conclusion, but when I Spy retained possession of the trucks after expiry of the leases that must have been on the basis of some express or implied agreement or understanding. The exact legal characterization of that arrangement does not affect the outcome of this appeal. Where the parties continue to perform a contract after its expiry, including a lease, it is common and within reasonable commercial expectations to infer that the parties have treated the arrangement as continuing on a month-to-month basis. There was nothing unreasonable about this conclusion of the trial judge, and no reviewable error is shown.

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[15] The respondents submitted at trial that an adverse inference should be drawn because The Driving Force failed to call two former employees as witnesses. Ms. Bergeron and Mr. Hogg were admittedly the local representatives for The Driving Force, and Juneau testified that Ms. Bergeron had agreed that the leases would include a right to purchase. Accordingly, I Spy argued that the failure to call her as a witness to rebut this evidence was significant. It is not clear if pre-trial questioning of these witnesses was undertaken or attempted by I Spy. By the time of the trial, The Driving Force could not locate Ms. Bergeron. Mr. Hogg, who had also left The Driving Force, was also not called. Whether an adverse inference should be drawn from the failure to call a witness is within the discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless it is unreasonable: ***Benhaim v St. Germain*** 2016 SCC 48 at paras. 42, 52, [2016] 2 SCR 352; ***Singh v Reddy***, 2019 BCCA 79 at paras. 17-23, 23 BCLR (6th) 22; ***Pfeifer v Westfair Foods Ltd***, 2004 ABCA 422 at para. 20, 361 AR 261. The respondents have not demonstrated any error in the trial judge's failure to draw an adverse inference, nor have they established that any adverse inference would have affected the outcome.

[16] The respondents note that the appellant did not give notice under R. 8.15 that it did not propose to call these two witnesses. The purpose of the notice would have been to allow the respondents to insist that the witnesses be called or to call the witnesses themselves. This rule, which is not mandatory, has little practical application in the case of witnesses who simply cannot be located. In any event, a failure to utilize the rule does not eliminate the trial judge's discretion over whether an adverse inference should be drawn.

[17] The respondents also argue that the trial judge "misapprehended or overlooked" the evidence of Ms. Juneau. This ground of appeal is not supported by the record. The trial judge extensively considered her evidence, but found that Ms. Juneau lacked credibility, and he therefore disregarded her evidence when it contradicted other evidence. No reviewable error has been shown.

[18] It follows that there was no reviewable error shown in the finding that there were no collateral "lease to own" agreements allowing I Spy to purchase the trucks at the end of the leases. The proof of those collateral agreements substantially depended on Ms. Juneau's evidence, which was disbelieved. Further, as the trial judge noted, the alleged collateral agreements involving a "lease to own" arrangement would have been inconsistent with the proven written agreements. No reviewable error has been shown.

[19] Finally, the cross-appeal asserts that the trial judge erred in not finding that I Spy entered into the lease agreements based on misrepresentations made by Ms. Bergeron. This allegation was not pleaded, and it was not discussed by the trial judge. Since this issue was not raised at trial, it was not an error for the trial judge not to discuss it, and on this record, it is not an issue that can be raised for the first time on appeal.

[20] In summary, the cross-appeal depends largely on challenges to the trial judge's fact findings. The findings of the trial judge regarding the arrangement between the parties do not

disclose any palpable and overriding error. No other reviewable error is shown, and the cross-appeal is dismissed.

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The Liability of the Respondent Juneau

[21] The appellant argues that the respondent Juneau should have been found jointly liable with I Spy for the conversion of its trucks. This raises the following issues:

(a) Since the relationship between the parties is primarily grounded in contract, was The Driving Force entitled to sue in tort?

(b) Was the test for conversion met?

(c) When is a director of a corporation jointly liable for a tort of conversion committed on behalf of the corporation?

These three issues overlap in determining whether the respondent Juneau is liable to the appellant The Driving Force.

Concurrent Liability in Tort and Contract

[22] It is well established that when a party breaches a contract, that party might also be liable in tort. For example, when it is a term of the contract that a party will provide goods or services in a non-negligent manner, parallel obligations may arise under the tort of negligence: see e.g. ***Adeco Exploration Company Ltd. v Hunt Oil Company of Canada, Inc.***, 2008 ABCA 214, 437 AR 33, 94 Alta LR (4th) 270.

[23] However, in such situations, it is clear that the terms of the contract take primacy. The principles were confirmed in ***BG Checo International Ltd v British Columbia Hydro and Power Authority***, [1993] 1 SCR 12 at pp. 26-27:

> In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. . . .
>
> Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering -- the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a

> general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. . . .

BG Checo was a case where there was concurrent liability in contract and for the tort of negligent misrepresentation. The present appeal does not involve the tort of negligence, the most common ground of concurrent liability in contract and tort.

[24] This appeal, rather, essentially involves a matter of debt arising from a breach of contract. The amended statement of claim makes that clear:

> 8. As of November 2017, there remains due and owing from Eagles Eyes to TDF $57,175.00 for rental of the Vehicles under the Agreement. Eagles Eyes has failed or neglected to pay this amount and remains truly and justly indebted to TDF for that amount. Monthly Rent for the Vehicles continues to accrue at a rate of $11,445.00 per month. . . .
>
> Remedy Sought:
>
> 23. Judgment against Eagles Eyes and Ms. Juneau in the amount of $57,175.00 being rental arrear owing under the Agreement to November 2017 plus accruing rental arrears at a rate of $11,445 for every month Eagle Eyes and Ms. Juneau have possession of the Vehicles past November 2017; . . .

The claim in conversion was clearly secondary to the claim under the contract.

[25] The truck leases in this case were primarily a method of financing; rather than raising the capital to purchase trucks, I Spy was simply able to rent them. In this respect, the "private ordering" of the parties should be respected. This was in substance a debt transaction, and the remedies should *prima facie* be in contract and debt. If the rental payments were not made, or the trucks were not returned, the intention of the parties was that the remedy would be for breach of contract.

[26] The foundation of the parties' relationship in contract is important. It demonstrates and confirms that I Spy was lawfully entitled to possession of the trucks at the commencement of the leases, and recovery of them by The Driving Force was a matter of contractual right. This is not a situation where the alleged tortfeasor acquired possession of property without the consent of the owner of that property. Even though the respondents had a contractual obligation to return the trucks at the end of the lease, that does not mean that their possession after that point was tortious.

[27] There is another important consequence of the relationship between the parties being founded in contract. It is the absence of a covenant or contract of guaranty or indemnity. In this case, the parties to the lease agreements were The Driving Force and I Spy. Notably, Juneau is not a party to any of the six contested leases and did not provide a personal guarantee. The corporation I Spy is treated in law as a separate person, and the expectation in commercial dealings is that

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personal liability of the shareholders and directors of the corporation is engaged by getting a written guarantee. The attempt to find I Spy collaterally liable in conversion, even though this was primarily a debtor-creditor relationship, is to support a claim against the director Juneau. This has particular importance in determining whether Juneau is entitled to rely on the separate legal personality of the corporation, an issue discussed *infra*, paras. 50-59.

[28] In summary, the theoretical ability of The Driving Force to sue in tort is tempered by the fact that this was primarily a contractual relationship. A secured lender should not be able to engage the personal liability of the directors and shareholders of a corporate borrower simply by suing for tortious conversion of the collateral rather than in contract or debt.

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The Tort of Conversion

[29] The Driving Force does not argue that Juneau could be directly liable for I Spy's breach of contract. The argument is that I Spy was not only liable for breach of contract but also for the tort of conversion, and that Juneau is jointly liable for that tort. This line of argument depends on I Spy being liable in conversion.

[30] In ***Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce***, [1996] 3 SCR 727 at para. 31, the tort of conversion was described as "a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession". ***Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)***, [2002] UKHL 19 at para. 39, [2002] 2 AC 883 stated:

> . . . Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. . . .

All the leading cases confirm that there is no universal test for the tort.

[31] One way of summarizing the test for conversion is found in ***Clow v Gershman Transport International Ltd***, 2000 ABQB 360 at para. 13, 82 Alta LR (3d) 196, 265 AR 181:

(a) a wrongful act;

(b) involving a chattel;

(c) consisting of handling, disposing or destruction of the chattel;

> (d) with the intention or effect of denying or negating the title of another person to such chattel.

Although the liability of I Spy in conversion was not directly confronted by the parties, on this record the first and fourth components of this formulation of the test are not met.

[32] It is admitted that I Spy had possession of and exercised control over the trucks. However, finding that possession and control to be a "wrongful act" depends on finding that I Spy had no right to do so. The tort of conversion cannot be made out where the alleged tortfeasor is holding or dealing with the property with the consent of the owner: ***Raza Kayani LLP v Toronto-Dominion Bank***, 2014 ONCA 862 at paras. 27-28, 378 DLR (4th) 729.

[33] The need for a wrongful act to make the conduct tortious was confirmed in ***373409 Alberta Ltd. (Receiver of) v Bank of Montreal***, 2002 SCC 81 at para. 9, [2002] 4 SCR 312:

> 9 An owner's right of possession includes the right to authorize others to deal with his or her chattel in any manner specified. As a result, dealing with another's chattel in a manner authorized by the rightful owner is consistent with the owner's right of possession, and does not qualify as wrongful interference. The principle is aptly stated in R. D. Bowers, *A Treatise on the Law of Conversion* (1917), at s. 10:
>
> > It will be noted that the deprivation must be wrongful, for without the element of wrong no tort can be committed and conversion cannot occur; and to be wrongful, it must be wholly without the owner's sanction or assent, either express or implied. So, where the owner has given to another, or permitted him to have control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property or exercises such dominion over it as is warranted by the authority thus given. Otherwise expressed, it has been said that a rightful interference with the chattels of another cannot constitute a conversion. [Footnotes omitted.]
>
> The principle is reiterated in A. Grubb, ed., The Law of Tort (2002), at para. 11.170:
>
> > No action lies in conversion or trespass to chattels for consensual interferences with goods: the nature of these torts involves *wrongful* interference with goods and an interference that is consented to cannot be wrongful. Consent may be express, as in a contract or agreement for bailment or lease, or it may be implied from the circumstances. [Emphasis in original.]

While ***Boma Manufacturing*** at para. 31 described conversion as a tort of "strict liability", that only means that it is no defence that the deliberate wrongful act constituting the conversion was

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committed in all innocence as to the consequences of the act: L. Klar and C Jefferies, Tort Law, 6th ed, (Toronto: Thomson Reuters, 2017) at p. 118, fn 404. However, without a wrongful interference with the owner's rights, there is no tort.

[34] In this case, under the leases the respondents had the consent of the owner (The Driving Force) to possess the trucks. When the leases expired, The Driving Force treated them as month-to-month leases; implicitly the respondents had continuing consent to possess the trucks on a month-to-month basis. The Driving Force acknowledged at trial that its threat to report the trucks stolen was improper, again conceding that I Spy at least had a colour of right of possession.

[35] To be sufficient to constitute the tort of conversion, any "unlawful act" must somehow deny or negate the possession of the owner, The Driving Force. Merely breaching the lease agreements is not an "unlawful act" for the purpose of the tort of conversion, as the mere failure to make the rental payments does not terminate lawful possession. In this case, the respondents have done nothing with respect to the trucks other than to be in default of their obligations to make payments under the leases. This, the trial judge found, was as a result of their misunderstanding of their rights under those leases.

[36] The failure to make lease payments, however, does not render continuing possession of the chattel unlawful for the purposes of the tort of conversion, although it may entitle the lessor to a number of remedies. Nor does the mere possession of the trucks after the expiry of the leases itself make out a sufficient "wrongful act" to constitute the tort of conversion. The failure to return the trucks at the end of the lease, and at the end of the month-to-month arrangement, was ultimately found to be a breach of contract but did not amount to a "wrongful act" for the tort of conversion. The trial reasons err in the analysis at para. 67 that "The conduct which constitutes the conversion is the same conduct which constitutes the breach of contract".

[37] The appellant emphasizes that I Spy claimed a right of ownership to the vehicles, specifically that it was entitled to an option to purchase the vehicles at the end of the leases. With respect to some vehicles, I Spy alleged that it had paid all of its obligations. However, mere assertions of rights in the chattels are not "unlawful acts" for the purposes of the law of conversion. Even I Spy's "threats" to take the vehicles to the United States and sell them were mere words, insufficient to constitute a tort without some actual interference with The Driving Force's possession. Merely asserting a claim in the chattels, even if it could be described as "wrongful", does not sufficiently interfere with the possession of the owner to constitute conversion.

[38] The trial judge found that a legitimate dispute arose between the parties as to the respondents' rights to the trucks. In the end, the parties resorted to litigation to determine the issues between them, but asserting a defence in litigation to the owner's claim is not a wrongful act denying or negating the title of the owner: ***Sprung Instant Structures Ltd v Royal Bank of Canada***, 2008 ABQB 30 at paras. 19-20, 87 Alta LR (4th) 111, 439 AR 334. Pleading claims or defences in litigation does not change the legal characterization of I Spy's possession. Other than

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resisting The Driving Force's claims, I Spy did nothing else with the trucks that negated The Driving Force's ultimately successful claim to the trucks.

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[39] This is not to say that a lessee of chattels can never be liable for conversion. That, for example, would arise if the lessee does something wholly inconsistent with the rights of the owner, as, for example, if the lessee were to purport to sell the leased chattels to a third party without a right to do so: see ***CIT Financial Ltd v 1153461 Ontario Inc***, [2004] OTC 700 at para. 61, 47 BLR (3d) 269; ***North General Wagon & Finance Co. Ltd. v Graham***, [1950] 2 KB 7 (CA); ***BMW Financial Services (GB) Ltd. v Bhagwanani***, [2007] EWCA Civ 1230. An element of deceit or dishonesty would also be sufficient. If the lessee were to assert ownership to a third party, who acted reasonably on that representation to the detriment of the true owner, that might in some circumstances amount to conversion. Likewise, once the trial judge determined that I Spy had no continuing right to possess the trucks, its claim to possession terminated, and if it thereafter exercised control over the trucks in defiance of the judgment that could possibly be seen as a conversion. As the trial judge found, there were no such acts involved in this case.

[40] The appellant particularly relies on ***CIT Financial***, but that case is distinguishable based on its unusual facts. The trucks in question were jointly leased to a numbered company and its owner, Vander Heide. The parties that were ultimately found liable in conversion were the numbered company and R&R Trucking, which had taken over the business and the leases. The conversion, however, arose from the sale of the trucks to a third party following an insolvency, not merely from the failure to make the payments under the leases: reasons at para. 61. Merely transferring possession of the trucks to R&R Trucking was not a conversion, even though it was a breach of the leases: at para. 59. The facts underlying the present appeal are far removed from ***CIT Financial.*** In any event, even though the court found there had been a conversion, liability was not imposed on D'Amico, the controlling mind of R&R Trucking, because all of the dealings were on behalf of the corporation: reasons at para. 64.

[41] Defendants have been found liable in conversion in so many and varied fact situations that, as observed in ***Kuwait Airways*** at para. 39, "framing a precise definition of universal application is well nigh impossible". Despite that, there does not appear to be another reported case where a lessee in default of the covenants in a chattel lease has been found liable in conversion, as well as for breach of the lease. The absence of such a prior case is meaningful. The appellant relies on a number of decisions which recite the basic principles of the law of conversion, but they are all distinguishable on their facts.

[42] ***Clow v Gershman Transport,*** for example, involved a wrongful seizure. Even the seizure of Clow's truck, however, was not an act of conversion:

> 19 Interference on the basis of wrongful seizure has traditionally been viewed by the common law as an act of trespass for which the defendant may be answerable in damages (*384238, supra*, at p 685). Fridman [The Law of Torts in Canada, 3rd ed., (Toronto: Carswell, 1989)], at 96, states:

> "An unlawful distraint, or other wrongful seizure of goods, that deprives the plaintiff of possession without questioning the plaintiff's rights to such goods, may be trespass; it is not conversion."
>
> Later, at the same page, he explains that the distinction between the two is that trespass involves a simple interference with the plaintiff's possession whereas conversion requires the defendant to exercise rights of ownership over the goods.

Wrongful seizures have always been found to be answerable in tort but not necessarily conversion. Not every exercise of control over property, even if it is subsequently held to be unjustified, amounts to a denial of the title of the owner.

[43] There is a group of cases where landlords have been found liable in conversion for denying the tenant access to its chattels after the termination of the lease: ***Dean v Kotsopoulos***, 2012 ONCA 143; ***1384334 Alberta Ltd (cob Buster's Pizza) v Buster's Pizza Donair & Pasta Enterprises Ltd***, 2020 ABQB 369 at paras. 88ff. These are not cases where a breach of a lease by failure to make the monthly payments has been found to result in conversion. In these cases, it is the landlord that is liable for conversion through wrongful seizure or distraint, not the lessee.

[44] There is another class of cases involving bills of exchange, such as cheques: ***373409 Alberta Ltd.***; ***Boma Manufacturing***. Bills of exchange are treated as property which can be transferred from one person to another by negotiation. Since they are negotiable instruments, there is not always a contractual relationship between the drawer, the drawee, the payee, the collecting bank, and the endorsee of the cheque. Wrongful negotiation of cheques has therefore always been dealt with by the law of conversion. By a legal fiction, the cheque (which although it is a chattel is just a piece of paper) is deemed to have the value of the face amount of the cheque, allowing the court to give a meaningful remedy for any wrongful dealing with the piece of paper: ***Boma Manufacturing*** at paras. 36-37. These cases also depend on there being a "wrongful act" in the negotiating of the cheque; without such a wrongful act, there can be no conversion. But because of their unusual nature, cases concerning bills of exchange cannot automatically be applied in a different factual context.

[45] Another unusual fact situation arose in ***Freyberg v Fletcher Challenge Oil and Gas Inc***, 2007 ABQB 353, 77 Alta LR (4th) 354 where the respondent oil company recovered natural gas from a formation under the honest but mistaken belief that it had a valid lease. The lease was ultimately found by the court to have terminated. The oil company, however, had captured a portion of the natural gas that belonged to the plaintiff: reasons at para. 101. The oil company was found to have converted the natural gas that belonged to the plaintiff, even though it had an honest belief in the validity of the lease. ***Freyberg***, however, was not a situation where the damages in conversion were the equivalent of the failure to pay monthly amounts (royalties) due under the lease. The lease had in fact terminated in accordance with its terms, not because of a breach, and no further royalties were payable.

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[46] In summary, the reasons under appeal incorrectly concluded that I Spy had converted the trucks owned by The Driving Force. As a general rule, the law of conversion should not be converted into a remedy for breaches of chattel leases, unless the lessee engages in some conduct with respect to the leased chattels that is completely inconsistent with any honest or legitimate assertion of the lessee's rights. In this case, I Spy was liable in contract, but liability in tort was not made out.

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Potential Liability of the Respondent Juneau

[47] The asserted basis for finding the individual respondent Juneau liable to The Driving Force was primarily through the tort of conversion. However, since there was no conversion by I Spy, Juneau could not be jointly liable in tort. Alternatively, The Driving Force argued that the corporate veil should be lifted to make Juneau liable.

[48] Liability in tort is primarily personal; a tort arises when the tortfeasor breaches a duty imposed on him or her by the law of tort. Corporations are considered to be separate legal persons, with their own rights and obligations; their shareholders and directors are not personally liable for the corporation's obligations. Corporations, however, can only act through human agents, and any corporate tort generally involves concurrent human actions. There is thus a conflict between these two basic principles: personal liability in tort, and the separate legal personality of corporations.

[49] This engages two separate but overlapping concepts. There are some occasions where the law will "lift the corporate veil", and find the directing minds behind the corporation responsible for the liabilities and obligations of the corporation. These situations are, however, an exception to the general rule that there is no personal liability for corporate obligations. The related concept is when the corporation and its human agents are concurrently liable in tort. When an individual is found to be concurrently liable for a tort committed in the name of a corporation, this is not truly an instance of "lifting the corporate veil". The liability of the individual is based on his or her breach of an individual duty owed in tort, not by lifting the corporate veil to impose the corporation's duty or liability on the individual. The arguments in this appeal did not always distinguish these two different concepts.

Lifting the Corporate Veil

[50] In this case the trial reasons initially treated the personal liability of Juneau as involving a lifting of the corporate veil: see *supra*, para. 8, quoting para. 85 of the reasons.

[51] The uncertainty surrounding "lifting the corporate veil" was identified in ***Kosmopoulos v Constitution Insurance Co***, [1987] 1 SCR 2 at p. 10:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.) The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company

> as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, Modern Company Law (4th ed. 1979), at p. 112. (emphasis added)

Many subsequent cases have noted that stating that the test is whether the result is "too flagrantly opposed to justice, convenience or the interests of the Revenue" cannot be a workable test. It is more in the nature of a background principle or policy objective, to be balanced against the reluctance of the courts to undermine the concept of the separate corporate legal personality.

[52] In ***Prest v Petrodel Resources Ltd.***, 2013 UKSC 34 at para. 106, [2013] 2 AC 415 Lord Walker questioned whether "piercing the corporate veil" was a doctrine at all, or only a label or metaphor applied to cases not covered by other discrete principles, representing at best ". . . a small residual category in which the metaphor operates independently [where] no clear example has yet been identified". And as noted by Lord Walker, concurrent liability in tort does not, strictly speaking, invoke this concept.

[53] A frequently cited case is ***Transamerica Life Insurance Company of Canada v Canada Life Assurance Company*** (1996), 28 OR (3d) 423, aff'd [1997] OJ No 3754 (CA). It concluded at p. 431 that ***Kosmopoulos*** did not signal a departure from the traditional rule set out in ***Salomon v Salomon & Co.***, [1897] AC 22:

> There are undoubtedly situations where justice requires that the corporate veil be lifted. The cases and authorities already cited indicate that it will be difficult to define precisely when the corporate veil is to be lifted, but that lack of a precise test does not mean that a court is free to act as it pleases on some loosely defined "just and equitable" standard. . . . (at p. 433)

Transamerica confirms at pp. 433-34 that mere control, which in this context means "complete domination", is not sufficient to lift the corporate veil. There must additionally be some element of fraud, improper purpose, or improper activity which caused the plaintiff's loss: see ***Aubin v Petrone***, 2020 ABCA 13 at paras. 23-26, 100 Alta LR (6th) 10; ***Yaiguaje v Chevron Corporation***, 2018 ONCA 472 at paras. 67, 70, 141 OR (3d) 1, leave refused April 4, 2019, SCC #38183.

[54] In the absence of a unifying test, lifting-the-veil cases tend to be decided based on their own facts and circumstances: ***XY, LLC v Zhu***, 2013 BCCA 352 at paras. 86-87, 366 DLR (4th) 443, leave refused [2014] 1 SCR xiii. For example, cases like ***Aubin v Petrone*** and ***Prest v Petrodel Resources*** are relevant in the specific context of matrimonial property disputes. They deal with the situation where the divisible matrimonial wealth is located in corporations that are controlled by one of the spouses, and they have little to offer outside that context. These decisions are often coloured by considerations of corporate oppression.

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[55] It is sometimes said that the corporate veil will be lifted where the corporation is merely a "sham", or is just the "alter ego" of its controlling shareholders. This equally imprecise test is not often helpful, unless the corporation never, from the beginning, had any legitimate business or assets of its own and was merely being used as a pretext. As noted by Lord Neuberger of Abbotsbury PSC in ***VTB Capital plc v Nutritek International Corp.***, [2013] UKSC 5 at para. 124, [2013] 2 AC 337:

> 124. . . . Words such as "façade", and other expressions found in the cases, such as "the true facts", "sham", "mask", "cloak", "device", or "puppet" may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law. . . .

In law, the corporation is a separate person, not an alter ego. In this appeal, at a factual level I Spy was not merely an alter ego, because it clearly had real business interests separate from those of its shareholder.

[56] One thing is clear. It is an error of principle to equate "control" of the corporation with the corporation merely being the alter ego of the shareholders. The Alberta *Business Corporations Act*, RSA 2000, c. B-9, permits "one person corporations" and gives them a separate legal personality just like any other corporation. It is an error to conclude that the corporation has no "real" independent existence simply because one person, being the sole shareholder and director, controls the corporation and is the ultimate beneficiary of any economic value within the corporation. ***Kosmopoulos*** at p. 11 cautioned against recognizing an "indefensible distinction" between single person corporations and other corporations.

[57] This point was made in the seminal case ***Salomon v Salomon & Co.***, where the corporation was controlled by Aron Solomon, and was incorporated expressly to carry on the business he previously carried on personally. The House of Lords disagreed that the corporation was merely an agent or alias for Aron Solomon, even though he clearly controlled it. As noted, this principle was adopted in Canada in ***Kosmopoulos***, and was recently affirmed in England in ***VTB Capital*** at paras. 118-43.

[58] One highly relevant factor in determining whether the corporate veil should be lifted is whether the plaintiff voluntarily dealt with a limited liability corporation, knowing the consequences. The Driving Force operated a nation-wide leasing service, and was undoubtedly aware of the implications of dealing with limited liability corporations, and that the way to engage the personal liability of shareholders and directors was by insisting on joint covenants or personal guarantees. In fact, Juneau was a co-lessee on some leases that are not the subject of this appeal. In those circumstances, absent unusual circumstances or fraud, The Driving Force cannot argue that respecting the corporate veil is "flagrantly opposed to justice".

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[59] In the circumstances of this case, there was no basis to lift the corporate veil. The Driving Force voluntarily contracted with I Spy, a properly incorporated entity with a separate legal personality. I Spy had its own business operations, and was entitled to, and did, incur its own obligations. Juneau was not a party to any of the six disputed leases, and did not sign a personal guarantee. These are strong indications that this is not a situation where the corporate personality was being misused, or that limiting The Driving Force's remedies to I Spy would be "flagrantly opposed to justice or convenience". There was no basis to lift the corporate veil to, in effect, make Juneau a co-covenantor on the leases: ***VTB Capital*** at para. 139.

Concurrent Liability in Tort

[60] The second basis on which Juneau might be personally liable would be as a concurrent tortfeasor with I Spy for the conversion of the leased chattels. The trial reasons at paras. 86, 89, 91 analyzed this as a type of "lifting of the corporate veil", although, as noted, it is conceptually different.

[61] The trial reasons primarily declined to find Juneau personally liable because there was no basis to "lift" or "pierce" the corporate veil. The parties' relationship was grounded in contract, and the principle of "primacy of private ordering" meant that "Driving Force may not avoid its agreements by the expedient of framing its claim in both contract and conversion": reasons at para. 91. The trial reasons concluded that since the facts founding liability in tort were the same as those founding liability in contract, there should not be concurrent liability in tort. The appellant argues that the trial judge erred, and that the principle of concurrent liability in tort should have entitled it to a judgment against Juneau for conversion.

[62] The trial reasons quoted at para. 87 from ***Shibamoto & Co. Ltd. v Western Fish Producers Inc.***, [1991] 3 FC 214 at p. 237, aff'd (1992) 145 NR 91 (CA), to the effect that:

> These cases demonstrate that when an individual chooses to convert property belonging to a third party and that property is in the possession of a company which he controls, the individual as well as the company is liable in tort . . .

There is a similar unqualified statement in ***Buster's Pizza*** at para. 94.

[63] The trial judge, however, preferred the analysis in ***CIT Financial Ltd. v 1153461 Ontario Inc.*** (2004), 47 BLR (3d) 269 (Ont SCJ). ***CIT Financial*** concluded that many of the cases relied on in ***Shibamoto*** dealt with fraudulent or sham transactions, and that "such a broad and unnuanced statement is not in accordance with the authorities." ***Shibamoto*** itself was based on a finding at p. 238 that the director was "the primary actor, not merely a secondary participant who was acting on behalf of the defendant companies".

[64] While it is recognized that corporations can only act through their human agents, and often a corporate tort will involve those human agents, concurrent liability is not always appropriate.

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There is no fixed rule that a tort by a corporation always involves a concurrent tort by one of its human agents. Further, "control" of the corporation does not necessarily mean there was personal involvement in the tort. However, to date no unifying test has been identified for determining when concurrent personal liability will be imposed for corporate torts: ***Hall v Stewart***, 2019 ABCA 98 at para. 18, 82 Alta LR (6th) 233, citing ***Hogarth v Rocky Mountain Slate Inc.***, 2013 ABCA 57 at paras. 112-3, 75 Alta LR (5th) 295, 542 AR 289; S. O'Byrne, Y. Philip, K. Fraser, *The Tortious Liability of Directors and Officers to Third Parties in Common Law Canada* (2017), 54:4 Alta L Rev 871 at pp. 871, 875; M. Khimji, C. Nicholls, *Piercing the Corporate Veil Reframed as Evasion and Concealment* (2015), 48 UBC L Rev 401 at paras. 1-3.

[65] ***Hall v Stewart*** at para. 18 extracted a number of factors that have been considered when determining if human agents should be concurrently liable for corporate torts. Omitting the citations of the supporting authorities, the identified factors are:

(a) Whether the tortious act was committed while engaged in the business of the corporation, and whether the tort of the employee was contemporaneous with that of the corporation;

(b) Whether the individual was pursuing any personal interest beyond the corporate interest;

(c) Whether the director or corporate representative owed a separate and distinct duty of care towards the injured party;

(d) That the conduct was "in the best interests of the company";

(e) Whether the plaintiff voluntarily dealt with the limited liability corporation, or had the corporate relationship "imposed" on it;

(f) The expectations of the parties, specifically whether it was reasonable for the plaintiff to think that the individuals involved would be personally responsible for any damage that resulted;

(g) Whether the tort was "independent". The cases sometimes say that the employee or individual is liable for his or her "independent" torts, implying that there are some torts which are so closely identified with corporate activity that they are not fairly categorized as "individual torts" as well;

(h) The case law clearly recognizes the rule in *Said v Butt*, [1920] 3 KB 497, respecting claims that individuals induced a breach of a corporate contract, which is not a situation of concurrent liability because the corporation is not liable in tort;

(i) The nature of the tort, and particularly whether it was an intentional tort;

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(j) Whether the damage was physical or economic.

In light of the authorities, the trial judge was correct in declining to apply a universal and categorical rule that individual human agents of corporations are invariably concurrently liable for corporate torts.

[66] Which of the identified factors will prevail in any particular case depends heavily on the factual circumstances. It would be an error to draw a straight line between "control" and personal liability. Concurrent liability is more likely to be found in cases of intentional torts, particularly those causing physical damage, and any tort involving an element of deceit or dishonesty. The identified factors should always be weighed and applied having regard to the generalized concern about the effect that individual liability can have on the viability and efficacy of corporate structures.

[67] In the present circumstances, concurrent liability would be inappropriate. To the extent that the trucks were retained in breach of the leases, it was clearly a part of the business operations of the corporation I Spy. Whatever her involvement may have been, Juneau was only acting on behalf of the corporation, and had no "independent" or personal interest beyond that. The parties' relationship was in contract, and The Driving Force knew that it was dealing with I Spy, a corporation. It had no reasonable expectation that Juneau would be personally liable for the way that I Spy dealt with the leased trucks. The alleged tort of conversion was identical to the breaches of the leases. The claimed "damages" were economic in nature and were essentially a claim in debt. In short, concurrent liability for any corporate tort would be inappropriate on this record.

Summary

[68] In summary, there is no basis on this record to lift or pierce the corporate veil. Further, to the extent that there is even a corporate tort involved, it would be inappropriate to find the director Juneau concurrently liable for the tort, even though she controlled the corporation's operations. As a result, the appellant has failed to show any reviewable error in the dismissal of its claim against Juneau.

Costs

[69] The leases provided that in the case of default The Driving Force could terminate the leases, and repossess the trucks. As an additional remedy, they provided:

> Any repossession or other action DF may take shall not prejudice DF's right to recover in full any loss or damages together with the cost of any legal proceedings to enforce the terms of this Agreement, including costs on a solicitor and his own client basis.

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The appellant argues that, based on this provision, it was entitled to solicitor and client costs of the trial.

[70] The trial judge declined to award enhanced costs because:

(a) The clause in question did not contain a covenant to pay enhanced costs. It was a "non-waiver" clause that merely said that repossession of the trucks "shall not prejudice" The Driving Force's right to recover solicitor and client costs;

(b) A representative of The Driving Force had improperly threatened to report to the police that the trucks were stolen; and

(c) No proper effort had been made by The Driving Force to edit, select and organize the documents that were placed before the Court, making the resolution of the claim significantly more difficult than necessary.

On appeal the appellant challenges this conclusion.

[71] Costs awards are highly discretionary in nature, and a trial judge's award of costs will not be overruled on appeal unless it is based on an error of principle, or it is wholly unreasonable: ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at paras. 24-7, [2004] 1 SCR 303; ***Kretschmer v Terrigno***, 2012 ABCA 345 at paras. 1, 46, 539 AR 212. The trial judge's interpretation of the covenant on costs is itself entitled to deference: ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53 at paras. 50-54, [2014] 2 SCR 633.

[72] Even if there is a binding covenant to pay solicitor and client costs, the trial judge has a discretion to depart from that covenant having regard to the way the litigation was conducted, the proportionality of the expense related to the amounts in issue, the degree of success achieved, and other relevant factors: ***3058354 Nova Scotia Co. v On*Site Equipment Ltd***., 2011 ABCA 168 at para. 101, 48 Alta LR (5th) 404, 505 AR 289; ***Canadian Natural Resources Ltd v Wood Group Mustang (Canada) Inc***, 2018 ABCA 305 at para. 107, 76 Alta LR (6th) 1.

[73] The appellant correctly points out that solicitor and client costs should not be awarded for misconduct that is unrelated to the prosecution of the action: ***Polar Ice Express Inc v Artic Glacier Inc***, 2009 ABCA 20 at para. 21, 99 Alta LR (4th) 203, 446 AR 295; ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 at paras. 5-10, 46 Alta LR (6th) 224. This case concerns the denial of solicitor and client costs for similar reasons. While there are clearly some distinctions between the two situations, costs awards should be related to the conduct of the litigation. That may include anomalous situations where the misconduct actually caused the litigation, such that without that misconduct there would have been no dispute, but that is not the situation here. Costs awards are intended to indemnify the successful party for its expenses, and serve to encourage settlement and proportionate litigation. They are not intended to be a mechanism for rewarding or

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punishing the general character, conduct, or motivations of the litigants. There are other suitable mechanisms that serve that purpose: ***Smithies Holdings Inc v RCV Holdings Ltd***, 2017 BCCA 177 at para. 134, 97 BCLR (5th) 88.

[74] While the costs award should not have been based on pre-litigation misconduct, the finding that there was no contractual right to solicitor and client costs was itself sufficient to justify the award. The trial judge's interpretation of the contract does not disclose any reviewable error. Absent a contractual provision, solicitor and client costs are exceptional. In this case the costs awarded to the appellant included enhanced costs to recognize its reasonable efforts to settle the litigation. Considered overall, the appellant has not been able to demonstrate any reviewable error in the award of costs.

[75] Of course, even if I Spy had covenanted to pay solicitor and client costs, that would not be binding on Juneau, who is not a party to any of the leases. Further, the covenant at its highest relates to "enforcing the terms of this Agreement". To the extent that The Driving Force was pursuing an independent claim in conversion, including an unsuccessful claim against the individual respondent Juneau, that would not obviously be litigation that would fall within the covenant.

[76] In summary, no reviewable error has been demonstrated in the award of costs.

Conclusion

[77] In conclusion, the appellant has failed to demonstrate any reviewable error, and the appeal is dismissed. For the reasons given, the cross-appeal is also dismissed.

Appeal heard on January 7, 2022

Memorandum filed at Edmonton, Alberta
this 21st day of January, 2022

Watson J.A.

Slatter J.A.

Schutz J.A.

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Appearances:

J.A. Delgado/ M. Harris
for the Appellant/Cross-Respondent

R.K. Omura
for the Respondents/Cross-Appellants

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TAB 39

F.H. *Appellant*

v.

Ian Hugh McDougall *Respondent*

- and -

F.H. *Appellant*

v.

The Order of the Oblates of Mary Immaculate in the Province of British Columbia *Respondent*

- and -

F.H. *Appellant*

v.

Her Majesty The Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development *Respondent*

INDEXED AS: F.H. *v.* MCDOUGALL

Neutral citation: 2008 SCC 53.

File No.: 32085.

2008: May 15; 2008: October 2.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Evidence — Standard of proof — Allegations of sexual assault in a civil case — Inconsistencies in complainant's testimony — Whether Court of Appeal erred in holding trial judge to standard of proof higher than balance of probabilities.

F.H. *Appelant*

c.

Ian Hugh McDougall *Intimé*

- et -

F.H. *Appelant*

c.

The Order of the Oblates of Mary Immaculate in the Province of British Columbia *Intimé*

- et -

F.H. *Appelant*

c.

Sa Majesté la Reine du chef du Canada, représentée par le ministre des Affaires indiennes et du Nord canadien *Intimée*

RÉPERTORIÉ : F.H. *c.* MCDOUGALL

Référence neutre : 2008 CSC 53.

N^o^ du greffe : 32085.

2008 : 15 mai; 2008 : 2 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

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

Preuve — Norme de preuve — Allégations d'agression sexuelle formulées dans une instance civile — Contradictions dans le témoignage du demandeur — La Cour d'appel a-t-elle eu tort de conclure que la juge du procès aurait dû appliquer une norme de preuve plus stricte que celle de la prépondérance des probabilités?

2008 SCC 53 (CanLII)

Evidence — Corroborative evidence — Allegations of sexual assault in a civil case — Whether victim must provide independent corroborating evidence.

Appeals — Standard of review — Applicable standard of appellate review on questions of fact and credibility.

From 1966 to 1974, H was a resident of the Sechelt Indian Residential School in British Columbia, an institution operated by the Oblates of Mary Immaculate and funded by the Canadian government. M was an Oblate Brother at the school and also the junior and intermediate boys' supervisor from 1965 to 1969. H claimed to have been sexually assaulted by M in the supervisors' washroom when he was approximately 10 years of age. These assaults were alleged to have occurred when the children were lined up and brought, one by one, into the washroom to be inspected by the supervisors for cleanliness. H told no one about the assaults until 2000, when he confided in his wife. He then commenced this action against the respondents. Despite inconsistencies in his testimony as to the frequency and gravity of the sexual assaults, the trial judge found that H was a credible witness and concluded that he had been anally raped by M on four occasions during the 1968-69 school year. In addition, she found that M had physically assaulted H by strapping him on numerous occasions. A majority of the Court of Appeal overturned the decision with respect to the sexual assaults on the grounds that the trial judge had failed to consider the serious inconsistencies in H's testimony in determining whether the alleged sexual assaults had been proven to the standard of proof that was "commensurate with the allegation", and had failed to scrutinize the evidence in the manner required.

Held: The appeal should be allowed and the trial judge's decision restored.

There is only one standard of proof in a civil case and that is proof on a balance of probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is a shifting standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard. If a trial judge expressly states the correct standard of proof, or does not express one at all, it will be presumed that the correct standard was applied unless it can be demonstrated that an incorrect standard was applied. Further, the appellate court must ensure that it does not substitute its own view of the facts with that of the trial judge in determining whether the correct standard was

Preuve — Corroboration — Allégations d'agression sexuelle formulées dans une instance civile — Le témoignage de la victime doit-il faire l'objet d'une corroboration indépendante?

Appels — Norme de contrôle — Norme de contrôle applicable en appel aux questions de fait et de crédibilité.

De 1966 à 1974, H a été pensionnaire au Pensionnat indien de Sechelt, en Colombie-Britannique, un établissement dirigé par les Oblats de Marie Immaculée et financé par l'État canadien. Frère oblat au pensionnat, M a été surveillant des garçons les plus jeunes et de ceux d'âge intermédiaire de 1965 à 1969. H a prétendu qu'à l'âge d'environ 10 ans, M l'avait agressé sexuellement dans les toilettes des surveillants. Selon son témoignage, les enfants formaient des rangs et étaient emmenés à tour de rôle dans les toilettes pour que le surveillant s'assure de leur propreté : c'est alors qu'ils étaient agressés sexuellement. H n'a révélé les agressions subies qu'en 2000, se confiant alors à son épouse. Il a ensuite intenté son action contre les intimés. Malgré les contradictions de son témoignage quant à la fréquence et à la gravité des agressions sexuelles, la juge du procès a conclu à sa crédibilité en tant que témoin et déterminé que M l'avait sodomisé quatre fois pendant l'année scolaire 1968-1969. Elle a par ailleurs conclu que M avait agressé H physiquement en le frappant avec une lanière en cuir à de nombreuses occasions. Les juges majoritaires de la Cour d'appel ont infirmé sa décision quant aux agressions sexuelles au motif qu'elle avait omis de prendre en compte les contradictions importantes du témoignage de H pour déterminer si les agressions sexuelles avaient été prouvées suivant la norme de preuve « proportionnée à l'allégation » et qu'elle n'avait pas examiné la preuve aussi attentivement qu'elle l'aurait dû.

Arrêt : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

Dans une instance civile, une seule norme de preuve s'applique, celle de la prépondérance des probabilités. Bien que la jurisprudence ait donné à penser que la norme pénale ou une norme variable s'applique lorsque, comme en l'espèce, un comportement criminel ou moralement répréhensible est allégué, au Canada, la norme de preuve civile ne comporte pas de degrés de probabilité. Lorsque le juge du procès énonce expressément la bonne norme de preuve ou qu'il ne renvoie à aucune, il est présumé avoir appliqué la bonne, sauf preuve du contraire. Aussi, lorsqu'elle détermine si la bonne norme a été appliquée, la cour d'appel doit veiller à ne pas substituer sa propre interprétation des faits à celle du juge du procès. Dans toute instance civile, le

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applied. In every civil case, a judge should be mindful of, and, depending on the circumstances, may take into account, the seriousness of the allegations or consequences or inherent improbabilities, but these considerations do not alter the standard of proof. One legal rule applies in all cases and that is that the evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Further, the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test. In serious cases such as this one, where there is little other evidence than that of the plaintiff and the defendant, and the alleged events took place long ago, the judge is required to make a decision, even though this may be difficult. Appellate courts must accept that if a responsible trial judge finds for the plaintiff, the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. In this case, the Court of Appeal erred in holding the trial judge to a higher standard of proof. This is sufficient to decide the appeal. [30] [40] [44-46] [49] [53-54]

In finding that the trial judge failed to scrutinize H's evidence in the manner required by law, in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances, the Court of Appeal also incorrectly substituted its credibility assessment for that of the trial judge. Assessing credibility is clearly in the bailiwick of the trial judge for which he or she must be accorded a heightened degree of deference. Where proof is on a balance of probabilities, there is no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge must not consider the plaintiff's evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issue in the case. It is apparent from her reasons that the trial judge recognized this obligation upon her, and while she did not deal with every inconsistency, she did address in a general way the arguments put forward by the defence. Despite significant inconsistencies in his testimony concerning the frequency and severity of the sexual assaults, and the differences between his trial evidence and answers on previous occasions, the trial judge found that H was nevertheless a credible witness. Where a trial judge demonstrates that he or she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court. Here, the Court of Appeal

juge doit avoir présentes à l'esprit — et, selon les circonstances, il peut les prendre en compte — la gravité des allégations ou de leurs conséquences, ou encore, l'improbabilité intrinsèque, mais ces considérations ne modifient pas la norme de preuve. Une seule règle de droit vaut dans tous les cas : le juge du procès doit examiner attentivement la preuve pour décider si, selon toute vraisemblance, l'événement allégué a eu lieu. En outre, la preuve doit toujours être claire et convaincante pour satisfaire au critère de la prépondérance des probabilités. Dans le cas d'une allégation grave comme celle considérée en l'espèce, lorsque la preuve consiste essentiellement dans les témoignages du demandeur et du défendeur, et que les faits allégués se sont produits longtemps auparavant, aussi difficile que puisse être sa tâche, le juge doit trancher. Lorsqu'un juge consciencieux ajoute foi à la thèse du demandeur, la cour d'appel doit tenir pour acquis que la preuve était suffisamment claire et convaincante pour qu'il conclue au respect du critère de la prépondérance des probabilités. En l'espèce, la Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte. Cette conclusion suffit pour statuer sur le présent pourvoi. [30] [40] [44-46] [49] [53-54]

En concluant que la juge du procès avait omis d'examiner le témoignage de H aussi attentivement qu'elle l'aurait dû légalement, à la lumière des contradictions du témoignage et de l'absence d'élément circonstanciel le corroborant, la Cour d'appel a également substitué à tort son appréciation de la crédibilité à celle de la juge du procès. Il incombe clairement au juge du procès d'apprécier la crédibilité d'un témoin, de sorte que sa décision à cet égard justifie une grande déférence. Lorsque la norme de preuve applicable est celle de la prépondérance des probabilités, il n'y a pas de règle quant aux circonstances dans lesquelles les contradictions relevées dans le témoignage du demandeur amèneront le juge du procès à conclure que le témoignage n'est pas crédible ou digne de foi. En première instance, le juge ne doit pas considérer le témoignage du demandeur en vase clos. Il doit plutôt examiner l'ensemble de la preuve et déterminer l'incidence des contradictions sur les questions de crédibilité touchant au cœur du litige. Il appert de ses motifs que la juge du procès a reconnu cette obligation, et bien qu'elle n'ait pas considéré chacune des contradictions, elle a examiné de façon générale les arguments de la défense. Malgré les contradictions importantes du témoignage de H sur la fréquence et la gravité des agressions sexuelles, ainsi que les divergences entre son témoignage au procès et les réponses données précédemment, la juge du procès a estimé que H était un témoin digne de foi. Lorsque le juge du procès est conscient des contradictions, mais qu'il arrive quand même à la conclusion que le témoin

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identified no such error. [52] [58-59] [70] [72-73] [75-76]

In addition, while it is helpful and strengthens the evidence of the party relying on it, as a matter of law, in cases of oath against oath, there is no requirement that a sexual assault victim must provide independent corroborating evidence. Such evidence may not be available, especially where the alleged incidents took place decades earlier. Also, incidents of sexual assault normally occur in private. Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration. In civil cases in which there is conflicting testimony, the judge must decide whether a fact occurred on a balance of probabilities, and provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result on an important issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on an important issue. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant, as in this case. Here, the Court of Appeal was correct in finding that the trial judge did not ignore M's evidence or marginalize him, but simply believed H on essential matters rather than M. [77] [80-81] [86] [96]

Finally, an unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at, but that does not make the reasons inadequate. Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been. The Court of Appeal found that the trial judge's reasons showed why she arrived at her conclusion that H had been sexually assaulted by M. Its conclusion that the trial judge's reasons were adequate should not be disturbed. [100-101]

Cases Cited

Applied: *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154; *R. v. Lifchus*, [1997] 3 S.C.R. 320;

était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel. En l'espèce, la Cour d'appel n'a pas relevé pareille erreur. [52] [58-59] [70] [72-73] [75-76]

Par ailleurs, même si la corroboration indépendante est utile et étoffe la preuve offerte, elle ne s'impose pas légalement lorsque, dans une affaire d'agression sexuelle, c'est la parole de la victime contre celle du défendeur. Il est possible qu'il ne puisse y avoir de corroboration, surtout lorsque les faits allégués se sont produits quelques décennies auparavant. Sans compter que les agressions sexuelles ont généralement lieu en privé. Exiger la corroboration rendrait la norme de preuve en matière civile plus stricte que celle appliquée en matière pénale. Dans une affaire d'agression sexuelle, la décision du juge du procès peut dépendre du fait qu'il ajoute foi au témoignage du demandeur ou à celui du défendeur, mais malgré ce dilemme, le juge doit apprécier la preuve et se prononcer sans exiger de corroboration. Au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités. S'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive, ce témoignage étant incompatible avec celui de l'autre partie. Croire une partie suppose alors explicitement ou non que l'on ne croit pas l'autre sur le point important en litige. C'est particulièrement le cas lorsque, comme en l'espèce, le demandeur formule des allégations que le défendeur nie en bloc. La Cour d'appel a eu raison de conclure que la juge du procès n'avait pas ignoré le témoignage de M ni marginalisé ce dernier, mais qu'elle avait simplement cru H plutôt que M sur des points importants. [77] [80-81] [86] [96]

Enfin, la partie qui n'a pas gain de cause peut juger insuffisants les motifs du juge du procès, surtout s'il ne l'a pas crue. Il faut reconnaître qu'il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision, mais ses motifs ne sont pas insuffisants pour autant. Les motifs ne sont pas non plus insuffisants parce que, avec le recul, on peut dire qu'ils ne sont pas aussi clairs et exhaustifs qu'ils auraient pu l'être. La Cour d'appel a conclu que les motifs de la juge du procès expliquaient les raisons pour lesquelles elle avait conclu que H avait été agressé sexuellement par M. Les motifs de la juge du procès étaient suffisants et ils ne doivent pas être modifiés. [100-101]

Jurisprudence

Arrêts appliqués : *Hanes c. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154; *R. c. Lifchus*, [1997]

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H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, 2005 SCC 25; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34; *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51; **referred to:** *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *Bater v. Bater*, [1950] 2 All E.R. 458; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. v. Burns*, [1994] 1 S.C.R. 656; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33; *R. v. R.W.B.* (1993), 24 B.C.A.C. 1; *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30; *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

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Criminal Code, R.S.C. 1985, c. C-46, s. 274.
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3 R.C.S. 320; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17; *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26; *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34; *R. c. R.E.M.*, [2008] 3 R.C.S. 3, 2008 CSC 51; **arrêts mentionnés :** *H.F. c. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325; *R. c. W. (D.)*, [1991] 1 R.C.S. 742; *Bater c. Bater*, [1950] 2 All E.R. 458; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Continental Insurance Co. c. Dalton Cartage Co.*, [1982] 1 R.C.S. 164; *Heath c. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304; *R (McCann) c. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39; *In re H. (Minors) (Sexual Abuse : Standard of Proof)*, [1996] A.C. 563; *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35; *R. c. Burns*, [1994] 1 R.C.S. 656; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33; *R. c. R.W.B.* (1993), 24 B.C.A.C. 1; *R. c. J.H.S.*, [2008] 2 R.C.S. 152, 2008 CSC 30; *Faryna c. Chorny*, [1952] 2 D.L.R. 354.

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Loi modifiant le Code criminel en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives à d'autres lois, S.C. 1980-81-82-83, ch. 125.

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Allan Donovan, *Karim Ramji* and *Niki Sharma*, for the appellant.

Bronson Toy, for the respondent Ian Hugh McDougall.

F. Mark Rowan, for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey and *Christine Mohr*, for the respondent Her Majesty the Queen in Right of Canada.

The judgment of the Court was delivered by

[1] ROTHSTEIN J. — The Supreme Court of British Columbia found in a civil action that the respondent, Ian Hugh McDougall, a supervisor at the Sechelt Indian Residential School, had sexually assaulted the appellant, F.H., while he was a student during the 1968-69 school year. A majority of the British Columbia Court of Appeal allowed the respondent's appeal in part, and reversed the decision of the trial judge. I would allow the appeal to this Court and restore the judgment of the trial judge.

I. Facts

[2] The Sechelt Indian Residential School was established in 1904 in British Columbia. It was funded by the Canadian government and operated by the Oblates of Mary Immaculate. F.H. was a resident student at the school from September 1966 to March 1967 and again from September 1968 to June 1974. Ian Hugh McDougall was an Oblate Brother until 1970 and was the junior and intermediate boys' supervisor at the school from 1965 to 1969.

[3] The school building had three stories. Dormitories for junior and senior boys were located on the top floor. A supervisors' washroom was also located on the top floor and was accessible through a washroom for the boys. The intermediate boys' dormitory was on the second floor. McDougall had a room in the corner of that dormitory.

Allan Donovan, *Karim Ramji* et *Niki Sharma*, pour l'appelant.

Bronson Toy, pour l'intimé Ian Hugh McDougall.

F. Mark Rowan, pour l'intimé The Order of the Oblates of Mary Immaculate in the Province of British Columbia.

Peter Southey et *Christine Mohr*, pour l'intimée Sa Majesté la Reine du chef du Canada.

Version française du jugement de la Cour rendu par

[1] LE JUGE ROTHSTEIN — Dans le cadre d'une poursuite au civil, la Cour suprême de la Colombie-Britannique a conclu que pendant l'année scolaire 1968-1969, l'intimé Ian Hugh McDougall, surveillant au Pensionnat indien de Sechelt, avait agressé sexuellement l'appelant, F.H., un ancien élève de l'établissement. Les juges majoritaires de la Cour d'appel de la Colombie-Britannique ont accueilli en partie l'appel de l'intimé et infirmé la décision de la juge du procès. Je suis d'avis d'accueillir le pourvoi et de rétablir le jugement de première instance.

I. Faits

[2] Le Pensionnat indien de Sechelt a vu le jour en Colombie-Britannique en 1904. Son financement était assuré par l'État canadien, et sa direction, par les Oblats de Marie Immaculée. F.H. y a séjourné de septembre 1966 à mars 1967, ainsi que de septembre 1968 à juin 1974. Frère Oblat jusqu'en 1970, Ian Hugh McDougall y a été surveillant des garçons les plus jeunes et de ceux d'âge intermédiaire de 1965 à 1969.

[3] L'établissement comptait trois étages. Les dortoirs des garçons les plus jeunes et des plus âgés étaient situés à l'étage supérieur. Les toilettes des surveillants se trouvaient également à l'étage supérieur et on pouvait y avoir accès par les toilettes des pensionnaires. Le dortoir des garçons d'âge intermédiaire était situé au deuxième étage, et la chambre de M. McDougall s'y trouvait dans un angle.

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[4] F.H. claims to have been sexually assaulted by McDougall in the supervisors' washroom when he was approximately 10 years of age. At trial, he testified that McDougall sexually abused him on four occasions. The trial judge set out his evidence of these incidents at paras. 34-38 of her reasons:

As to the first occasion, F.H. had been in the dormitory with others. The defendant asked four boys to go upstairs to the main washroom where they were to wait before going to the supervisors' washroom for an examination. F.H. was the last to go into the washroom to be examined. When he went in, he was asked to remove his pyjamas and while facing the defendant, he was checked from head to toe. His penis was fondled. The defendant then turned him around, asked him to bend over and put his finger in his anus. He removed his clothing, grabbed F.H. around the waist, pulled him onto his lap and raped him. The defendant had put the cover of the toilet down and was using it as a seat. After the defendant ejaculated, he told the plaintiff to put on his pyjamas and leave the room.

F.H. was shocked. He did not cry or scream, nor did he say anything. When he went to the main communal washroom, he could see that he was bleeding. The next morning, he noticed blood in his pyjamas. He went downstairs to the boys' washroom and changed. The bloody pyjamas were rinsed and placed in his locker.

The second incident was approximately two weeks after the first. F.H. was in the dormitory getting ready for bed when the defendant asked him to go to the supervisors' washroom so he could do an examination. There were no other boys present. F.H. was asked to remove his pyjamas and again, he was raped. He went to the communal washroom to clean himself up. In the morning, he realized that his pyjamas were bloody. As it was laundry day, he threw his pyjamas in the laundry bin with the sheets.

The third incident occurred approximately one month later. F.H. testified that once again he was asked to go to the supervisors' washroom, remove his pyjamas and turn around. Again, the defendant grabbed him by the waist and raped him. He was bleeding, but could not recall whether there was blood on his pyjamas.

The fourth incident occurred approximately one month after the third. As he was getting ready for bed, the defendant grabbed him by the shoulder and took

[4] F.H. prétend qu'à l'âge d'environ 10 ans, M. McDougall l'a agressé sexuellement dans les toilettes des surveillants. Au procès, il a dit avoir subi quatre agressions. La juge du procès relate son témoignage aux par. 34-38 de ses motifs :

[TRADUCTION] La première fois, F.H. se trouvait dans le dortoir avec d'autres garçons. Le défendeur a demandé à quatre d'entre eux de se rendre aux toilettes principales à l'étage supérieur et d'attendre avant d'aller dans les toilettes des surveillants pour un examen. F.H. a été le dernier à s'y présenter. Le défendeur lui a demandé de retirer son pyjama et, alors que F.H. était de face, il l'a examiné des pieds à la tête. Il a caressé son pénis. Le défendeur l'a ensuite retourné, lui a demandé de se pencher et a inséré son doigt dans son anus. Le défendeur a enlevé ses vêtements, a empoigné F.H. par la taille, l'a mis sur ses genoux et l'a violé. Il avait rabattu le couvercle de la toilette, sur lequel il s'était assis. Après avoir éjaculé, il a dit au demandeur de remettre son pyjama et de quitter la pièce.

F.H. était sous le choc. Il n'a ni pleuré ni crié; il est demeuré silencieux. Lorsqu'il s'est rendu aux toilettes communes principales, il a constaté qu'il saignait. Le lendemain matin, il a remarqué la présence de sang dans son pyjama. Il est descendu aux toilettes des garçons et il s'est changé. Il a rincé son pyjama et l'a rangé dans son casier.

La deuxième agression s'est produite environ deux semaines plus tard. F.H. se trouvait dans le dortoir et se préparait à aller au lit lorsque le défendeur lui a dit de se rendre aux toilettes des surveillants pour un examen. Aucun autre garçon n'était présent. Il a demandé à F.H. d'enlever son pyjama, puis il l'a encore une fois violé. F.H. s'est rendu aux toilettes communes pour se laver. Le lendemain matin, il a constaté que son pyjama était taché de sang. Comme c'était jour de lessive, il a déposé son pyjama dans le panier à linge avec les draps.

La troisième agression a eu lieu environ un mois plus tard. Dans son témoignage, F.H. a dit qu'on lui avait une fois de plus demandé d'aller dans les toilettes des surveillants, d'enlever son pyjama et de se retourner. Encore une fois, le défendeur l'avait empoigné par la taille et l'avait violé. Il avait saigné, mais il ne se souvient pas s'il y avait des taches de sang sur son pyjama.

La quatrième agression est survenue environ un mois après la troisième. Alors que F.H. se préparait à aller au lit, le défendeur l'a saisi par les épaules et l'a emmené à

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him upstairs to the supervisors' washroom. Another rape occurred.

([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

[5] F.H. did not tell anyone about the assaults until approximately the year 2000. He and his wife were having marital difficulties. She had learned of his extra-marital affair. He testified that because of the problems in his marriage he felt he had to tell his wife about his childhood experience. At his wife's recommendation, he sought counselling.

[6] F.H. commenced his action against the respondents on December 7, 2000, approximately 31 years after the alleged sexual assaults. In British Columbia there is no limitation period applicable to a cause of action based on sexual assault and the action may be brought at any time (see *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(4)(l)).

II. Judgments Below

A. *British Columbia Supreme Court*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

[7] F.H.'s action was joined with the action of R.C., another former resident of the school who made similar claims against the same parties. The parties agreed to have a trial on the following discrete issues of fact:

(1) Was either plaintiff physically or sexually abused while he attended the school?

(2) If the plaintiff was abused

(a) by whom was he abused?

(b) when did the abuse occur? and

(c) what are the particulars of the abuse?

[8] The trial judge, Gill J., began her reasons by noting that the answer to the questions agreed to by the parties depended on findings as to credibility and reliability. Few issues of law were raised. She referred to *H.F. v. Canada (Attorney General)*, [2002] B.C.J. No. 436 (QL), 2002 BCSC 325, in

l'étage supérieur dans les toilettes des surveillants. Un autre viol a été commis.

([2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518)

[5] F.H. n'a révélé les agressions subies que vers l'année 2000. Il vivait à ce moment des difficultés conjugales après que son épouse eut appris son infidélité. Il a témoigné qu'il avait alors ressenti le besoin de confier ce qu'il avait vécu enfant. Sur les conseils de son épouse, il a consulté une thérapeute.

[6] F.H. a intenté son action contre les intimés le 7 décembre 2000, soit environ 31 ans après les agressions sexuelles alléguées. En Colombie-Britannique, aucun délai de prescription ne s'applique à la poursuite pour agression sexuelle, et celle-ci peut être intentée à tout moment (voir la *Limitation Act*, R.S.B.C. 1996, ch. 266, al. 3(4)(l)).

II. Les décisions des juridictions inférieures

A. *Cour suprême de la Colombie-Britannique*, [2005] B.C.J. No. 2358 (QL), 2005 BCSC 1518

[7] L'action de F.H. et celle de R.C., un autre ancien pensionnaire ayant formulé des allégations apparentées contre les mêmes parties, ont été réunies. Les parties ont convenu que l'instruction porterait sur les questions de fait suivantes :

[TRADUCTION]

(1) L'un ou l'autre des demandeurs a-t-il été agressé physiquement ou sexuellement alors qu'il était pensionnaire?

(2) Dans l'affirmative,

a) qui l'a agressé,

b) à quel moment et

c) dans quelles circonstances?

[8] Après avoir présidé le procès, la juge Gill a d'abord fait remarquer dans ses motifs que la réponse à ces questions dépendait de la crédibilité attribuée aux témoignages. Peu de questions de droit étaient en cause. Elle a cité la décision *H.F. c. Canada (Attorney General)*, [2002] B.C.J.

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which the court stated that in cases involving serious allegations and grave consequences, the civil standard of proof that is "commensurate with the occasion" applied (para. 4).

[9] The trial judge then went on to review the testimony of each plaintiff, McDougall and others who worked at the school or were former students. McDougall denied the allegations of sexual abuse and testified that he could not recall ever strapping F.H. He also denied ever conducting physical examinations of the boys and gave evidence that boys were not taken into the supervisors' washroom.

[10] In determining whether F.H. was sexually assaulted, the trial judge dealt with the arguments of the defence that F.H.'s evidence was neither reliable nor credible. Gill J. rejected the defence's position that F.H.'s inability to respond to certain questions should lead to an adverse conclusion regarding the reliability of his evidence. She found F.H.'s testimony credible while acknowledging that the commission of the assaults in the manner described by F.H. would have carried with it a risk of detection. Gill J. also rejected the contention of defence counsel that F.H.'s motive to lie must weigh heavily against his credibility. Rather she agreed with counsel for F.H. that the circumstances surrounding his disclosure were not suggestive of concoction.

[11] The trial judge pointed out areas of consistency and inconsistency between F.H.'s testimony and that of the other students at the school. She also noted that there were significant discrepancies in the evidence given by F.H. as to the frequency of the abuse. At trial, F.H. said there were four incidents. On previous occasions, he said the abuse occurred every two weeks or ten days. Despite these inconsistencies, the trial judge concluded F.H. was a credible witness and stated that his evidence about "the nature of the assaults, the location and the times they occurred" had been consistent (para. 112). She concluded that F.H. had been sexually abused by McDougall, the sexual assaults

No. 436 (QL), 2002 BCSC 325, établissant que dans un cas d'allégations graves aux conséquences sérieuses, il y avait lieu d'appliquer la norme de preuve civile qui est [TRADUCTION] « proportionnée aux circonstances » (par. 4).

[9] La juge du procès a ensuite considéré le témoignage de chacun des demandeurs, celui de M. McDougall et ceux d'autres personnes ayant travaillé au pensionnat ou y ayant séjourné. M. McDougall a nié les allégations d'agression sexuelle et dit ne pas se rappeler avoir même frappé F.H. une seule fois avec une lanière en cuir. Il a aussi nié avoir jamais procédé à des examens corporels et il a déclaré que les garçons n'étaient pas emmenés dans les toilettes des surveillants.

[10] Pour déterminer si F.H. avait été agressé sexuellement, la juge Gill a soupesé la prétention de la défense selon laquelle le témoignage de F.H. n'était ni fiable ni crédible. Elle a rejeté la thèse voulant que le tribunal doive conclure à la non-fiabilité du témoignage de F.H. en raison de l'incapacité de ce dernier de répondre à certaines questions. Elle a tenu le témoignage de F.H. pour digne de foi tout en reconnaissant que la perpétration des agressions de la manière décrite par F.H. était susceptible de détection. Elle a par ailleurs rejeté la prétention de la défense selon laquelle l'intérêt de F.H. à mentir minait grandement sa crédibilité. Elle a plutôt convenu avec le demandeur que les circonstances de la révélation des agressions ne suggéraient pas la fabrication.

[11] La juge a relevé les éléments de concordance et de divergence entre les témoignages de F.H. et ceux des autres pensionnaires. Elle a aussi noté des contradictions importantes dans le témoignage de F.H. sur la fréquence des agressions. Au procès, F.H. avait fait état de quatre agressions, alors qu'il avait dit auparavant qu'elles avaient eu lieu toutes les deux semaines ou tous les dix jours. La juge a néanmoins conclu à sa crédibilité en tant que témoin et à la constance de son témoignage concernant [TRADUCTION] « la nature des agressions ainsi que le lieu et les moments où elles se sont produites » (par. 112). À son avis, il y avait eu agressions sexuelles, M. McDougall ayant sodomisé F.H.

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being four incidents of anal intercourse committed during the 1968-69 school year.

[12] In relation to the issue of physical abuse, the trial judge limited herself to deciding whether the plaintiffs had proved that they were strapped while at school. To answer this question, the trial judge reviewed the evidence of McDougall and the testimony of another Brother employed at the school as well as the testimony of several of F.H.'s fellow students. She concluded that strapping was a common form of discipline and that it was not used only in response to serious infractions. She concluded that F.H. was strapped by McDougall an undetermined number of times while at the school.

[13] With respect to the claims made by R.C., the trial judge found that he had not proven that he had been sexually assaulted, but found that he had been strapped by a person other than McDougall.

B. *British Columbia Court of Appeal* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

[14] The decision of the Court of Appeal was delivered by Rowles J.A., with Southin J.A. concurring. Ryan J.A. dissented.

(1) Reasons of Rowles J.A.

[15] Rowles J.A. concluded that McDougall's appeal from that part of the order finding that he had sexually assaulted F.H. should be allowed; however his appeal from that part of the order finding that he had strapped F.H. should be dismissed.

[16] Rowles J.A. found that it was obvious that the trial judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made, i.e. proof that is "commensurate with the occasion". However, in her view, the trial judge was bound to consider the serious inconsistencies in the evidence of F.H. in determining whether the alleged sexual assaults had been proven to the standard "commensurate with the allegation". She found that the trial judge did

à quatre reprises pendant l'année scolaire 1968-1969.

[12] Pour ce qui est des sévices physiques, la juge du procès s'est seulement demandé si les demandeurs avaient prouvé les coups infligés avec une lanière en cuir pendant leur séjour au pensionnat. Elle a considéré le témoignage de M. McDougall, celui d'un autre frère employé au pensionnat, ainsi que ceux d'autres anciens pensionnaires. Elle a conclu qu'il s'agissait d'un châtiment courant au pensionnat, qu'il n'était pas réservé aux auteurs de manquements graves et que M. McDougall l'avait infligé à F.H. un nombre indéterminé de fois.

[13] En ce qui concerne R.C., la juge du procès a conclu qu'il n'avait pas prouvé les agressions sexuelles alléguées et qu'une autre personne que M. McDougall l'avait frappé avec une lanière en cuir.

B. *Cour d'appel de la Colombie-Britannique* (2007), 68 B.C.L.R. (4th) 203, 2007 BCCA 212

[14] La décision de la Cour d'appel a été rendue par la juge Rowles, avec l'appui de la juge Southin, la juge Ryan inscrivant sa dissidence.

(1) Motifs de la juge Rowles

[15] La juge Rowles a conclu qu'il y avait lieu d'accueillir l'appel interjeté par M. McDougall quant à la conclusion qu'il avait agressé sexuellement F.H., mais non quant à celle qu'il l'avait frappé avec une lanière en cuir.

[16] Selon elle, la juge du procès connaissait manifestement la jurisprudence sur la norme de preuve applicable dans une affaire d'allégations d'actes moralement répréhensibles, à savoir une norme « proportionnée aux circonstances ». Toutefois, à son avis, elle aurait dû prendre en compte les contradictions importantes du témoignage de F.H. pour déterminer si les agressions sexuelles alléguées avaient été prouvées suivant la norme de preuve « proportionnée à l'allégation ». Elle a conclu que la juge du procès n'avait pas examiné la

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not scrutinize the evidence in the manner required and thereby erred in law.

[17] In allowing the appeal in respect of the sexual assaults alleged by F.H., Rowles J.A. was of the opinion that in view of the state of the evidence on that issue, no practical purpose would be served by ordering a new trial.

(2) Concurring Reasons of Southin J.A.

[18] In her concurring reasons, Southin J.A. discussed the "troubling aspect" of the case — "how, in a civil case, is the evidence to be evaluated when it is oath against oath, and what is the relationship of the evaluation of the evidence to the burden of proof?" (para. 84).

[19] Southin J.A. held that it was of central importance that the gravity of the allegations be forefront in the trier of fact's approach to the evidence. It was not enough, in her view, to choose the testimony of the plaintiff over that of the defendant. Instead, "[t]o choose one over the other . . . requires . . . an articulated reason founded in evidence other than that of the plaintiff" (para. 106). Moreover, Southin J.A. found that Cory J.'s rejection in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, of the "either/or" approach to evaluating evidence of the Crown and the accused as to the conduct of the accused in criminal cases also applied to civil cases.

[20] In the end, she could not find in the trial judge's reasons a "legally acceptable articulated reason for accepting the plaintiff's evidence and rejecting the defendants' evidence" (para. 112).

(3) Dissenting Reasons of Ryan J.A.

[21] While sharing the concerns of the majority about "the perils of assigning liability in cases where the events have occurred so long ago", Ryan J.A. disagreed with the conclusion that the trial judge did not apply the proper standard of proof to her assessment of the evidence (para. 115).

preuve aussi attentivement qu'elle l'aurait dû, d'où l'erreur de droit.

[17] En accueillant l'appel quant aux agressions sexuelles alléguées, la juge Rowles a estimé qu'il n'était pas utile d'ordonner la tenue d'un nouveau procès étant donné la teneur de la preuve offerte à cet égard.

(2) Motifs concordants de la juge Southin

[18] Dans ses motifs concordants, la juge Southin se penche sur l'[TRADUCTION] « aspect préoccupant » de l'affaire : « dans une instance civile, comment doit-on apprécier la preuve constituée de témoignages opposés et quelle relation doit s'établir entre l'appréciation de la preuve et le fardeau de la preuve? » (par. 84).

[19] Selon la juge Southin, il importait au plus haut point que le juge appelé à apprécier la preuve demeure conscient de la gravité des allégations. Il ne suffisait pas de préférer le témoignage du demandeur à celui du défendeur, car [TRADUCTION] « préférer [ce] témoignage à [l']autre [. . .] exige [. . .] qu'un motif convaincant fondé sur un autre élément de preuve que le témoignage du demandeur le justifie » (par. 106). De plus, elle a statué que dans l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742, la conclusion du juge Cory selon laquelle il n'y avait pas d'obligation de choisir entre la preuve de la poursuite et celle de l'accusé s'appliquait également en matière civile.

[20] Finalement, elle n'a pas relevé dans les motifs de la juge du procès [TRADUCTION] « de motif convaincant et valable en droit d'ajouter foi au témoignage du demandeur et d'écarter ceux des défendeurs » (par. 112).

(3) Motifs dissidents de la juge Ryan

[21] Même si elle partage les préoccupations des juges majoritaires concernant [TRADUCTION] « le risque d'imputer une responsabilité pour des faits survenus il y a aussi longtemps », la juge Ryan se refuse à conclure que la juge du procès n'a pas appliqué la bonne norme de preuve (par. 115).

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[22] Ryan J.A. noted that the trial judge set out the test — a standard of proof commensurate with the occasion — early in her reasons. "Having set out the proper test, we must assume that she properly applied it, unless her reasons demonstrate otherwise" (para. 116).

[23] In the view of Ryan J.A., alleging that the trial judge misapplied the standard of proof to her assessment of the evidence was to say that the trial judge erred in her findings of fact. To overturn the trial judge's findings of fact, the appellate court must find that the trial judge made a manifest error, ignored conclusive or relevant evidence or drew unreasonable conclusions from it.

[24] Ryan J.A. was of the view that the trial judge had made no such error. The trial judge had acknowledged the most troubling aspect of F.H.'s testimony — that it was not consistent with earlier descriptions of the abuse — and decided that at its core, the testimony was consistent and truthful. The inconsistencies were not overlooked by the trial judge.

[25] Having found no error in the reasons for judgment, Ryan J.A. was of the view that the Court of Appeal should have deferred to the conclusions of the trial judge. Accordingly, she would have dismissed the appeal.

III. Analysis

A. *The Standard of Proof*

(1) Canadian Jurisprudence

[26] Much has been written as judges have attempted to reconcile the tension between the civil standard of proof on a balance of probabilities and cases in which allegations made against a defendant are particularly grave. Such cases include allegations of fraud, professional misconduct, and criminal conduct, particularly sexual assault against minors. As explained by L. R. Rothstein, R. A. Centa and E. Adams, in "Balancing Probabilities: The Overlooked Complexity of the Civil Standard

[22] Elle signale qu'au début de ses motifs, la juge du procès énonce le critère applicable, celui de la norme de preuve proportionnée aux circonstances : [TRADUCTION] « une fois le bon critère établi, il faut supposer qu'elle l'a correctement appliqué, à moins que ses motifs n'indiquent le contraire » (par. 116).

[23] Selon elle, prétendre que la juge du procès a mal appliqué la norme aux faits mis en preuve revient à dire qu'elle a tiré des conclusions de fait erronées. Or, pour infirmer des conclusions de fait, une cour d'appel doit constater qu'une erreur manifeste a été commise, qu'un élément de preuve déterminant ou pertinent n'a pas été pris en compte ou que des conclusions déraisonnables ont été tirées de la preuve.

[24] La juge Ryan estime que la juge du procès n'a pas commis de telles erreurs. Cette dernière a reconnu l'aspect le plus préoccupant du témoignage de F.H. — sa divergence avec les descriptions antérieures des agressions — et elle a conclu que, pour l'essentiel, le témoignage était constant et digne de foi. Elle n'a donc pas fait abstraction des contradictions.

[25] À défaut d'erreur entachant les motifs de la décision contestée, la juge Ryan a conclu que la Cour d'appel aurait dû respecter les conclusions de la juge du procès. Elle était donc d'avis de rejeter l'appel.

III. Analyse

A. *La norme de preuve*

(1) La jurisprudence canadienne

[26] Les efforts des tribunaux pour résoudre les difficultés que pose l'application de la norme de preuve civile de la prépondérance des probabilités dans une affaire où les faits reprochés au défendeur sont particulièrement graves — comme la fraude, la faute professionnelle ou le comportement criminel, en particulier l'agression sexuelle d'un mineur — ont suscité de nombreux commentaires. Comme l'expliquent L. R. Rothstein, R. A. Centa et E. Adams dans leur article intitulé « Balancing

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of Proof" in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 455, at p. 456:

These types of allegations are considered unique because they carry a moral stigma that will continue to have an impact on the individual after the completion of the case.

[27] Courts in British Columbia have tended to follow the approach of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.). Lord Denning was of the view that within the civil standard of proof on a balance of probabilities "there may be degrees of probability within that standard" (p. 459), depending upon the subject matter. He stated:

It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. [p. 459]

[28] In the present case the trial judge referred to *H.F. v. Canada (Attorney General)*, at para. 154, in which Neilson J. stated:

The court is justified in imposing a higher degree of probability which is "commensurate with the occasion": . . . .

[29] In the constitutional context, Dickson C.J. adopted the *Bater* approach in *R. v. Oakes*, [1986] 1 S.C.R. 103. In his view a "very high degree of probability" required that the evidence be cogent and persuasive and make clear the consequences of the decision one way or the other. He wrote at p. 138:

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit.

Probabilities : The Overlooked Complexity of the Civil Standard of Proof », dans *Special Lectures of the Law Society of Upper Canada 2003 : The Law of Evidence* (2004), 455, p. 456 :

[TRADUCTION] Les allégations de cette nature sont jugées uniques parce qu'elles continuent de frapper l'intéressé d'un opprobre moral même après le dénouement de l'instance.

[27] Les tribunaux de la Colombie-Britannique se sont généralement rangés à l'avis exprimé par lord Denning dans l'arrêt *Bater c. Bater*, [1950] 2 All E.R. 458 (C.A.), à savoir que la norme civile de la prépondérance des probabilités [TRADUCTION] « peut comporter des degrés de probabilité » (p. 459), selon l'objet du litige. Voici ce qu'il a dit :

[TRADUCTION] [Une cour civile] n'adopte pas une norme aussi sévère que le ferait une cour criminelle, même en examinant une accusation de nature criminelle, mais il reste qu'elle exige un degré de probabilité proportionné aux circonstances. [p. 459]

[28] En l'espèce, la juge du procès a cité les propos suivants de la juge Neilson dans la décision *H.F. c. Canada (Attorney General)*, par. 154 :

[TRADUCTION] La cour est justifiée d'exiger un degré de probabilité plus élevé qui soit « proportionné aux circonstances » : . . .

[29] Dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, portant sur une question d'ordre constitutionnel, le juge en chef Dickson s'est rallié à l'approche formulée dans l'arrêt *Bater*. À son avis, un « degré très élevé de probabilité » exigeait que la preuve soit forte et persuasive et qu'elle fasse ressortir nettement les conséquences de la décision quelle qu'elle soit (p. 138) :

Compte tenu du fait que l'article premier est invoqué afin de justifier une violation des droits et libertés constitutionnels que la *Charte* vise à protéger, un degré très élevé de probabilité sera, pour reprendre l'expression de lord Denning, « proportionné aux circonstances ». Lorsqu'une preuve est nécessaire pour établir les éléments constitutifs d'une analyse en vertu de l'article premier, ce qui est généralement le cas, elle doit être forte et persuasive et faire ressortir nettement à la cour les conséquences d'une décision d'imposer ou de ne pas imposer la restriction.

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[30] However, a "shifting standard" of probability has not been universally accepted. In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, Laskin C.J. rejected a "shifting standard". Rather, to take account of the seriousness of the allegation, he was of the view that a trial judge should scrutinize the evidence with "greater care". At pp. 169-71 he stated:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. . . .
>
> . . . There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. . . .
>
> I do not regard such an approach (the *Bater* approach) as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

[31] In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see *Heath v. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (Ont. Ct. (Gen. Div.)), at para. 53).

(2) Recent United Kingdom Jurisprudence

[32] In the United Kingdom some decisions have indicated that depending upon the seriousness of the matters involved, even in civil cases, the criminal standard of proof should apply. In *R (McCann) v. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, Lord Steyn said at para. 37:

> . . . I agree that, given the seriousness of matters involved, at least some reference to the heightened civil

[30] Une « norme variable » de probabilité n'a toutefois pas fait l'unanimité. Dans l'arrêt *Continental Insurance Co. c. Dalton Cartage Co.*, [1982] 1 R.C.S. 164, le juge en chef Laskin l'a en effet écartée. À son avis, pour tenir compte de la gravité de l'allégation, le juge du procès devait plutôt examiner la preuve « plus attentivement » (p. 169-171) :

> Chaque fois qu'il y a une allégation de conduite moralement blâmable ou qui peut revêtir un aspect criminel ou pénal et que l'allégation se présente dans le cadre d'un litige civil, le fardeau de la preuve qui s'applique est toujours celui de la preuve suivant la prépondérance des probabilités. . .
>
> . . . L'appréciation des éléments de preuve se rapportant au fardeau de la preuve implique nécessairement une question de jugement, et un juge de première instance est fondé à examiner la preuve plus attentivement si la preuve offerte doit établir des allégations sérieuses. . .
>
> Je n'estime pas que ce point de vue [celui de l'arrêt *Bater*] s'écarte du principe d'une norme de preuve fondée sur la prépondérance des probabilités ni qu'il appuie une norme variable. La question dans toutes les affaires civiles est de savoir quelle preuve il faut apporter et quel poids lui accorder pour que la cour conclue qu'on a fait la preuve suivant la prépondérance des probabilités.

[31] Suivant les décisions ontariennes rendues en matière de discipline professionnelle, la norme de la prépondérance des probabilités exige que la preuve soit [TRADUCTION] « claire et persuasive et qu'elle se fonde sur des éléments solides » (voir *Heath c. College of Physicians & Surgeons (Ontario)* (1997), 6 Admin. L.R. (3d) 304 (C. Ont. (Div. gén.)), par. 53).

(2) La jurisprudence britannique récente

[32] Au Royaume-Uni, il appert de certaines décisions que, selon la gravité des questions en jeu, la norme de preuve pénale s'applique même dans une affaire civile. Dans l'arrêt *R (McCann) c. Crown Court at Manchester*, [2003] 1 A.C. 787, [2002] UKHL 39, lord Steyn s'exprime comme suit au par. 37 :

> [TRADUCTION] . . . je conviens qu'en raison de la gravité des questions en jeu, il serait normalement nécessaire

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standard would usually be necessary: *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586 D-H, per Lord Nicholls of Birkenhead. For essentially practical reasons, the Recorder of Manchester decided to apply the criminal standard. The Court of Appeal said that would usually be the right course to adopt. Lord Bingham of Cornhill has observed that the heightened civil standard and the criminal standard are virtually indistinguishable. I do not disagree with any of these views. But in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard.

[33] Yet another consideration, that of "inherent probability or improbability of an event" was discussed by Lord Nicholls in *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 586:

. . . the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

[34] Most recently in *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, a June 11, 2008 decision, the U.K. House of Lords again canvassed the issue of standard of proof. Subsequent to the hearing of the appeal, Mr. Southey, counsel for the Attorney General of Canada, with no objection from other counsel, brought this case to the attention of the Court.

[35] Lord Hoffmann addressed the "confusion" in the United Kingdom courts over this issue. He stated at para. 5:

Some confusion has however been caused by dicta which suggest that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. The cases in which such statements have been made fall into three categories. First, there are cases in which the court has for one purpose classified the proceedings as civil (for example, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) but nevertheless thought that, because of the serious consequences of the

de faire appel, dans une certaine mesure, à la norme de preuve civile plus stricte : *In re H (Minors) (Sexual Abuse : Standard of Proof)* [1996] AC 563, 586 D-H, lord Nicholls of Birkenhead. Essentiellement pour des raisons d'ordre pratique, le recorder de Manchester a décidé d'appliquer la norme pénale. La Cour d'appel a indiqué que ce choix est opportun dans la plupart des cas. Lord Bingham of Cornhill a fait remarquer que la norme civile plus stricte est presque identique à la norme appliquée au pénal. Je ne rejette aucun de ces points de vue. Mais à mon avis, le pragmatisme commande de faciliter la tâche des tribunaux en leur enjoignant d'appliquer la norme pénale dans toute affaire relative à l'article premier.

[33] Dans l'arrêt *In re H. (Minors) (Sexual Abuse : Standard of Proof)*, [1996] A.C. 563 (H.L.), lord Nicholls aborde un autre aspect, celui de [TRADUCTION] « la probabilité ou [de] l'improbabilité intrinsèque d'un événement » (p. 586) :

[TRADUCTION] . . . la probabilité ou l'improbabilité intrinsèque d'un événement est un élément à prendre en compte pour soupeser les probabilités et décider si, tout bien considéré, l'événement a eu lieu. Plus l'événement est improbable, plus la preuve offerte doit être forte pour l'établir suivant la prépondérance des probabilités.

[34] Plus récemment, dans l'arrêt *In re B (Children)*, [2008] 3 W.L.R. 1, [2008] UKHL 35, rendu le 11 juin 2008, la Chambre des lords s'est de nouveau penchée sur la question de la norme de preuve. Après l'audition du présent pourvoi, l'avocat du procureur général du Canada, Me Southey, a porté cet arrêt à l'attention de notre Cour sans que les avocats des autres parties ne s'y opposent.

[35] Lord Hoffmann y fait état de la « confusion » qui règne au sein des tribunaux britanniques sur le sujet (par. 5) :

[TRADUCTION] Une certaine confusion a toutefois été créée par des décisions donnant à penser que la norme de preuve peut varier selon la gravité de la faute alléguée, voire celle des conséquences pour l'intéressé. Ces décisions appartiennent à trois catégories. Dans la première, le tribunal qualifie l'affaire de civile à une fin donnée (p. ex., pour l'application de l'article 6 de la Convention européenne des droits de l'homme et des libertés fondamentales), mais il estime néanmoins, vu la gravité des conséquences de l'instance, que la norme de preuve pénale ou l'équivalent devrait s'appliquer. Dans

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proceedings, the criminal standard of proof or something like it should be applied. Secondly, there are cases in which it has been observed that when some event is inherently improbable, strong evidence may be needed to persuade a tribunal that it more probably happened than not. Thirdly, there are cases in which judges are simply confused about whether they are talking about the standard of proof or about the role of inherent probabilities in deciding whether the burden of proving a fact to a given standard has been discharged.

[36] The unanimous conclusion of the House of Lords was that there is only one civil standard of proof. At para. 13, Lord Hoffmann states:

I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

However, Lord Hoffmann did not disapprove of application of the criminal standard depending upon the issue involved. Following his very clear statement that there is only one civil standard of proof, he somewhat enigmatically wrote, still in para. 13:

I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case, at p. 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

[37] Lord Hoffmann went on to express the view that taking account of inherent probabilities was not a rule of law. At para. 15 he stated:

I wish to lay some stress upon the words I have italicised ["to whatever extent is appropriate in the particular case"]. Lord Nicholls [*In re H*] was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

[38] *In re B* is a child case under the United Kingdom *Children Act 1989*. While her comments on standard of proof are confined to the 1989 Act, Baroness Hale explained that neither the seriousness of the allegation nor the seriousness of the

la deuxième catégorie, le tribunal opine que lorsqu'un événement est intrinsèquement improbable, de solides éléments de preuve peuvent être nécessaires pour le convaincre qu'il est plus probable que l'événement se soit produit que le contraire. Dans la troisième catégorie, le juge confond simplement la norme de preuve et le rôle de la probabilité intrinsèque pour décider si une partie s'est acquittée ou non du fardeau de la preuve au regard de la norme applicable.

[36] La Chambre des lords a conclu à l'unanimité à l'existence d'une seule norme de preuve en matière civile. Lord Hoffmann dit au par. 13 :

[TRADUCTION] Je pense que le temps est venu d'affirmer une fois pour toutes qu'il n'y a en matière civile qu'une seule norme de preuve : il doit être plus probable que le fait allégué s'est produit que le contraire.

Or, lord Hoffmann n'a pas désapprouvé l'application de la norme pénale selon la question en jeu. Après avoir très clairement énoncé qu'une seule norme de preuve s'appliquait en matière civile, il poursuit au par. 13 en tenant des propos plutôt énigmatiques :

[TRADUCTION] Je n'entends pas désapprouver l'une ou l'autre des décisions comprises dans la première catégorie, mais je conviens avec lord Steyn dans *McCann's*, p. 812 que ce serait beaucoup plus clair si les tribunaux disaient simplement que, même s'il s'agit d'une instance civile, vu la nature de la question en jeu, il est indiqué d'appliquer la norme pénale.

[37] Lord Hoffmann ajoute que la prise en compte de la probabilité intrinsèque ne constitue pas une règle de droit (par. 15) :

[TRADUCTION] J'insiste sur les mots que j'ai mis en italiques [« dans la mesure où cela est indiqué dans les circonstances »]. Lord Nicholls [dans *In re H*] n'a pas énoncé une règle de droit. Il n'existe qu'une seule règle de droit : il faut prouver qu'il est plus probable que le fait a eu lieu que le contraire. Le sens commun — et non le droit — exige, pour trancher à cet égard, qu'on tienne compte, dans la mesure où cela est indiqué, de la probabilité intrinsèque.

[38] L'arrêt *In re B* a été rendu sous le régime de la *Children Act 1989* du Royaume-Uni. Bien que ses observations sur la norme de preuve applicable ne valent que pour cette loi, la baronne Hale explique que ni la gravité de l'allégation ni celle

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consequences should make any difference to the standard of proof to be applied in determining the facts. At paras. 70-72, she stated:

My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section I of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.

As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable.

(3) Summary of Various Approaches

[39] I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

(1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;

(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;

(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

des conséquences possibles ne devraient modifier la norme de preuve appliquée pour établir les faits. Voici ce qu'elle dit aux par. 70-72 :

[TRADUCTION] Vos seigneuries, pour cette raison, j'irais plus loin et je clamerais haut et fort que la norme de preuve applicable pour établir les faits nécessaires au respect du critère du par. 31(2) ou à l'application des considérations liées au bien-être de l'article premier de la loi de 1989 est simplement la prépondérance des probabilités, ni plus ni moins. Ni la gravité de l'allégation, ni celle des conséquences ne devraient modifier la norme de preuve appliquée pour établir les faits. La probabilité intrinsèque ne doit être prise en compte, s'il y a lieu, que pour découvrir la vérité.

Pour ce qui est des conséquences, elles sont toujours sérieuses quelle que soit l'issue de l'instance. L'enfant peut voir sa relation avec sa famille sérieusement compromise ou s'exposer encore à un préjudice important. À l'inverse, le père ou la mère peut voir sa relation avec l'enfant sérieusement compromise ou avoir encore la possibilité de maltraiter cet enfant ou un autre.

Pour ce qui est de la gravité de l'allégation, il n'y a pas de lien logique ou nécessaire entre gravité et probabilité. Le comportement gravement préjudiciable — comme le meurtre — est suffisamment rare pour être la plupart du temps intrinsèquement improbable. Malgré cela, lorsque, par exemple, on découvre un corps à la gorge tranchée, mais aucune arme à proximité, le meurtre est loin d'être improbable. D'autres comportements gravement préjudiciables, comme l'alcoolisme ou la toxicomanie, sont malheureusement trop répandus et loin d'être improbables.

(3) Résumé des différentes approches

[39] Voici en résumé quelles sont selon moi les différentes approches possibles dans une affaire civile où un comportement criminel ou moralement répréhensible est allégué :

(1) La norme de preuve pénale s'applique selon la gravité de l'allégation.

(2) Une norme de preuve intermédiaire se situant entre la civile et la pénale, proportionnée aux circonstances, s'applique.

(3) Lorsque l'allégation est grave, la norme de preuve n'est pas plus stricte, mais la preuve doit faire l'objet d'un examen plus attentif.

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(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and

(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

(4) The Approach Canadian Courts Should Now Adopt

[40] 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. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

[41] Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27:

First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt

(4) La norme de preuve n'est pas plus stricte, mais la preuve doit être claire et convaincante.

(5) La norme de preuve n'est pas plus stricte, mais plus l'événement est improbable, plus la preuve doit être solide pour satisfaire au critère de la prépondérance des probabilités.

(4) L'approche qui devrait désormais être celle des cours de justice canadiennes

[40] Comme l'a fait la Chambre des lords, notre Cour devrait selon moi affirmer une fois pour toutes qu'il n'existe au Canada, en common law, qu'une seule norme de preuve en matière civile, celle de la prépondérance des probabilités. Le contexte constitue évidemment un élément important et le juge ne doit pas faire abstraction, lorsque les circonstances s'y prêtent, de la probabilité ou de l'improbabilité intrinsèque des faits allégués non plus que de la gravité des allégations ou de leurs conséquences. Toutefois, ces considérations ne modifient en rien la norme de preuve. À mon humble avis, pour les motifs qui suivent, il faut écarter les approches énumérées précédemment.

[41] L'arrêt *Hanes c. Wawanesa Mutual Insurance Co.*, [1963] R.C.S. 154, p. 158-164, a clairement établi que la norme pénale ne s'applique pas en matière civile au Canada. La preuve hors de tout doute raisonnable exigée en matière criminelle est liée à la présomption d'innocence dont bénéficie l'accusé dans un procès pénal. Le fardeau de la preuve incombe toujours à la poursuite. Comme l'a expliqué le juge Cory dans l'arrêt *R. c. Lifchus*, [1997] 3 R.C.S. 320, par. 27 :

Premièrement, il faut indiquer clairement au jury que la norme de la preuve hors de tout doute raisonnable a une importance vitale puisqu'elle est inextricablement liée au principe fondamental de tous les procès pénaux : la présomption d'innocence. Ces deux concepts sont pour toujours intimement liés l'un à l'autre, comme Roméo et Juliette ou Oberon et Titania, et ils doivent être présentés comme formant un tout. Si la présomption d'innocence est le fil d'or de la justice pénale, alors la preuve hors de tout doute raisonnable en est le fil d'argent, et ces deux fils sont pour toujours entrelacés pour former la trame du droit pénal. Il faut

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that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[42] By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:

Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

[43] An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466-67:

As well, suggesting that the standard of proof is "higher" than the "mere balance of probabilities" inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of "51 percent probability," or "more likely than not" can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.

[44] Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other

rappeler aux jurés que le fardeau de prouver hors de tout doute raisonnable que l'accusé a commis le crime incombe à la poursuite tout au long du procès, et qu'il ne se déplace jamais sur les épaules de l'accusé.

[42] À l'opposé, dans une affaire civile, nulle présomption d'innocence ne s'applique. L'explication en est donnée dans J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 154 :

[TRADUCTION] Comme il importe peu à la société que le demandeur ou le défendeur ait gain de cause dans une instance civile, il n'y a pas lieu de prévenir un jugement erroné en appliquant une norme de preuve plus stricte que celle de la prépondérance des probabilités.

Il est vrai qu'une conclusion de responsabilité tirée dans une affaire civile peut avoir des conséquences sérieuses qui continuent de se faire sentir après l'instance. Mais il demeure qu'une affaire civile ne fait pas intervenir le pouvoir de l'État de punir une personne ou de la priver de sa liberté.

[43] Le recours à une norme de preuve intermédiaire présente des difficultés d'ordre pratique. Comme le disent Rothstein, Centa et Adams (p. 466-467) :

[TRADUCTION] De même, laisser entendre que la norme de preuve applicable est « plus stricte » que la « simple prépondérance des probabilités » soulève nécessairement la question du pourcentage de probabilité à établir? Ce qui n'est d'aucune utilité, car le décideur pourra se représenter une probabilité de « 51 p. 100 » ou une « probabilité plus grande », mais non une probabilité de 60 p. 100 ou de 70 p. 100.

[44] Autrement dit, il semblerait incongru qu'un juge conclue qu'il est probable, mais pas assez probable suivant une norme non précisée, qu'un événement ait eu lieu et, par conséquent, que cet événement ne s'est pas produit. Comme l'explique lord Hoffmann dans l'arrêt *In re B*, par. 2 :

[TRADUCTION] Lorsqu'une règle de droit exige la preuve d'un fait (le « fait en litige »), le juge ou le jury doit déterminer si le fait s'est ou non produit. Il ne saurait conclure qu'il a pu se produire. Le droit est un système binaire, les seules valeurs possibles étant zéro et un. Ou bien le fait s'est produit, ou bien il ne s'est pas produit. Lorsqu'un doute subsiste, la règle selon laquelle

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carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, 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.

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, 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.

[47] Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B*, at para. 72:

Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is

le fardeau de la preuve incombe à l'une ou l'autre des parties permet de trancher. Lorsque la partie à laquelle incombe la preuve ne s'acquitte pas de son obligation, la valeur est de zéro et le fait est réputé ne pas avoir eu lieu. Lorsqu'elle s'en acquitte, la valeur est de un, et le fait est réputé s'être produit.

À mon avis, la seule façon possible d'arriver à une conclusion de fait dans une instance civile consiste à déterminer si, selon toute vraisemblance, l'événement a eu lieu.

[45] Laisser entendre que lorsqu'une allégation formulée dans une affaire civile est grave, la preuve offerte doit être examinée plus attentivement suppose que l'examen peut être moins rigoureux dans le cas d'une allégation moins grave. Je crois qu'il est erroné de dire que notre régime juridique admet différents degrés d'examen de la preuve selon la gravité de l'affaire. Il n'existe qu'une seule règle de droit : le juge du procès doit examiner la preuve attentivement.

[46] De même, la preuve doit toujours être claire et convaincante pour satisfaire au critère de la prépondérance des probabilités. Mais, je le répète, aucune norme objective ne permet de déterminer qu'elle l'est suffisamment. Dans le cas d'une allégation grave comme celle considérée en l'espèce, le juge peut être appelé à apprécier la preuve de faits qui se seraient produits de nombreuses années auparavant, une preuve constituée essentiellement des témoignages du demandeur et du défendeur. Aussi difficile que puisse être sa tâche, le juge doit trancher. Lorsqu'un juge consciencieux ajoute foi à la thèse du demandeur, il faut tenir pour acquis que la preuve était à ses yeux suffisamment claire et convaincante pour conclure au respect du critère de la prépondérance des probabilités.

[47] Enfin, il peut arriver que le fait soit intrinsèquement improbable. L'improbabilité intrinsèque dépend toujours des circonstances. Comme le dit la baronne Hale dans l'arrêt *In re B*, par. 72 :

[TRADUCTION] Prenons l'exemple bien connu de l'animal aperçu dans Regent's Park. S'il est vu à l'extérieur du zoo, dans un lieu où l'on promène habituellement son chien, alors il est plus vraisemblable qu'il s'agisse d'un

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seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

[48] Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:

Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

(5) Conclusion on Standard of Proof

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof 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.

[50] I turn now to the issues particular to this case.

B. *The Concerns of the Court of Appeal Respecting Inconsistency in the Evidence of F.H.*

[51] The level of scrutiny required in cases of sexual assault was central to the analysis of the Court of Appeal. According to Rowles J.A. at para. 72, one of the issues was "whether the trial judge, in light of the standard of proof that had to be applied in a case such as this, failed to consider

chien que d'un lion. S'il est vu à l'intérieur du zoo, près de l'enclos des lions, dont la porte est ouverte, il se peut fort bien qu'il soit plus vraisemblable qu'il s'agisse d'un lion que d'un chien.

[48] Un fait allégué peut être très improbable, un autre moins. Il ne saurait y avoir de règle permettant de déterminer dans quelles circonstances et jusqu'à quel point le juge du procès doit tenir compte de l'improbabilité intrinsèque. Dans l'arrêt *In re B*, lord Hoffmann fait remarquer ce qui suit (par. 15) :

[TRADUCTION] Le sens commun — et non le droit — exige, pour trancher à cet égard, qu'on tienne compte, dans la mesure où cela est indiqué, de la probabilité intrinsèque.

Il revient au juge du procès de décider dans quelle mesure, le cas échéant, les circonstances donnent à penser que le fait allégué est intrinsèquement improbable et, s'il l'estime indiqué, il peut en tenir compte pour déterminer si la preuve établit que, selon toute vraisemblance, l'événement s'est produit. Or, aucune règle de droit ne saurait le lui imposer.

(5) Conclusion sur la norme de preuve

[49] En conséquence, je suis d'avis de confirmer que dans une instance civile, une seule norme de preuve s'applique, celle de la prépondérance des probabilités. Dans toute affaire civile, le juge du procès doit examiner la preuve pertinente attentivement pour déterminer si, selon toute vraisemblance, le fait allégué a eu lieu.

[50] Je passe maintenant aux questions particulières que soulève le présent pourvoi.

B. *Les préoccupations de la Cour d'appel concernant les contradictions relevées dans le témoignage de F.H.*

[51] La rigueur de l'examen qui s'impose dans une affaire d'agression sexuelle est au cœur de l'analyse de la Cour d'appel. Selon la juge Rowles, celle-ci devait notamment déterminer [TRADUCTION] « si la juge du procès, compte tenu de la norme de preuve applicable dans une affaire de cette nature,

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the problems or troublesome aspects of [F.H.]'s evidence". The "troublesome aspects" of F.H.'s evidence related to, amongst others, inconsistencies as to the frequency of the alleged sexual assaults as between F.H.'s evidence on discovery and at trial, as well as to an inconsistency between the original statement of claim alleging attempted anal intercourse and the evidence given at trial of actual penetration.

[52] In the absence of support from the surrounding circumstances, when considering the evidence of F.H. on its own, the majority of the Court of Appeal concluded that the trial judge had failed to consider whether the facts had been proven "to the standard commensurate with the allegation" and had failed to "scrutinize the evidence in the manner required and thereby erred in law" (para. 79).

[53] As I have explained, there is only one civil standard of proof — proof on a balance of probabilities. Although understandable in view of the state of the jurisprudence at the time of its decision, the Court of Appeal was in error in holding the trial judge to a higher standard. While that conclusion is sufficient to decide this appeal, nonetheless, I think it is important for future guidance to make some further comments on the approach of the majority of the Court of Appeal.

[54] Rowles J.A. was correct that failure by a trial judge to apply the correct standard of proof in assessing evidence would constitute an error of law. The question is how such failure may be apparent in the reasons of a trial judge. Obviously in the remote example of a trial judge expressly stating an incorrect standard of proof, it will be presumed that the incorrect standard was applied. Where the trial judge expressly states the correct standard of proof, it will be presumed that it was applied. Where the trial judge does not express a particular standard of proof, it will also be presumed that the correct standard was applied:

> Trial judges are presumed to know the law with which they work day in and day out.
>
> (*R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, *per* McLachlin J. (as she then was))

a omis de prendre en compte les lacunes du témoignage de [F.H.] ou ses aspects préoccupants » (par. 72). Ces « aspects préoccupants » englobaient les déclarations contradictoires de F.H. à l'interrogatoire préalable et au procès concernant la fréquence des agressions sexuelles alléguées, de même que la divergence entre l'allégation initiale de tentative de relation anale et l'affirmation au procès qu'il y avait eu pénétration.

[52] Vu l'absence d'un élément circonstanciel étayant le témoignage de F.H., les juges majoritaires de la Cour d'appel ont conclu que la juge du procès avait omis de se demander si les faits avaient été prouvés [TRADUCTION] « selon la norme proportionnée à l'allégation » et qu'elle n'avait pas « examiné la preuve aussi attentivement qu'elle l'aurait dû, d'où l'erreur de droit » (par. 79).

[53] Je le répète, une seule norme de preuve s'applique en matière civile, celle de la prépondérance des probabilités. Bien que la jurisprudence du moment puisse expliquer sa décision, la Cour d'appel a statué à tort que la juge du procès aurait dû appliquer une norme plus stricte. Cette conclusion suffit pour statuer sur le présent pourvoi, mais j'estime important pour l'avenir de faire quelques observations supplémentaires sur le raisonnement des juges majoritaires de la Cour d'appel.

[54] La juge Rowles a eu raison de conclure que l'omission d'un juge de première instance d'appliquer la bonne norme de preuve constitue une erreur de droit. La question est de savoir dans quelle mesure une telle omission peut ressortir des motifs du juge. Évidemment, dans le cas improbable où le juge du procès formule expressément une norme de preuve incorrecte, il est présumé l'avoir appliquée. Lorsqu'il énonce expressément la bonne norme de preuve, il est présumé l'avoir appliquée. Dans le cas où le juge ne renvoie à aucune norme de preuve particulière, on présume également qu'il a appliqué la bonne :

> Les juges du procès sont censés connaître le droit qu'ils appliquent tous les jours.
>
> (*R. c. Burns*, [1994] 1 R.C.S. 656, p. 664, la juge McLachlin (maintenant Juge en chef))

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Whether the correct standard was expressly stated or not, the presumption of correct application will apply unless it can be demonstrated by the analysis conducted that the incorrect standard was applied. However, in determining whether the correct standard has indeed been applied, an appellate court must take care not to substitute its own view of the facts for that of the trial judge.

[55] An appellate court is only permitted to interfere with factual findings when "the trial judge [has] shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at para. 4 (emphasis deleted), *per* Fish J.). Rowles J.A. correctly acknowledged as much (para. 27). She also recognized that where there is some evidence to support an inference drawn by the trial judge, an appellate court will be hard pressed to find a palpable and overriding error. Indeed, she quoted the now well-known words to this effect in the judgment of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 27 of her reasons (para. 22 of *Housen*).

[56] Rowles J.A. was satisfied that the trial judge was aware of the standard of proof that had heretofore been applied in cases of moral blameworthiness. At para. 35 of her reasons she stated:

> From her reasons it is obvious that the judge was aware of the case authorities that have considered the standard of proof to be applied in cases where allegations of morally blameworthy conduct have been made.

That should have satisfied the Court of Appeal that the trial judge understood and applied the standard of proof they thought to be applicable to this case.

C. *The Inconsistency in the Evidence of F.H.*

[57] At para. 5 of her reasons, the trial judge had regard for the judgment of Rowles J.A. in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, at paras. 28-29, dealing with the reliability and credibility of witnesses in the case of inconsistencies and an absence of

Que la norme applicable ait été précisée ou non, on présume qu'elle a été appliquée, sauf lorsque l'analyse révèle le contraire. Toutefois, lorsqu'elle détermine si la bonne norme a effectivement été appliquée, la cour d'appel doit prendre garde de ne pas substituer son interprétation des faits à celle du juge du procès.

[55] La cour d'appel ne peut infirmer une conclusion de fait que « lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve » (*H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 4 (soulignement omis), le juge Fish). La juge Rowles le reconnaît à juste titre (par. 27). Elle ajoute que lorsque le juge du procès s'appuie sur quelque élément de preuve pour tirer une conclusion, la cour d'appel peut difficilement conclure à l'existence d'une erreur manifeste et dominante. D'ailleurs, toujours au par. 27, elle renvoie à l'arrêt *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33, par. 22, et aux propos maintes fois cités depuis qu'y tiennent à ce sujet les juges Iacobucci et Major.

[56] La juge Rowles était convaincue que la juge du procès savait quelle norme de preuve avait été appliquée jusqu'alors aux allégations d'actes moralement répréhensibles. Elle dit au par. 35 :

> [TRADUCTION] Il appert de ses motifs que la juge était au fait de la jurisprudence sur la norme de preuve applicable à des allégations d'actes moralement répréhensibles.

Cela aurait dû convaincre la Cour d'appel que la juge du procès avait compris et appliqué la norme de preuve qu'elles tenaient pour applicable en l'espèce.

C. *Les contradictions du témoignage de F.H.*

[57] Au paragraphe 5 de ses motifs, la juge du procès tient compte du jugement de la juge Rowles dans l'affaire *R. c. R.W.B.* (1993), 24 B.C.A.C. 1, par. 28-29, portant sur la crédibilité d'un témoignage qui est entaché de contradictions et que la

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supporting evidence. Although *R.W.B.* was a criminal case, I, like the trial judge, think the words of Rowles J.A. are apt for the purposes of this case:

> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here. [para. 29]

[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.

[59] It is apparent from her reasons that the trial judge recognized the obligation upon her to have regard for the inconsistencies in the evidence of F.H. and to consider them in light of the totality of the evidence to the extent that was possible. While she did not deal with every inconsistency, as she explained at para. 100, she did address in a general way the arguments put forward by the defence.

[60] The trial judge specifically dealt with some of what the Court of Appeal identified as the troublesome aspects of F.H.'s evidence. For example, Rowles J.A. stated at para. 77 that F.H.'s evidence with respect to inspections in the supervisors' washroom was not consistent with the testimony of other witnesses:

preuve n'étaye pas par ailleurs. Même si la juge Rowles se prononçait dans le contexte pénal, à l'instar de la juge du procès, j'estime que ses remarques sont pertinentes dans le cas présent :

> [TRADUCTION] En l'espèce, il existait un certain nombre de contradictions dans le témoignage de la plaignante de même qu'entre son témoignage et celui d'autres témoins. Bien que de légères contradictions n'entachent pas indûment la crédibilité d'un témoin, une suite de contradictions peut constituer un facteur non négligeable et semer un doute raisonnable dans l'esprit du juge des faits quant à la crédibilité du témoignage. Aucune règle ne permet de déterminer dans quels cas des contradictions susciteront un tel doute, mais le juge des faits doit à tout le moins les examiner dans leur ensemble pour déterminer si le témoignage en question est digne de foi. C'est particulièrement vrai en l'absence de corroboration sur la principale question en litige, comme c'était le cas en l'espèce. [par. 29]

[58] Comme l'a estimé la juge Rowles à l'égard de la norme de preuve pénale, lorsque la norme applicable est la prépondérance des probabilités, il n'y a pas non plus de règle quant aux circonstances dans lesquelles les contradictions relevées dans le témoignage du demandeur amèneront le juge du procès à conclure que le témoignage n'est pas crédible ou digne de foi. En première instance, le juge ne doit pas considérer le témoignage du demandeur en vase clos. Il doit plutôt examiner l'ensemble de la preuve pour déterminer l'incidence des contradictions sur les questions de crédibilité touchant au cœur du litige.

[59] Il appert de ses motifs que la juge du procès a reconnu son obligation de tenir compte des contradictions du témoignage de F.H. et de les confronter avec l'ensemble de la preuve dans la mesure du possible. Bien qu'elle n'ait pas considéré chacune des contradictions, elle a examiné de façon générale les arguments de la défense, ce qu'elle explique au par. 100.

[60] La juge du procès se penche expressément sur certains aspects du témoignage de F.H. tenus pour préoccupants par la Cour d'appel. À titre d'exemple, la juge Rowles dit au par. 77 que le témoignage de F.H. concernant les inspections effectuées dans les toilettes des surveillants contredisait celui d'autres témoins :

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There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to the respondent's recollection of events. In fact, the defence evidence was to the opposite effect, that is, the boys did not line up outside the staff washroom for any reason or at any time.

[61] However, Gill J. dealt with the washroom inspections as well as the inconsistent recollection of the witnesses regarding these inspections. She also made a finding of fact that inspections were performed and were routine at the school. At para. 106 of her reasons she stated:

> It was argued that the evidence of F.H. was not consistent with the evidence of others. No inspections were done in the supervisors' washroom or in the way that F.H. described. I agree that no other witness described inspections being done in the supervisors' washroom. However, evidence about inspections was given by defence witnesses. I have already referred to the evidence of Mr. Paul. I accept that inspections were done in the manner he described. The boys were sometimes inspected on shower days and supervisors regularly checked to ensure that they had washed themselves thoroughly. Admittedly, Mr. Paul did not say that the defendant had conducted such examinations, but he described the inspections as a routine of the school. In fact, Mr. Paul's evidence is not consistent with the evidence of the defendant, who stated that the only examination of the boys was for head lice and it was done by the nurse.

[62] In this passage of her reasons, the trial judge dealt with the inconsistency between the evidence of F.H. and other witnesses. She also considered McDougall's testimony in light of other evidence given by witnesses for the defence. From the evidence of Mr. Paul she concluded that examinations were routinely carried out. She found that Mr. Paul's evidence about examinations was not consistent with that of McDougall who had testified that examinations were only for head lice and were carried out by the nurse. The necessary inference is that she found McDougall not to be credible on this issue.

[63] The majority of the Court of Appeal was also concerned with the testimony of F.H., that each time he was sexually assaulted by McDougall,

[TRADUCTION] Nul témoin ayant fréquenté le pensionnat n'a confirmé que d'autres garçons avaient formé des rangs puis avaient été examinés par M. McDougall dans les toilettes des surveillants de manière à étayer la version des faits de l'intimé. En fait, la preuve offerte par la défense établissait le contraire, c'est-à-dire que les garçons n'avaient jamais fait la file à l'extérieur des toilettes des surveillants pour quelque raison que ce soit.

[61] Or, la juge Gill traite des inspections dans les toilettes et du fait que les souvenirs des témoins à leur sujet sont contradictoires. Elle tire aussi la conclusion de fait que des inspections avaient lieu périodiquement au pensionnat. Voici ce qu'elle dit au par. 106 :

> [TRADUCTION] On a soutenu que le témoignage de F.H. ne concordait pas avec celui d'autres témoins. Aucune inspection n'avait lieu dans les toilettes des surveillants ou de la façon indiquée par F.H. Je conviens qu'aucun autre témoin n'a fait état d'inspections effectuées dans les toilettes des surveillants; toutefois, des témoins de la défense ont confirmé l'existence d'inspections. J'ai déjà fait référence au témoignage de M. Paul. Je conclus que des inspections ont été effectuées de la manière qu'il a décrite. Les garçons subissaient parfois un examen le jour de la douche et les surveillants s'assuraient régulièrement que les garçons s'étaient bien lavés. Certes, M. Paul n'a pas affirmé que le défendeur avait effectué de tels examens, mais il a dit que ceux-ci étaient courants. En fait, le témoignage de M. Paul ne corrobore pas celui du défendeur selon lequel les inspections visaient seulement la détection de poux et relevaient de l'infirmière.

[62] Dans ce passage de ses motifs, la juge du procès relève la divergence entre le témoignage de F.H. et ceux des autres témoins. Elle examine aussi le témoignage de M. McDougall à la lumière de ceux des autres témoins de la défense. Elle conclut du témoignage de M. Paul que des inspections avaient lieu couramment. Elle constate que son témoignage n'est pas compatible avec celui de M. McDougall selon lequel les inspections visaient seulement la détection de poux et relevaient de l'infirmière. Il s'ensuit nécessairement qu'à son avis, le témoignage de M. McDougall n'était pas digne de foi sur ce point.

[63] Les juges majoritaires de la Cour d'appel se disent également préoccupées par le témoignage de F.H. selon lequel chaque fois qu'il avait été agressé

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he would go upstairs from his dorm to the supervisors' washroom. At para. 77 of her reasons, Rowles J.A. stated:

> However, [F.H.] was a junior boy rather than an intermediate one at the relevant time and his dorm would have been on the top floor. Based on the evidence of where the boys slept, [McDougall] could not have taken [F.H.] "upstairs" from his dorm.

Counsel for F.H. points out that in his evidence at trial, F.H. testified that he was an intermediate boy when the sexual assaults occurred and that as an intermediate boy he would have to go upstairs to the supervisors' washroom. Although there was contradictory evidence, there was evidence upon which F.H. could have been believed.

[64] It is true that Gill J. did not deal with F.H.'s inconsistency as to the frequency of the inspections inside the supervisors' washroom as identified by Rowles J.A. at para. 75:

> The respondent also told Ms. Stone that the young boys regularly lined up outside the staff washroom, which they referred to as the "examination room", every second week in order to be examined. At trial he testified this lining up only happened the first time he was sexually assaulted. Again, this is a substantial change in the respondent's recounting of events.

Nor did Gill J. specifically address the change in the allegations of attempted anal intercourse and genital fondling in the original statement of claim and the evidence of F.H. at trial of actual penetration. Rowles J.A. stated at para. 76:

> The respondent's original statement of claim only alleged attempted anal intercourse and genital fondling. There was no allegation about the appellant actually inserting his finger in F.H.'s anus or having forced anal intercourse. The respondent's evidence at trial was of actual penetration. As the trial judge found, the respondent acknowledged that he had reviewed the statement of claim, including the paragraphs which particularized the alleged assaults, and that he was aware of the difference between actually doing something and attempting to do something.

sexuellement par M. McDougall, il s'était rendu aux toilettes des surveillants situées à l'étage supérieur de son dortoir. La juge Rowles dit ce qui suit au par. 77 :

> [TRADUCTION] Or, [F.H.] faisait alors partie des plus jeunes garçons et non de ceux d'âge intermédiaire, de sorte que son dortoir aurait dû se situer à l'étage supérieur. Vu la preuve relative au lieu où dormaient les garçons, [M. McDougall] ne pouvait pas « faire monter » [F.H.].

L'avocat de l'appelant fait observer qu'au procès, F.H. a déclaré qu'il faisait partie des garçons d'âge intermédiaire lors des agressions sexuelles et que, par conséquent, il devait monter pour se rendre aux toilettes des surveillants. Malgré les contradictions, des éléments de preuve permettaient d'ajouter foi au témoignage de F.H.

[64] Il est vrai que la juge Gill ne traite pas de l'incohérence du témoignage de F.H. concernant la fréquence des inspections dans les toilettes des surveillants, contrairement à la juge Rowles qui la relève au par. 75 :

> [TRADUCTION] L'intimé a aussi dit à Mme Stone que, toutes les deux semaines, les jeunes garçons se plaçaient à l'extérieur des toilettes des surveillants, qu'ils appelaient la « salle d'examen », pour y être examinés. Au procès, il a témoigné que la mise en rang n'avait eu lieu que lors de la première agression sexuelle. Encore une fois, il s'agit d'une modification importante de sa relation des événements.

La juge Gill ne mentionne pas expressément le fait que les allégations de tentative de relation anale et d'attouchement des organes génitaux figurant dans la déclaration initiale différaient du témoignage de F.H. au procès selon lequel il y avait eu pénétration. La juge Rowles dit au par. 76 :

> [TRADUCTION] Dans sa déclaration initiale, l'intimé alléguait seulement la tentative de relation anale et l'attouchement des organes génitaux, nullement que l'appelant avait inséré son doigt dans son anus ou qu'il l'avait contraint à une relation anale. Au procès, il a affirmé qu'il y avait eu pénétration. Comme l'a dit la juge du procès, l'intimé a reconnu avoir lu la déclaration, y compris les paragraphes détaillant les agressions alléguées, et qu'il était conscient de la différence entre faire quelque chose et tenter de faire quelque chose.

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[65] However, at paras. 46 and 48 of her reasons, Gill J. had recounted these inconsistencies as raised in cross-examination. Her reasons indicate she was aware of the inconsistencies.

[66] As for the inconsistency relating to the frequency of the sexual assaults, Rowles J.A. stated at para. 73:

> At his examination for discovery the respondent said that the sexual assaults took place "weekly", "frequently", and "every ten days or so" over the entire time he was at the School. The respondent admitted at trial that he had said on discovery that he had told the counsellor, Ms. Nellie Stone, that the sexual assaults by the appellant had taken place over the entire time he was at the School, while he was between the ages of eight and fourteen years. At trial, the respondent testified that the sexual assaults occurred on only four occasions over a period of two-and-a-half months. [Emphasis added.]

[67] Counsel for F.H. points out that F.H.'s evidence was that he was subjected to physical and sexual abuse while he was at the residential school perpetrated by more than one person, that the question to which he was responding mixed both sexual and physical abuse and that the majority of the Court of Appeal wrongly narrowed F.H.'s statement only to assaults perpetrated by McDougall. Counsel says that F.H. was commenting on all of the physical and sexual abuse he experienced at the school which involved more than McDougall and took place over his six years of attendance.

[68] The Court of Appeal appears to have interpreted his evidence on discovery that he was sexually assaulted by McDougall over the entire time he was at the school, while in his evidence at trial it was only four times over two and a half months. Although the evidence is not without doubt, it is open to be interpreted in the way counsel for F.H. asserts and that there was no inconsistency between F.H.'s evidence on discovery and at trial.

[69] As to the frequency of the alleged sexual assaults by McDougall, the trial judge did not

[65] Or, aux paragraphes 46 et 48 de ses motifs, la juge Gill a fait état de ces contradictions soulevées en contre-interrogatoire. Il s'ensuit donc qu'elle en était consciente.

[66] En ce qui concerne les divergences relatives à la fréquence des agressions sexuelles, la juge Rowles dit ce qui suit au par. 73 :

> [TRADUCTION] À l'interrogatoire préalable, l'intimé a déclaré que les agressions sexuelles s'étaient produites « chaque semaine », « fréquemment » et « environ tous les dix jours » pendant toute la durée de son séjour au pensionnat. Au procès, il a reconnu avoir déclaré à l'interrogatoire préalable qu'il avait dit à sa thérapeute, Mme Nellie Stone, que les agressions sexuelles perpétrées par l'appelant avaient eu lieu pendant toute la durée de son séjour au pensionnat, de l'âge de huit à quatorze ans. Or, au procès, il a précisé que les agressions sexuelles ne s'étaient produites qu'à quatre occasions sur une période de deux mois et demi. [Je souligne.]

[67] L'avocat de F.H. fait remarquer que son client a témoigné que plus d'une personne l'avaient agressé physiquement et sexuellement pendant son séjour au pensionnat, que la question à laquelle il a répondu portait à la fois sur les agressions sexuelles et les sévices physiques et que les juges majoritaires de la Cour d'appel ont considéré à tort que sa déclaration ne visait que les agressions perpétrées par M. McDougall. Il fait valoir que les propos de F.H. s'appliquaient à toutes les agressions physiques et sexuelles subies au cours des six années de son séjour au pensionnat, et pas seulement à celles commises par M. McDougall.

[68] La Cour d'appel semble conclure que F.H. a témoigné à l'interrogatoire préalable que M. McDougall l'avait agressé sexuellement pendant toute la période qu'il avait été pensionnaire, alors qu'il a dit au procès qu'il y avait eu quatre agressions sur une période de deux mois et demi. Bien que le témoignage ne soit pas sans soulever de doute, il est possible de l'interpréter de la manière prônée par l'avocat de F.H. et de conclure à l'absence de contradiction entre le témoignage à l'interrogatoire préalable et celui offert au procès.

[69] En ce qui concerne la fréquence des agressions sexuelles qu'aurait perpétrées M. McDougall,

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ignore inconsistencies in the evidence of F.H. In spite of the inconsistencies, she found him to be credible. At para. 112 of her reasons, she stated:

> There are, however, some inconsistencies in the evidence of F.H. As the defence has also argued, his evidence about the frequency of the abuse has not been consistent and there are differences between what he admittedly told Ms. Stone, what he said at his examination for discovery and his evidence at trial. At trial, he said there were four incidents. On previous occasions, he said that this occurred every two weeks or ten days. That is a difference of significance. However, his evidence about the nature of the assaults, the location and the times they occurred has been consistent. Despite differences about frequency, it is my view that F.H. was a credible witness.

[70] The trial judge was not obliged to find that F.H. was not credible or that his evidence at trial was unreliable because of inconsistency between his trial evidence and the evidence he gave on prior occasions. Where a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court.

[71] All of this is not to say that the concerns expressed by Rowles J.A. were unfounded. There are troubling aspects of F.H.'s evidence. However, the trial judge was not oblivious to the inconsistencies in his evidence. The events occurred more than 30 years before the trial. Where the trial judge refers to the inconsistencies and deals expressly with a number of them, it must be assumed that she took them into account in assessing the balance of probabilities. Notwithstanding its own misgivings, it was not for the Court of Appeal to second guess the trial judge in the absence of finding a palpable and overriding error.

[72] With respect, I cannot interpret the reasons of the majority of the Court of Appeal other than that it disagreed with the trial judge's credibility assessment of F.H. in light of the inconsistencies in his evidence and the lack of support from the surrounding circumstances. Assessing credibility

la juge du procès tient compte des contradictions dans le témoignage de F.H, mais elle ajoute tout de même foi à celui-ci (par. 112) :

> [TRADUCTION] Des contradictions entachent toutefois le témoignage de F.H. Comme l'a aussi fait valoir la défense, son témoignage sur la fréquence des agressions n'a pas été invariable et il y a des différences entre ce qu'il a reconnu avoir dit à Mme Stone, son témoignage en interrogatoire préalable et ce qu'il a affirmé au procès. Pendant le procès, il a déclaré qu'il y avait eu quatre agressions. Auparavant, il avait affirmé que les agressions se produisaient toutes les deux semaines ou tous les dix jours. C'est là une différence importante. Toutefois, son témoignage concernant la nature des agressions, ainsi que le lieu et les moments où elles se sont produites n'a pas varié. Malgré les divergences quant à la fréquence des agressions, je suis d'avis que F.H. était un témoin digne de foi.

[70] La juge du procès n'avait pas à conclure à la non-crédibilité de F.H. ou à la non-fiabilité de son témoignage au procès parce que celui-ci contredisait ses déclarations antérieures. Lorsque le juge du procès est conscient des contradictions, mais qu'il arrive quand même à la conclusion que le témoin était digne de foi, sauf erreur manifeste et dominante, rien ne justifie l'intervention de la cour d'appel.

[71] Il ne s'ensuit pas que les préoccupations de la juge Rowles n'étaient pas fondées. Certains éléments du témoignage de F.H. soulèvent des questions. Or, la juge du procès était consciente des contradictions du témoignage. Les événements sont survenus plus de 30 ans auparavant. Comme la juge du procès renvoie aux contradictions et considère expressément certaines d'entre elles, il faut présumer qu'elle en a tenu compte pour établir la prépondérance des probabilités. Malgré ses réserves, il n'appartenait pas à la Cour d'appel de revenir sur la décision de première instance en l'absence d'une erreur manifeste et dominante.

[72] En toute déférence, je ne peux voir dans les motifs des juges majoritaires de la Cour d'appel qu'un désaccord avec l'appréciation de la crédibilité de F.H. par la juge du procès à la lumière des contradictions et de l'absence d'élément circonstanciel corroborant le témoignage. Il incombe

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is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 20:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

[73] As stated above, an appellate court is only permitted to intervene when "the trial judge is shown to have committed a palpable and overriding error or made findings of fact that are clearly wrong, unreasonable or unsupported by the evidence" (*H.L.*, at para. 4 (emphasis deleted)). The Court of Appeal made no such finding. With respect, in finding that the trial judge failed to scrutinize F.H.'s evidence in the manner required by law, it incorrectly substituted its credibility assessment for that of the trial judge.

D. *Palpable and Overriding Error*

[74] Notwithstanding that the Court of Appeal made no finding of palpable and overriding error, the Attorney General of Canada submits that the trial judge did indeed make such an error. This argument is based entirely on the inconsistencies in the evidence of F.H. The Attorney General says that in light of these inconsistencies, the trial judge was clearly wrong in finding F.H. credible.

[75] I do not minimize the inconsistencies in F.H.'s testimony. They are certainly relevant to an assessment of his credibility. Nonetheless, the trial judge was convinced, despite the inconsistencies, that F.H. was credible and that the four sexual assaults alleged to have been committed by McDougall did occur. From her reasons, it appears that the trial judge's decision on the credibility of the witnesses was made in the context of the evidence as a whole.

clairement au juge du procès d'apprécier la crédibilité, de sorte que sa décision à cet égard justifie une grande déférence. Comme l'ont expliqué les juges Bastarache et Abella dans l'arrêt *R. c. Gagnon*, [2006] 1 R.C.S. 621, 2006 CSC 17, par. 20 :

> Apprécier la crédibilité ne relève pas de la science exacte. Il est très difficile pour le juge de première instance de décrire avec précision l'enchevêtrement complexe des impressions qui se dégagent de l'observation et de l'audition des témoins, ainsi que des efforts de conciliation des différentes versions des faits. C'est pourquoi notre Cour a statué — la dernière fois dans l'arrêt *H.L.* — qu'il fallait respecter les perceptions du juge de première instance, sauf erreur manifeste et dominante.

[73] Je le répète, une cour d'appel ne peut intervenir que « lorsqu'il est établi que le juge de première instance a commis une erreur manifeste et dominante ou tiré des conclusions de fait manifestement erronées, déraisonnables ou non étayées par la preuve » (*H.L.*, par. 4 (soulignement omis)). La Cour d'appel n'a pas opiné en ce sens. En toute déférence, en concluant que la juge du procès avait omis d'examiner le témoignage de F.H. aussi attentivement qu'elle l'aurait dû légalement, la Cour d'appel a substitué à tort son appréciation de la crédibilité à celle de la juge du procès.

D. *Erreur manifeste et dominante*

[74] Bien que la Cour d'appel n'ait pas relevé d'erreur manifeste et dominante, le procureur général du Canada soutient que la juge du procès en a de fait commis une. Sa prétention s'appuie entièrement sur les contradictions du témoignage de F.H. Selon lui, au vu de ces contradictions, la juge du procès aurait clairement eu tort de conclure que F.H. était digne de foi.

[75] Je ne veux pas minimiser les contradictions du témoignage de F.H. Elles sont certainement pertinentes pour l'appréciation de sa crédibilité. Or, malgré ces contradictions, la juge du procès était convaincue de la fiabilité du témoignage de F.H. et de la perpétration des quatre agressions sexuelles par M. McDougall. Il appert de ses motifs que la conclusion sur la crédibilité des témoins a été tirée au regard de l'ensemble de la preuve. La juge a tenu

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She considered the layout of the school and the fact that the manner in which F.H. described the assaults as taking place would have carried with it the risk of detection. She also considered whether F.H.'s evidence about inspections taking place in the supervisors' washroom and the availability of sheets and pyjamas was consistent with evidence of other witnesses. She acknowledged that F.H. had a motive to lie to save his marriage and decided that the circumstances surrounding disclosure were not suggestive of concoction. She also factored into her analysis the demeanor of F.H.: that "[he] was not a witness who gave detailed answers, often responding simply with a yes or no, nor did he volunteer much information" (para. 110), and that "[w]hen [he] testified, he displayed no emotion but it was clear that he had few, if any, good memories of the school" (para. 113).

[76] In the end, believing the testimony of one witness and not the other is a matter of judgment. In light of the inconsistencies in F.H.'s testimony with respect to the frequency of the sexual assaults, it is easy to see how another trial judge may not have found F.H. to be a credible witness. However, Gill J. found him to be credible. It is important to bear in mind that the evidence in this case was of matters occurring over 30 years earlier when F.H. was approximately 10 years of age. As a matter of policy, the British Columbia legislature has eliminated the limitation period for claims of sexual assault. This was a policy choice for that legislative assembly. Nonetheless, it must be recognized that the task of trial judges assessing evidence in such cases is very difficult indeed. However, that does not open the door to an appellate court, being removed from the testimony and not seeing the witnesses, to reassess the credibility of the witnesses.

E. *Corroboration*

[77] The reasons of the majority of the Court of Appeal may be read as requiring, as a matter of law, that in cases of oath against oath in the context of sexual assault allegations, that a sexual assault victim must provide some independent

compte de l'aménagement du pensionnat et du fait que la perpétration des agressions de la manière décrite par F.H. était susceptible de détection. Elle s'est également demandé si le témoignage de F.H. concernant les inspections effectuées dans les toilettes des surveillants et l'accès aux draps et aux pyjamas concordait avec celui d'autres témoins. Elle a reconnu que F.H. avait intérêt à mentir pour préserver son mariage, mais elle a statué que les circonstances de la révélation ne suggéraient pas la fabrication. Dans son analyse, la juge du procès a aussi pris en considération l'attitude de F.H., à savoir qu'[TRADUCTION] « [il] ne s'agissait pas d'un témoin offrant des réponses détaillées, qu'il répondait souvent par un simple oui ou non, sans devancer les questions » (par. 110) et que « [p]endant son témoignage, il n'a manifesté aucune émotion, mais il était clair qu'il avait peu de bons souvenirs du pensionnat, voire aucun » (par. 113).

[76] En fin de compte, ajouter foi à un témoignage et non à un autre est affaire de jugement. Vu les contradictions du témoignage de F.H. au sujet de la fréquence des agressions sexuelles, on conçoit aisément qu'un autre juge n'aurait peut-être pas conclu que F.H. était un témoin digne de foi. Cependant, la juge Gill l'a trouvé crédible. Il importe de se rappeler que le témoignage portait sur des événements survenus plus de 30 ans auparavant et qu'à l'époque F.H. avait environ 10 ans. Pour des raisons de principe, le législateur de la Colombie-Britannique a cessé d'assujettir à un délai de prescription la poursuite pour agression sexuelle. Il lui était loisible de le faire. Néanmoins, il faut reconnaître que la tâche du juge du procès appelé à apprécier la preuve dans une affaire de cette nature est particulièrement ardue. Mais une cour d'appel qui n'a pas entendu les témoignages ni observé les témoins n'a pas pour autant le droit de réévaluer la fiabilité de ceux-ci.

E. *Corroboration*

[77] Les motifs des juges majoritaires de la Cour d'appel peuvent être interprétés comme établissant qu'une corroboration indépendante s'impose légalement lorsque, dans une affaire où une agression sexuelle est alléguée, c'est la parole de la victime

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corroborating evidence. At para. 77 of her reasons, Rowles J.A. observed:

> There was no corroborative evidence from the witnesses who had been students at the School of other boys having lined up and being examined by McDougall in the supervisor[s'] washroom so as to lend support to [F.H.]'s recollection of events.

At para. 79 she stated:

> No support for [F.H.]'s testimony could be drawn from the surrounding circumstances.

[78] In her concurring reasons at para. 106, Southin J.A. stated:

> To choose one over the other in cases of oath against oath requires, in my opinion, an articulated reason founded in evidence other than that of the plaintiff.

[79] The impression these passages may leave is that there is a legal requirement of corroboration in civil cases in which sexual assault is alleged. In an abundance of caution and to provide guidance for the future, I make the following comments.

[80] Corroborative evidence is always helpful and does strengthen the evidence of the party relying on it as I believe Rowles J.A. was implying in her comments. However, it is not a legal requirement and indeed may not be available, especially where the alleged incidents took place decades earlier. Incidents of sexual assault normally occur in private.

[81] Requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Modern criminal law has rejected the previous common law and later statutory requirement that allegations of sexual assault be corroborated in order to lead to a conviction (see *Criminal Code*, R.S.C. 1970, c. C-34, s. 139(1), mandating the need for corroboration and its subsequent amendments removing this requirement (*Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125),

contre celle du défendeur. La juge Rowles fait observer au par. 77 :

> [TRADUCTION] Nul témoin ayant fréquenté le pensionnat n'a confirmé que d'autres garçons avaient formé des rangs puis avaient été examinés par M. McDougall dans les toilettes des surveillants de manière à étayer la version des faits de [F.H.].

Elle ajoute (par. 79) :

> [TRADUCTION] Aucun élément circonstanciel ne corrobore le témoignage de [F.H.].

[78] La juge Southin affirme pour sa part (par. 106, motifs concordants) :

> [TRADUCTION] Préférer un témoignage à un autre exige, à mon avis, qu'un motif convaincant fondé sur un autre élément de preuve que le témoignage du demandeur le justifie.

[79] Ces extraits peuvent donner à penser qu'il existe en matière civile une exigence juridique de corroboration dès lorsqu'une agression sexuelle est alléguée. Par surcroît de prudence et afin d'offrir des repères pour l'avenir, j'ajoute les remarques suivantes.

[80] Un élément de corroboration est toujours utile et étoffe la preuve offerte. C'est à mon avis ce que voulait dire la juge Rowles. Or, il ne s'agit pas d'une exigence juridique, car il est possible qu'un tel élément n'existe pas, surtout lorsque les faits se sont produits quelques décennies auparavant. Sans compter que les agressions sexuelles ont généralement lieu en privé.

[81] Exiger la corroboration rendrait la norme de preuve en matière civile plus stricte que celle appliquée en matière pénale. Le droit criminel moderne a écarté l'exigence, d'abord établie par la common law puis par la loi, qu'une allégation d'agression sexuelle soit corroborée pour qu'il puisse y avoir déclaration de culpabilité (voir *Code criminel*, S.R.C. 1970, ch. C-34, par. 139(1), prévoyant la nécessité d'une corroboration et ses modifications subséquentes supprimant cette exigence (*Loi modifiant le Code criminel en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives*

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as well as the current *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, stipulating that no corroboration is required for convictions in sexual assault cases). Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

F. *Is W. (D.) Applicable in Civil Cases in Which Credibility Is in Issue?*

[82] At paras. 107, 108 and 110 of her reasons, Southin J.A. stated:

> It is not enough for the judge to say that I find the plaintiff credible and since he is credible the defendant must be lying.
>
> What I have said so far is, to me, no more than an application to civil cases of *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.).
>
> . . .
>
> I see no logical reason why the rejection of "either/or" in criminal cases is not applicable in civil cases where the allegation is of crime, albeit that the burden of proof on the proponent is not beyond reasonable doubt but on a balance of probabilities.

[83] *W. (D.)* was a decision by this Court in which Cory J., at p. 758, established a three-step charge to the jury to help the jury assess conflicting evidence between the victim and the accused in cases of criminal prosecutions of sexual assaults:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are

à d'autres lois, S.C. 1980-81-82-83, ch. 125), ainsi que la version actuelle du *Code criminel*, L.R.C. 1985, ch. C-46, art. 274, portant que la corroboration n'est pas nécessaire pour déclarer une personne coupable d'agression sexuelle). Dans une affaire d'agression sexuelle, la décision du juge du procès peut dépendre du fait qu'il ajoute foi au témoignage du demandeur ou à celui du défendeur, mais malgré ce dilemme, il doit apprécier la preuve et se prononcer sans exiger de corroboration.

F. *L'arrêt W. (D.) s'applique-t-il au civil en matière de crédibilité?*

[82] La juge Southin dit ce qui suit aux par. 107, 108 et 110 :

> [TRADUCTION] Le juge ne peut se contenter de dire qu'il trouve le demandeur crédible et, de ce fait, que le défendeur ment nécessairement.
>
> Jusqu'ici mes motifs ne font qu'appliquer l'arrêt *R. c. W. (D.)*, [1991] 1 R.C.S. 742 (C.S.C.), au contexte civil.
>
> . . .
>
> Je ne vois aucun motif rationnel de ne pas rejeter l'alternative en matière civile, tout comme en matière pénale, lorsque l'acte reproché constitue un acte criminel, même si la norme de preuve applicable est celle de la prépondérance des probabilités, et non celle de l'absence de tout doute raisonnable.

[83] Dans l'arrêt *W. (D.)*, par la voix du juge Cory, notre Cour a établi un exposé à trois volets afin d'aider le jury à évaluer les témoignages contradictoires de la victime et de l'accusé dans le cadre d'une poursuite criminelle pour agression sexuelle (p. 758) :

> Premièrement, si vous croyez la déposition de l'accusé, manifestement vous devez prononcer l'acquittement.
>
> Deuxièmement, si vous ne croyez pas le témoignage de l'accusé, mais si vous avez un doute raisonnable, vous devez prononcer l'acquittement.
>
> Troisièmement, même si vous n'avez pas de doute à la suite de la déposition de l'accusé, vous devez vous demander si, en vertu de la preuve que vous acceptez,

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convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[84] These charges to the jury are not sacrosanct but were merely put in place as guideposts to the meaning of reasonable doubt, as recently explained by Binnie J. in *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30, at paras. 9 and 13:

Essentially, *W. (D.)* simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts. It alerts the jury to the "credibility contest" error. It teaches that trial judges are required to impress on the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.

. . .

. . . In *R. v. Avetysan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[85] The *W. (D.)* steps were developed as an aid to the determination of reasonable doubt in the criminal law context where a jury is faced with conflicting testimonial accounts. Lack of credibility on the part of an accused is not proof of guilt beyond a reasonable doubt.

[86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that

vous êtes convaincus hors de tout doute raisonnable par la preuve de la culpabilité de l'accusé.

[84] Cet exposé au jury n'est pas sacré. Il offre simplement des repères pour l'application du doute raisonnable, comme l'a récemment expliqué le juge Binnie dans l'arrêt *R. c. J.H.S.*, [2008] 2 R.C.S. 152, 2008 CSC 30, par. 9 et 13 :

Essentiellement, l'arrêt *W. (D.)* explique tout simplement au bénéfice des jurés profanes en quoi consiste un doute raisonnable dans le contexte de l'évaluation de témoignages contradictoires. Il attire l'attention des jurés sur l'erreur consistant à procéder à un « concours de crédibilité ». Il explique que les juges de première instance sont tenus de bien faire comprendre aux jurés que le ministère public n'est jamais dispensé du fardeau de prouver tous les éléments de l'infraction hors de tout doute raisonnable.

. . .

. . . Dans *R. c. Avetysan*, [2000] 2 R.C.S. 745, 2000 CSC 56, le juge Major qui s'exprimait au nom des juges de la majorité a souligné que, dans toutes les causes où la question de la crédibilité revêt de l'importance, « [c]e qu'il importe vraiment de déterminer, c'est essentiellement si les directives du juge du procès ont donné au jury l'impression qu'il devait choisir entre les deux versions des événements » (par. 19). L'essentiel c'est que le manque de crédibilité de l'accusé n'équivaut pas à une preuve de sa culpabilité hors de tout doute raisonnable.

[85] La démarche proposée dans l'arrêt *W. (D.)* a été conçue pour aider le jury aux prises avec des témoignages contradictoires dans une affaire criminelle à déterminer s'il existe un doute raisonnable. La non-crédibilité de l'accusé ne prouve pas sa culpabilité hors de tout doute raisonnable.

[86] Toutefois, au civil, lorsque les témoignages sont contradictoires, le juge est appelé à se prononcer sur la véracité du fait allégué selon la prépondérance des probabilités. S'il tient compte de tous les éléments de preuve, sa conclusion que le témoignage d'une partie est crédible peut fort bien être décisive, ce témoignage étant incompatible avec celui de l'autre partie. Aussi, croire une partie suppose explicitement ou non que l'on ne croit pas l'autre sur le point important en litige. C'est particulièrement le cas lorsque, comme en l'espèce, le

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are altogether denied by the defendant as in this case. *W. (D.)* is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases.

G. *Did the Trial Judge Ignore the Evidence of McDougall?*

[87] In an argument related to *W. (D.)*, the Attorney General of Canada says, at para. 44 of its factum, that "[s]imply believing the testimony of one witness, without assessing the evidence of the other witness, marginalizes that other witness" since he has no way of knowing whether he was disbelieved or simply ignored.

[88] The Attorney General bases his argument on the well-known passage in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), which concludes at p. 357:

> . . . a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

[89] Thus, the Attorney General contends, at para. 47 of its factum, that:

> In a civil proceeding alleging a sexual assault, if the trier of fact accepts the plaintiff's evidence and simply ignores the defendant's evidence, that conclusion would breach the requirement described in *Faryna*, that every element of the evidence must be considered.

[90] I agree that it would be an error for the trial judge to ignore the evidence of the defendant and simply concentrate on the evidence submitted by the plaintiff. But that is not the case here.

[91] The trial judge described the testimony given by McDougall with respect to his vocational beliefs, his subsequent marriage, his role at the school, the routine at the school, the laundry procedure and his denials as to having sexually assaulted either R.C. or F.H. She also dealt with the defence arguments

demandeur formule des allégations que le défendeur nie en bloc. La démarche préconisée dans l'arrêt *W. (D.)* ne convient pas pour évaluer la preuve au regard de la prépondérance des probabilités dans une instance civile.

G. *La juge du procès a-t-elle ignoré le témoignage de M. McDougall?*

[87] Dans sa plaidoirie relative à l'arrêt *W. (D.)*, le procureur général du Canada indique au par. 44 de son mémoire que [TRADUCTION] « [l]e simple fait de croire un témoin, sans apprécier le témoignage de l'autre témoin, a pour effet de marginaliser cet autre témoin » puisqu'il n'a aucun moyen de savoir si le juge ne l'a pas cru ou s'il a simplement ignoré son témoignage.

[88] La thèse du procureur général repose sur un extrait souvent cité de l'arrêt *Faryna c. Chorny*, [1952] 2 D.L.R. 354 (C.A.C.-B.), p. 357. La Cour d'appel y conclut :

> [TRADUCTION] . . . une cour d'appel doit être convaincue que la conclusion sur la crédibilité tirée en première instance repose non pas sur un seul élément de preuve, à l'exclusion de tout autre, mais bien sur l'ensemble des éléments permettant d'apprécier la crédibilité dans le cas considéré.

[89] Le procureur général soutient donc au par. 47 de son mémoire :

> [TRADUCTION] Dans une instance civile où une agression sexuelle est alléguée, le juge des faits qui ajoute foi au témoignage du demandeur et ignore simplement celui du défendeur ne satisfait pas à l'exigence, établie dans l'arrêt *Faryna*, que chacun des éléments de la preuve soit examiné.

[90] Je conviens que le juge du procès qui considère le seul témoignage du demandeur, à l'exclusion de celui du défendeur, commet une erreur. Or, ce n'est pas ce qui s'est passé en l'espèce.

[91] La juge du procès a relaté le témoignage de M. McDougall concernant sa foi et sa vocation, son mariage subséquent, sa fonction au pensionnat, la vie quotidienne dans l'établissement, l'entretien des vêtements et de la literie et sa dénégation des allégations d'agression sexuelle formulées par

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with respect to the credibility and reliability of the testimony of R.C. and F.H. regarding the sexual assaults. Indeed, she found that R.C. did not prove he was sexually assaulted by McDougall.

[92] In determining whether McDougall had ever strapped R.C. or F.H., she summarized McDougall's evidence as follows at para. 131:

> As stated, it was the defendant's evidence that during his years at the school, he administered the strap to only five or six intermediate boys. He did so as punishment for behaviour such as fighting or swearing. It was always to the hand and was always done in the dorm. He denied the evidence of Mr. Jeffries that he had frequently disciplined him for the reasons Mr. Jeffries described. He denied going to his grandmother's home or mocking him about wanting to visit his grandmother. He denied the evidence of F.H.

[93] She also highlighted a contradiction in McDougall's testimony at para. 135:

> It is also my view that the defendant minimized his use of the strap as a form of discipline. Further, while he testified that no child was ever strapped in his room, when testifying about one specific incident, he said that he brought the boy "upstairs to my room and I administered the strap three times to his right hand".

Although McDougall later "corrected himself" to say that he had strapped the boy in the dorm and not in his room, it was open to the trial judge to believe his first statement and not his "correction".

[94] And as earlier discussed, at para. 106 of her reasons, she pointed out inconsistency between the evidence of McDougall and one of the defence witnesses, Mr. Paul, on the issue of routine physical inspections of the students.

[95] At para. 66 of her reasons for the majority of the Court of Appeal, Rowles J.A. stated:

R.C. et F.H. Elle s'est également penchée sur les prétentions de la défense au sujet de la crédibilité des témoignages de R.C. et de F.H. concernant les agressions sexuelles. Elle a d'ailleurs conclu que R.C. n'avait pas prouvé que M. McDougall l'avait agressé sexuellement.

[92] Pour déterminer si M. McDougall avait jamais frappé R.C. ou F.H. avec une lanière en cuir, elle a résumé son témoignage comme suit (par. 131) :

> [TRADUCTION] Ainsi, selon le témoignage du défendeur, pendant les années qu'il a passées au pensionnat, il n'aurait frappé avec une lanière en cuir que cinq ou six garçons d'âge intermédiaire. Il l'aurait fait parce qu'ils s'étaient battus ou qu'ils avaient blasphémé. Il visait toujours les mains et la correction était toujours administrée dans le dortoir. Il a rejeté le témoignage de M. Jeffries selon lequel il l'avait fréquemment puni pour les motifs précisés par M. Jeffries. Il a nié être allé chez la grand-mère de M. Jeffries ou s'être moqué de lui parce qu'il voulait rendre visite à sa grand-mère. Il a nié les allégations de F.H.

[93] Elle a par ailleurs relevé une contradiction dans le témoignage de M. McDougall (par. 135) :

> [TRADUCTION] Je suis aussi d'avis que le défendeur a minimisé son recours à la lanière en cuir pour corriger les pensionnaires. Par ailleurs, bien qu'il ait déclaré n'avoir jamais infligé ce châtiment dans sa chambre, lorsqu'il a témoigné sur un incident en particulier, il a dit avoir « fait monté le garçon dans [sa] chambre et l'avoir frappé à la main droite trois fois avec une lanière en cuir ».

M. McDougall avait ensuite rectifié les faits : il avait dit avoir frappé le garçon dans le dortoir, et non dans sa chambre. Or, il était loisible à la juge du procès d'ajouter foi à la première version plutôt qu'à la seconde.

[94] Et, je le rappelle, la juge du procès relève au par. 106 la divergence entre les propos de M. McDougall et ceux d'un témoin de la défense, M. Paul, au sujet des inspections corporelles périodiques des garçons.

[95] Au nom des juges majoritaires de la Cour d'appel, la juge Rowles indique ce qui suit (par. 66) :

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From the reasons the trial judge gave for finding that the appellant had strapped the respondent, one can infer that the judge did not accept the appellant's evidence on that issue. Disbelief of a witness's evidence on one issue may well taint the witness's evidence on other issues but an unfavourable credibility finding against a witness does not, of itself, constitute evidence that can be used to prove a fact in issue.

[96] I agree with Rowles J.A. However, the trial judge's unfavourable credibility findings with respect to McDougall's strapping evidence together with her belief in Paul's evidence in preference to that of McDougall with respect to routine physical inspections, indicates that she did not ignore McDougall's evidence or marginalize him. She simply believed F.H. on essential matters rather than McDougall.

H. *Were the Reasons of the Trial Judge Adequate?*

[97] The Attorney General alleges that the reasons of the trial judge are inadequate. The same argument was not accepted by the Court of Appeal. At para. 61, Rowles J.A. stated:

Generally speaking, if a judge's reasons reveal the path the judge took to reach a conclusion on the matter in dispute, the reasons are adequate for the purposes of appellate review. To succeed in an argument that the trial judge did not give adequate reasons, an appellant does not have to demonstrate that there is a flaw in the reasoning that led to the result. In this case, the judge's reasons are adequate to show how she arrived at her conclusion that the respondent had been sexually assaulted.

Where the Court of Appeal expresses itself as being satisfied that it can discern why the trial judge arrived at her conclusion, a party faces a serious obstacle to convince this Court that the reasons are nonetheless inadequate.

[98] The meaning of adequacy of reasons is explained in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

[TRADUCTION] On peut inférer des motifs qu'elle invoque pour conclure que l'appelant a frappé l'intimé avec une lanière en cuir que la juge du procès n'a pas ajouté foi au témoignage de l'appelant sur ce point. Le fait de ne pas croire un témoin sur un point peut bien ternir son témoignage sur un autre sujet, mais une conclusion sur la crédibilité qui est défavorable à un témoin ne saurait à elle seule établir un fait en litige.

[96] Je suis d'accord avec la juge Rowles. Toutefois, les conclusions défavorables tirées par la juge du procès sur la crédibilité du témoignage de M. McDougall au sujet du recours à la lanière en cuir et le fait qu'elle a ajouté foi au témoignage de M. Paul plutôt qu'à celui de M. McDougall au sujet des inspections corporelles périodiques montrent qu'elle n'a pas ignoré le témoignage de M. McDougall et qu'elle ne l'a pas marginalisé. Elle a simplement cru F.H. plutôt que M. McDougall sur des points importants.

H. *Les motifs de la juge du procès étaient-ils suffisants?*

[97] Le procureur général soutient que les motifs de la juge du procès ne sont pas suffisants. La Cour d'appel a rejeté cette prétention (par. 61, la juge Rowles) :

[TRADUCTION] De façon générale, lorsque le juge précise le raisonnement à l'issue duquel il a tiré sa conclusion sur la question en litige, ses motifs sont suffisants aux fins d'un examen en appel. Pour qu'ils soient jugés insuffisants, point n'est besoin d'établir qu'un vice entache le raisonnement ayant mené à la conclusion. En l'espèce, les motifs de la juge permettent de comprendre comment elle est arrivée à la conclusion que l'intimé avait été agressé sexuellement.

Dans la mesure où la Cour d'appel dit pouvoir discerner les raisons pour lesquelles la juge du procès a tiré sa conclusion, la partie qui souhaite convaincre notre Cour que les motifs sont néanmoins insuffisants doit surmonter un obstacle de taille.

[98] Dans l'arrêt *R. c. Sheppard*, [2002] 1 R.C.S. 869, 2002 CSC 26, notre Cour explique la notion de suffisance des motifs. Dans l'arrêt *R. c. Walker*, [2008] 2 R.C.S. 245, 2008 CSC 34, le juge Binnie résume comme suit la teneur de l'obligation de motiver une décision :

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(1) To justify and explain the result;

(2) To tell the losing party why he or she lost;

(3) To provide for informed consideration of the grounds of appeal; and

(4) To satisfy the public that justice has been done.

[99] However, an appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. Nor, is a failure to give adequate reasons a free standing basis for appeal. At para. 20 of *Walker*, Binnie J. states:

> Equally, however, *Sheppard* holds that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. . . . The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confe[r] entitlement to appellate intervention" (para. 53).

[100] An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see *Gagnon*). But that does not make the reasons inadequate. In *R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51, released at the same time as this decision, McLachlin C.J. has explained that credibility findings may involve factors that are difficult to verbalize:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge in saying

(1) justifier et expliquer le résultat;

(2) indiquer à la partie qui n'a pas gain de cause pourquoi elle a perdu;

(3) permettre un examen éclairé des moyens d'appel;

(4) convaincre le public que justice a été rendue.

[99] Cependant, une cour d'appel n'est pas admise à intervenir au seul motif que le juge du procès s'est mal exprimé. L'omission de fournir des motifs suffisants ne constitue pas non plus un motif d'appel distinct. Au par. 20 de l'arrêt *Walker*, le juge Binnie dit ce qui suit :

> L'arrêt *Sheppard* établit toutefois que « [l]a cour d'appel n'est pas habilitée à intervenir simplement parce qu'elle estime que le juge du procès s'est mal exprimé » (par. 26). Les motifs sont suffisants s'ils répondent aux questions en litige et aux principaux arguments des parties. Leur suffisance doit être mesurée non pas dans l'abstrait, mais d'après la réponse qu'ils apportent aux éléments essentiels du litige. [. . .] L'obligation de fournir des motifs « devrait recevoir une interprétation fonctionnelle et fondée sur l'objet » et l'inobservation de cette obligation n'a pas pour effet de créer « un droit d'appel distinct » ou de conférer « en soi le droit à l'intervention d'une cour d'appel » (par. 53).

[100] La partie qui n'a pas gain de cause peut juger insuffisants les motifs du juge du procès, surtout s'il ne l'a pas crue. Il faut reconnaître qu'il peut être très difficile au juge appelé à tirer des conclusions sur la crédibilité des témoins de préciser le raisonnement qui est à l'origine de sa décision (voir l'arrêt *Gagnon*). Ses motifs ne sont pas insuffisants pour autant. Dans l'arrêt *R. c. R.E.M.*, [2008] 3 R.C.S. 3, 2008 CSC 51, rendu concurremment avec la présente décision, la juge en chef McLachlin explique que les conclusions relatives à la crédibilité peuvent faire intervenir des éléments difficiles à exprimer :

> Bien qu'il soit utile que le juge tente d'exposer clairement les motifs qui l'ont amené à croire un témoin plutôt qu'un autre, en général ou sur un point en particulier, il demeure que cet exercice n'est pas nécessairement purement intellectuel et peut impliquer des facteurs difficiles à énoncer. De plus, pour expliquer en détail pourquoi un témoignage a été écarté, il se peut

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unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization. [para. 49]

Nor are reasons inadequate because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.

[101] Rowles J.A. found that the reasons of the trial judge showed why she arrived at her conclusion that F.H. had been sexually assaulted by McDougall. I agree with her that the reasons of the trial judge were adequate.

IV. Conclusion

[102] I am of the respectful opinion that the majority of the Court of Appeal erred in reversing the decision of the trial judge. The appeal should be allowed with costs. The decision of the Court of Appeal of British Columbia should be set aside and the decision of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: Donovan & Company, Vancouver.

Solicitors for the respondent Ian Hugh McDougall: Forstrom Jackson, Vancouver.

Solicitors for the respondent The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Solicitor for the respondent Her Majesty the Queen in Right of Canada: Attorney General of Canada, Toronto.

que le juge doive tenir des propos peu flatteurs sur le témoin. Or, le juge voudra peut-être épargner à l'accusé, qui a témoigné pour nier le crime, la honte de subir des commentaires négatifs sur son comportement, en plus de celle de voir son témoignage écarté et d'être déclaré coupable. Bref, l'appréciation de la crédibilité est un exercice difficile et délicat qui ne se prête pas toujours à une énonciation complète et précise. [par. 49]

De même, les motifs ne sont pas insuffisants parce que, avec le recul, on peut dire qu'ils ne sont pas aussi clairs et exhaustifs qu'ils auraient pu l'être.

[101] La juge Rowles a conclu que les motifs de la juge du procès expliquaient les raisons pour lesquelles elle avait conclu que F.H. avait été agressé sexuellement par M. McDougall. Je conviens avec elle que les motifs de la juge du procès étaient suffisants.

IV. Conclusion

[102] En toute déférence, je suis d'avis que les juges majoritaires de la Cour d'appel ont eu tort d'annuler la décision de la juge du procès. Le pourvoi est accueilli avec dépens. La décision de la Cour d'appel de la Colombie-Britannique est annulée, et celle de la juge du procès rétablie.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant : Donovan & Company, Vancouver.

Procureurs de l'intimé Ian Hugh McDougall : Forstrom Jackson, Vancouver.

Procureurs de l'intimé The Order of the Oblates of Mary Immaculate in the Province of British Columbia: Macaulay McColl, Vancouver.

Procureur de l'intimée Sa Majesté la Reine du chef du Canada : Procureur général du Canada, Toronto.

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TAB 40

Citation: FBI Foods Ltd. v. Glassner et al
2001 BCSC 151

Date: 20010201
Docket: C995160
Registry: Vancouver

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FBI FOODS LTD. – LES ALIMENTS FBI LTEE.

PLAINTIFF

AND:

IRVING GLASSNER

DEFENDANT

AND:

CADBURY SCHWEPPES INC. AND CADBURY BEVERAGES CANADA INC.

THIRD PARTIES

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE DILLON

Counsel for the Plaintiff	Michael P. Carroll, Q.C.
Counsel for the Defendant	Richard R. Sugden, Q.C.
Dates and Place of Hearing:	December 12 & 13, 2000 Vancouver, B.C.

[1] The plaintiff claims contribution against the defendant for half of the amount that the plaintiff paid to settle a breach of confidence claim previously brought by Cadbury Schweppes Inc. (“Cadbury”) against both parties. This trial proceeded by agreed statement as to all facts with the addition of some discovery evidence read in by the plaintiff. Various judgments also form the background to this case. Third party proceedings between the defendant and Cadbury are left for another day, depending on the outcome of this trial.

Facts

[2] Cadbury successfully sued the plaintiff and defendant for breach of confidence arising from the wrongful use by the plaintiff and defendant of confidential information in the production of a clam and tomato cocktail in competition with Cadbury’s own product known as “Clamato”. Cadbury was awarded judgment on May 25, 1994 (93 B.C.L.R. (2d) 318 (B.C.S.C.)) against the parties to this action and Lawrence Kurlender (“Kurlender”) for damages in the amount that FBI Foods Ltd. (“FBI”) or Caesar Canning Ltd. would have paid to develop a product to compete in the tomato cocktail market in Canada. The defendant was found personally liable in the action as a director of Caesar Canning Ltd., the company that originally secured the licence to manufacture and market Clamato cocktail

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in Canada, because he knew or should have known that his company did not have licence to copy the Clamato recipe and was “alive to the peril of what his company was doing under his direction” (at 341 and 335). The plaintiff was vicariously liable through its employee, Kurlender, who knew the facts constituting the breach of confidence and indifferently assumed the risk. Although counsel spent much time at this trial explaining the facts that gave rise to the breach of confidence, these facts are detailed in the reasons for judgment at trial and need not be repeated here. Damages were to be assessed on taxation but the parties subsequently agreed that this amount was $29,761.20 based on the amount that was paid to an expert to figure out the formula for Clamato and basically copy it without containing any clam or seafood product.

[3] In this action, the defendant admitted on discovery that he copied the recipe for “Clamato” without the clam and with different seasonings. The original licence agreement had prohibited the use of clams in any product. When the licence was terminated, all parties initially thought that the restriction against clams was the only operating restriction. However, when the plaintiff and defendant developed a product

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that was basically the same without the clams based upon the "Clamato" recipe, Cadbury sued for breach of confidentiality.

[4] Cadbury appealed the Supreme Court decision, claiming damages for lost profit and royalties as well as an injunction to prevent these parties from selling products derived from the Clamato recipe. The plaintiff and defendant cross-appealed, seeking dismissal of the award against them. The defendant prepared a draft factum but never filed it. Instead, the defendant settled Cadbury's claim against him just prior to hearing of the appeal. The terms of this settlement were not made known to the plaintiff until recently.

[5] The settlement between Cadbury and the defendant was in the form of a covenant by Cadbury not to sue and contained the following provision:

> FOR AND IN CONSIDERATION of the sum of ONE DOLLAR ($1.00), and other good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, the undersigned hereby jointly and severally promise, covenant and agree to and with IRVING GLASSNER, his heirs, executors, administrators, agents and assigns, that neither we, or either of us, nor anyone claiming through us, will hereafter bring, commence, prosecute or maintain, or cause or permit to be brought, commenced, prosecuted or maintained, any suit or action, either at law or in equity for any claim or right of action now existing, against IRVING GLASSNER, either personally or in his capacity as a former officer and director of CAESAR CANNING LTD., and that *neither we, nor either of us, nor anyone claiming through us, will enforce, prosecute or*

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> *recover upon, or attempt to enforce, any claim or right of action whatsoever now existing, which we, or either of us, or anyone claiming through us, may now have or may hereafter assert.* (My italics)

[6] Cadbury was successful against the plaintiff in the British Columbia Court of Appeal on August 15, 1996 and obtained damages for lost profits for one year plus an injunction (23 B.C.L.R. (3d) 325 (B.C.C.A.)). The one year represented the 'head start time' that a company would have needed to produce a competitive tomato cocktail on the market without the confidential information misused by the plaintiff and defendant. Caesar Beverages Inc., a company owned 50% by the plaintiff and 50% by Caesar Canning Ltd. (a company owned by the defendant and his wife), produced and sold the products during this head start period in eastern Canada. A wholly owned subsidiary of the plaintiff produced the product in the west after purchasing the assets of Caesar Canning Ltd. from a receiver in 1986, but was immune from liability for damages because this involvement was after the head start period. The defendant's appeal against Cadbury was dismissed as abandoned.

[7] Following the judgment of the Court of Appeal, the plaintiff informed the defendant that it reserved its right to claim against the defendant for contribution and indemnity for at least 50% of whatever costs or damages it was obliged to

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pay Cadbury as a result of the judgment. It also informed the defendant that it intended to appeal to the Supreme Court of Canada.

[8] On January 28, 1999, the Supreme Court of Canada gave its judgment in the matter (***Cadbury Schweppes Inc. v. FBI Foods Ltd.*** (1999), 59 B.C.L.R. (3d) 1 (S.C.C.)). Liability for breach of confidence was not contested so the Supreme Court was concerned primarily with remedies. The appropriate remedy was fact driven and intended to restore Cadbury's lost opportunity. The court disallowed the injunction and referred the matter back to the British Columbia Supreme Court for assessment of damages upon proper principles. This was to be based upon lost profits from lost market opportunity over the twelve months that it would otherwise have taken the defendants to develop their own product.

[9] The plaintiff immediately informed the defendant that it was examining whether it could claim contribution from the defendant and subsequently informed the defendant that it would be seeking contribution. The defendant was invited to comment upon settlement negotiations that were progressing between Cadbury and the plaintiff but the defendant declined to do so. The defendant was specifically informed about the

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settlement offer of $300,000 and was asked to contribute 50%. The defendant declined to do so.

[10] In the settlement negotiations, Cadbury outlined the value of its claim in excess of $1,000,000 as related only to lost sales attributable to the plaintiff and not to Caesar Canning Ltd.. The eventual settlement agreement of December 21, 1999 was for payment of $300,000 to Cadbury in settlement of all claims including the judgment of the Supreme Court of Canada. It included the following payment term:

> The said sum of $300,000.00 will be payable in two equal installments of $150,000.00. The first such installment will be paid on or before December 31, 1999. The second installment will be payable on the earlier of the date that FBI receives a payment by way of contribution and indemnity from Irving Glassner pursuant to proceedings instituted by FBI against Irving Glassner in the Supreme Court of British Columbia, Vancouver Registry Action No. C995160, or June 1, 2000.

The defendant was not a party to this agreement. The plaintiff now claims contribution for half of that settlement based upon the 50% interest held by Caesar Canning Ltd. in Caesar Beverages Ltd., the company that produced the offending product in the east. The defendant acknowledges ownership of Caesar Canning Ltd. and does not contest the percentage of attribution.

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Issues

[11] The plaintiff states that its claim for equitable contribution arose once all appeals had been completed and settlement accomplished. The defendant, however, states that the plaintiff has not proven that any portion of the settlement was paid on behalf of the defendant. He also states that third party proceedings should have been brought in the original actions and delay in doing so has prejudiced the defendant. Further, judicial discretion should be exercised to prevent the claim being advanced at this stage as an abuse of process.

[12] The following questions are to be decided. When did the plaintiff's claim for equitable contribution arise? Has the plaintiff proven that it paid for a portion of the loss for the defendant? Does issue estoppel prevent the plaintiff from proceeding with this claim because it should have brought third party proceedings in the earlier action? Should this claim not be allowed to proceed as an abuse of process?

Analysis

[13] It should be noted from the outset that the plaintiff's claim is for equitable contribution in the nature of unjust enrichment and is not brought under the ***Negligence Act,*** R.S.B.C. 1996, c. 333. There is no tort involved. The

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difference between the principle of common law liability and the principle of liability in equity was stated in ***Bonner v. Tottenham and Edmonton Permanent Investment Building Society*** [1899] 1 Q.B. 161 (C.A.) at 174:

> There is a common law principle of liability, and also a principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued.

The equitable principle requires that the burden borne by one for the benefit of others associated with him in interest, whether borne because of election by a plaintiff of choice of parties or by requirement of law as to parties to actions, be shared equally (*supra* at 175-176). From this, it is clear that it is not necessary for equitable recovery that the beneficiary be sued in the first action in order for a plaintiff to recover a benefit paid. This is different from contribution at law wherein liability must be established in

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the initial action (see ***Bonner v. Tottenham***, *supra* at 174 and distinguish from ***Cook v. Teh*** (1988), 28 B.C.L.R. (2d) 300 (B.C.S.C.) at 302 and ***Krusel v. Firth*** (1991), 54 B.C.L.R. (2d) 392 (B.C.S.C.) at 397).

[14] The rule of equity that allows a right of contribution is that if two persons are equally liable to be sued for one sum, and one is compelled to pay, he has a right of contribution against the other person liable which is measured by the benefit which that person has received by the payment (***Moxham v. Grant,*** [1900] 1 Q.B. 88 (C.A.)). The principle found early expression in surety cases where equity provided some relief to common law that said that the surety could not sue until he had actually paid more that his portion of the debt. In equity, the claim could be advanced earlier if judgment had been obtained against the surety for more than his portion. Burnyeat,J. recently restated the doctrine in ***Clayburn Industries v. Recor Services*** (2000), 78 B.C.L.R. (3d) 19 at 25-26; 2000 BCSC 1069 as follows:

> Originally, the right to contribution was only available as between co-sureties for the same debt. The following description is given for the contribution between co-sureties in Snells's Principles of Equity, Sweet & Maxwell Ltd., 1982, 28th ed.:
>
> > Where there are two or more sureties for the same debts, and one of them pays the whole debt or more than his proportion of it, he has a right to contribution from his co-surety or co-

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> sureties if he cannot obtain indemnity from the principle debtor. (at p.469)
>
> No action for contribution could be brought at law until the surety had actually paid more than his proportion of the debt. In equity, however, even before payment it has always been possible for a surety to bring an action in the nature of *quia timet* against his co-sureties if judgment has been obtained against him by the creditor for more than his proportion, or perhaps if he is merely threatened by the creditor with an action for more than his proportion. (at p.470)
>
> The principle of contribution is based on the concept of unjust enrichment and, because it is general in nature, it is not restricted to surety cases. Although the application of the doctrine generally arises in the context of co-sureties or guarantors, the rules extend in general to persons who, in one way or another, incur a common liability where one of them has discharged more than his or her proportionate share of that mutual obligation. The principles of contribution have been extended to cases involving co-insurers, co-mortgagors, co-trustees, corporate directors and partners and other co-obligors but the right to contribution at common law does not apply among joint tortfeasors: *Merryweather v. Nixan* (1799), 8 T.R. 186.

[15] Section 53(3) of the ***Law and Equity Act,*** R.S.B.C. 1996, c. 253 sets out the principles of contribution between persons jointly liable. But, these same principles are in effect between several concurrent wrongdoers so that once it is determined that the respective wrongs have caused the same damage for which both parties are liable, any difference in the initial wrongs is irrelevant (***Clayburn Industries v. Recor Services***, *supra* at 26-27).

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[16] Here, the plaintiff and defendant are concurrent wrongdoers, severally liable because there were different wrongs committed based upon different participation in the breach of confidence. It is conceded that in order for the plaintiff to have an equitable claim against the defendant, it must have borne a burden for the benefit of the defendant. The defendant contests in several ways that any benefit was received.

[17] The defendant says that the amount paid by the plaintiff to Cadbury was for lost profits and royalties and because the defendant was found not liable to Cadbury for lost profits at trial and then settled against Cadbury, the plaintiff cannot seek contribution. While this may be the case at common law (see ***Krusel v. Firth***, *supra* at 397; ***Sylte v. Jackson Bros. Logging Co.*** (1988), 27 B.C.L.R. (2d) 357 (B.C.S.C.) at 363-4); but contra see ***Tucker (Public Trustee of) v. Asleson*** (1993), 102 D.L.R. (4th) 518 (B.C.C.A.),78 B.C.L.R. (2d) 173), it is not so in equity where there need be no finding of liability and contribution will ensue as long as a benefit has been paid on the defendant's behalf.

[18] The defendant then argued that the covenant not to sue the defendant given in settlement extinguished the defendant's liability to Cadbury. As such, Cadbury could not have

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recovered the whole of its loss from the plaintiff and only recovered that portion attributable to the plaintiff. This is very similar to the argument above and is answered the same as it applies to equity. However, in ***Tucker***, Madam Justice Southin found that release of a tortfeasor severally liable with another did not preclude a claim in contribution from the other tortfeasor severally liable for the excess that it had to pay regardless that the liability of the tortfeasor released was not disputed at trial. She said at 576:

> ... if the person suffering the damage or loss has released his cause of action against one, that one is not liable to contribute to the other".
>
> To my mind that does not make sense. I think the right of contribution and indemnity among several concurrent tortfeasors is independent of what the injured person does if, in fact, damage or loss has been caused by the fault of two or more. A finding in an action between the person suffering the loss and one of the several concurrent tortfeasors that the latter has caused some part of the damage by his fault, makes that person liable to the person suffering the loss for the whole of the loss, subject to deduction for what that person has received from the released tortfeasor, but does not prevent the tortfeasor who was sued from maintaining his claim for contribution, whether in that action or a separate action. In the first action, it is quite unnecessary for the court to make any division of fault but in the proceedings for contribution it must do so in order to implement the statute.

By analogy, this reasoning applies in this case.

[19] The defendant then refined his argument even further and said that the damages paid by the plaintiff were attributable

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exclusively to FBI Foods. In ***British Columbia Ferry Corp. v. T&N plc*** (1993), 86 B.C.L.R.(2d) 353 (B.C.S.C.), ***Tucker*** was distinguished because the plaintiff ferry corporation sought only that portion of damage actually caused by the defendant tortfeasor in the action and had agreed not to seek any portion of the losses claimed against the third party against whom contribution was then sought.

[20] Throughout the original action, Cadbury pursued the whole of its loss that it suffered through wrongful copying and use of the Clamato formula without distinction between the defendants when it came to damages. The trial judge found a common liability between the plaintiff and defendant through the joint venture and the conduct of the defendant and Kurlender in wrongfully copying and using the Clamato formula. Damages flowed from that. The sole separation of the defendants in damages occurred in the Court of Appeal in respect of FBI Brands only. FBI Brands was the corporation operating in the west that had taken over after the receivership of Caesar’s Canning Ltd. and after the head start period. There was no attempt at trial or in the Court of Appeal to separate causation or to apportion damages between the defendants, except as already stated. The damages as agreed between Cadbury and the plaintiff were for lost profits

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in eastern Canada as arose through Caesar Beverages Inc.. In the Supreme Court of Canada, Cadbury did not contest the separation out of FBI Brands. In settlement correspondence, Cadbury made it clear that it sought damages for lost sales only within the FBI area and not the area of Caesar's Canning. By FBI 'area' was meant eastern Canada as indicated in tables to the settlement letters. This situation is different from ***B.C. Ferry Corp. v. T&C plc.*** where the plaintiff elected to claim from one defendant only that portion of loss caused by that defendant alone.

[21] The benefit derived here was payment by FBI of damages for the lost profits and royalties from the eastern market which was operated through the eastern production and distribution company, Caesar Beverages Ltd., which was owned equally by FBI and Mr. Glassner through his company, Caesar Canning Inc.. That equal ownership would give rise to benefit of 50 percent in a settlement was not, in itself, contested.

[22] The claim for contribution does not arise until the payor has paid more than his share. There is no equity to receive a contribution until a disproportionate share of the loss has been paid (***Hawrish v. Peters,*** [1982] 1 S.C.R. 1083 at 1086-1088). In the case of co-sureties, ascertainment of the right to contribution may be made prospectively but is then a

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different right than that which accrues upon actual payment (***Hawrish***, *supra* at 1090).

[23] As between several concurrent tortfeasors, the right of contribution and indemnity is independent from the loss suffered by the injured person. It is a separate and distinct cause of action that does not arise until the judgment or settlement in the original action (***Cristovao v. Doran's Beverages Inc.*** (1983), 143 D.L.R. (3d) 641 at 648 (Ont.H.C.); ***Tucker v. Asleson***, *supra* at 576). Procedurally, it is open to claim for contribution by third party action in the first action or in a separate action after liability is determined in the first action.

[24] The negligence cases are helpful to decide that it is not necessary to bring third party proceedings in the first action in order to found a claim in contribution. In fact, it really should be brought in a separate action after the settlement or judgment in the first action has been paid. While the claim can be brought in the earlier action, the right does not accrue until payment of a disproportionate amount on behalf of the defendant. The negligence cases clearly suggest that the party who recognizes that there may be a claim in contribution at the end of the day has an option. While this may appear to go against the general principle of *res judicata* that

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litigants should bring forward their entire case in one action and avoid carving up a controversy that should be resolved in one action (***Lim v. Lim*** (1999), 180 D.L.R. (4th) 87 at 92-93; 1999 BCCA 596), judicial economy is not always the overriding principle, especially when the cause of action does not arise until after judgment or settlement in the first action and a disproportionate share of the loss has been paid. In ***Lim***, Mr. Justice Hall recognized that this principle of judicial economy should be followed "to the extent possible" (at 92). He acknowledged that there were limits to the principle and that the interests of justice must always be regarded. He found the decision of the Nova Scotia Court of Appeal in ***Hoque v. Montreal Trust Co.***(1997), 162 N.S.R. (2d) 321 at 338 (N.S.C.A.) helpful in that regard. There, the court said that the test was not whether the issue could have been raised in the first action, but whether it should have been raised depending on a number of factors. Cromwell, J.A. said at 338:

> My review of these authorities shows that while there are some very broad statements that all matters which could have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party should have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether

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> there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

These considerations support a flexible approach so that litigation is not shut out except after scrupulous examination of all of the circumstances and where reasonable diligence would have caused the matter to be raised earlier (***Yat Tung Investment Co. v. Dao Heng Bank***, [1975] A.C. 581 at 590 (H.L.); ***Hoque*** *supra* at 331; ***British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.*** (1998), 50 B.C.L.R. (3d) 1 at 11 (B.C.C.A.)).

[25] The defendant agrees with these principles and that the plaintiff had an option to wait. However, he stated that the plaintiff should have brought the issue as third party proceedings in the first action based upon the ***Hoque*** factors. The new allegation is not inconsistent with matters actually decided in the first action: however, the cause of action did not arise until the first action was settled. It is a separate cause of action. It would not have been practicable to bring the action for contribution in the first action when the parties were of one interest in that action. It is not a simple situation such as an action for debt where there are co-sureties so that the amount of contribution is clear from

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the start. The plaintiff could not have ascertained the amount of the settlement with due diligence in the first action which was hard fought. Therefore, it does not follow as a matter of principle that this action should be barred. Issue estoppel is not appropriate.

[26] Further and separately, the defendant stated that it is an abuse of process to allow the action now because the defendant has been prejudiced by failure to raise the matter in the first action. The delay in bringing an action against the defendant has prevented the defendant from putting forward a defence, namely, that the corporate veil should not have been pierced at trial in the first action. When the defendant did not proceed with his appeal, he did not pursue the alleged error of the trial judge in attributing responsibility for Caesar Canning Ltd. to the defendant. Instead, he settled with Cadbury for undisclosed terms and did not participate further in the appeals. He did not seek to settle with the plaintiff. It was not until after judgment from the British Columbia Court of Appeal that the plaintiff advised the defendant that it was going to claim contribution. The defendant says that it is unfair and an abuse of process to allow the plaintiff’s action to proceed in these circumstances when the defendant could have been completely absolved of liability.

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[27] An action can be struck out as an abuse of process when *res judicata* is not available. The *res judicata* rule in ***Henderson v. Henderson*** (1843), 67 E.R. 313 as quoted in ***Lim*** *supra* at 92 is also a rule of public policy (***Vervaeke v. Smith,*** [1982] 2 All E.R. 144 at 152 (H.L.)). This rule requires parties to bring forward their whole case in one action. Lyons, J.A. recognized that it is possible to get beyond the hard and fast rules of issue estoppel in ***Solomon v. Smith*** (1987),45 D.L.R.(4th)266 at 275:

> I agree ... that a plea of issue estoppel is not available. However to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast, institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can best be avoided. ... we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process — a waste of time and resources of litigants and the court and erosion of the principle of finality so crucial to the proper administration of justice.

Abuse of process has been invoked in this way to prevent the regurgitation of issues and actions that had already been

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decided in another jurisdiction and that were continued in a course of conduct intended to harass (***420093 B.C.Ltd. v. Bank of Montreal*** (1995), 128 D.L.R.(4th)488 at 504-6 (Alta. C.A.)). This wider sense of the doctrine in ***Henderson*** has been said to be reserved for "special circumstances" where justice demands non-application of the rule (***Yat Tung Investment Co.*** *supra* at 590). The policy is aimed at preventing fresh litigation between the same parties over the same subject matter (***Nesbitt Thomson Deacon Inc. v. Everett*** (1989) 37 B.C.L.R. (2d) 341 at 343 (B.C.C.A.)).

[28] This is not the type of repetitious litigation as seen in ***420093 B.C. Ltd.***. Nor is it an obvious waste of time or an attempt to re-litigate an issue. In fact, the defendant does not argue this. He states that the defence has been prejudiced by not having the opportunity on appeal to absolve the defendant of liability. This, however, ignores the reality that the cause of action did not arise until after settlement monies were paid on behalf of the defendant and that, in equity, it is unnecessary for a beneficiary to even be sued in the first action in order for a plaintiff to recover a benefit paid. The plaintiff was entitled to wait and see whether it would be held liable in the Supreme Court of Canada. Neither party requested adjudication of third party claims in the

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first action. In ***Nesbitt Thomson Deacon Inc.*** *supra* at 343, Hutcheon, J.A. considered it clearly without merit to argue that third party proceedings should have been brought in the first action when the second action was to recover monies paid to settle the first action. Although invited by the defendant to distinguish this case on the facts, I find that I am unable to do so.

[29] This leaves the matter of prejudice. In ***Tucker*** (albeit a negligence case), fault had to be borne by Tucker even though her liability was not disputed at trial and she did not appeal (at 573). Findings in the first action do not prevent a claim in contribution unless the plaintiff in the first action elected to claim only from one for loss caused by that one (see ***British Columbia Ferry Corp. v. T & C plc*** *supra* at 356 and above). It cannot be said that serious prejudice has resulted here. The defendant chose to settle early on favourable terms that were not communicated to the plaintiff. He then chose to abandon his appeal when the possibility of the plaintiff claiming contribution was still possible. He ignored offers to participate in settlement discussions. It is unnecessary for me to weigh the likelihood of success of the defendant’s forgone appeal argument.

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Conclusion

[30] There is no reason to bar the plaintiff's claim. There were no arguments advanced against the quantum of the contribution in this situation. The defendant shall pay the plaintiff $150,000. Interest is payable pursuant to the ***Court Order Interest Act,*** R.S.B.C. 1996, c. 79. The plaintiff is entitled to costs on the scale of three.

"Janice Dillon, J."
the Honourable Madam Justice Janice Dillon

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TAB 41

1916 CarswellMan 83
Manitoba Kings Bench, Trial

Gardner v. Newton

1916 CarswellMan 83, [1916] M.J. No. 41, 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276

Gardner v. Newton

Mathers, C. J. K. B.

Judgment: February 28, 1916

Counsel: *I. Pitblado, K. C.*, and *C. H. Locke*, for plaintiff.
W. A. T. Sweatman, and *W. L. McLaws*, for defendant.

***Mathers, C. J. K. B.*:**

1 On November 5, 1912, the plaintiff by indenture of lease made pursuant to *The Short Forms of Indenture Act*, "in consideration of the rents, covenants and agreements" therein contained, demised and leased to The Clothes Shop, Ltd., the corner store in the Carlton Building on the southeast corner of Portage Avenue and Carlton Street in this city for a term of four years and ten months to be computed from December 1, 1912, and ending on September 13, 1917. The rent reserved was $73,300, payable in monthly instalments of $1,150 from December 1, 1912, to November 30, 1915, and $1,450 from December 1, 1915, to September 30, 1917, each in advance on the first day of every month of the said term and the lessee was also to pay business tax, electric light, gas and water charges.

2 The lessee covenanted to pay rent and to pay business tax, electric light, gas and water charges and if it made default in payment of such charges they should be construed as rent and the lessor should be at liberty to distrain therefor.

3 The lease also contained a covenant by the lessee to repair, provided that if the demised premises should at any time prior to or during the term be burned down or damaged by fire, lightning or tempest so as to render the same unfit for the purposes of the lessee, then and so often as the same should happen the rent reserved or a proportionate part thereof according to the nature and extent of the injury sustained and all remedies for recovering the same should be suspended and abated until the premises should be rebuilt or made fit for the the purposes of the lessee, provided that the lessor, in the event of such destruction or partial destruction might terminate the term demised by mailing a notice to that effect to the lessee at Winnipeg.

> Provided further that, notwithstanding anything herein contained the lessor shall not under any circumstances be obliged to rebuild or repair the premises in the event of loss or damage by fire or any of the causes hereinbefore mentioned, rendering them unfit for occupation, nor shall the lessees under any circumstances have the right to rebuild or repair the said demised premises in the event of such loss or damage except at their own charge and expense and with written consent of the lessor first had and obtained, provided always that rent shall cease from the time of such destruction or partial destruction.

4 The indenture provides for a number of events such as default in paying rent or the making of an assignment for the benefit of creditors or in case the premises should be abandoned or should become and remain vacant for a period of ten days, on the happening of any of which a sum equivalent to three months' rent should immediately become due and payable as rent and the lease should at the option of the lessor cease and be void and the term granted expire and be at an end and the lessor should have a right to re-enter and release the premises.

5 It also contained the usual proviso for re-entry by the lessor for non-payment of rent or non-performance of covenants.

6 The lessor on his part covenanted for quiet enjoyment and to heat the demised premises when necessary during the term.

7 The Clothes Shop, Ltd., entered into possession under the lease and continued in possession until April 28, 1915. On April 8, 1915, the lessee transferred by bill of sale bearing that date all its goods and chattels in connection with its store business carried on in the demised premises, and also its book accounts to the defendant Newton. The bill of sale recited that

> Whereas the bargainer is indebted to certain creditors whose names are set out in the schedule hereto annexed and marked with the leter "A," and has agreed to sell and transfer to the bargainee the goods and chattels and other assets hereinafter mentioned for the purpose of selling and disposing of the same, and distributing the proceeds thereof *pro rata* among the creditors set out in the said schedule.

8 The plaintiff was named as one of the creditors in the schedule referred to.

9 At the same time The Clothes Shop, Ltd., executed under its seal the following document, to which also was attached as schedule "A" the said list of creditors:

> This agreement made in duplicate this eighth day of April, A.D. 1915; Between The Clothes Shop, Limited, hereinafter called "the debtor," of the First Part; and Charles Henry Newton, of the City of Winnipeg, in the Province of Manitoba, Official Assignee, hereinafter called "the Trustee," of the Second Part.
>
> Whereas the debtor is indebted to certain creditors whose names are set out in the Schedule hereto annexed and marked with the letter "A."
>
> And Whereas under and by virtue of a certain bill of sale, bearing date herewith and made between the parties hereto, the said debtor has sold and transferred to the said trustee certain goods and chattels stock-in-trade, fixtures and fittings and book accounts mentioned in said bill of sale;
>
> And Whereas it is agreed that the said bill of sale is executed by the debtor and received by the said trustee on the terms and conditions hereinafter mentioned, viz.:
>
> 1. The said trustee shall be and is hereby declared to be the trustee for and on behalf of the creditors of the said debtor, whose names are set out in the said Schedule "A."
>
> 2. The said trustee shall have the right to sell and dispose of the said stock-in-trade, fixtures and fittings, book accounts, promissory notes, bills receivable, and other goods and chattels referred to or described in the said bill of sale, or which comes otherwise in his possession or power, either by public auction or private sale or for cash or upon terms of credit with or without security as the said trustee shall deem advisable or expedient, and shall pay and distribute the proceeds realized from and out of any such sale or sales, and out of the collection of book accounts, promissory notes, bills receivable in the manner following:
>
> First: In payment of his costs, charges and expenses for and in connection with the sale and realization of such assets and the distribution hereinafter mentioned together with the solicitors' charges of and in connection with the said bill of sale and this agreement, and
>
> Secondly: The claims of preferred creditors, if any, and
>
> Thirdly: In payment *pro rata* among the general creditors mentioned in the said Schedule.
>
> 3. And it is distinctly understood and agreed between the parties hereto that the said trustee shall not be liable to the said debtor or the said creditors, for any moneys, excepting such as are actually received by him, and shall not be liable for any loss or damage done to or any shrinkage of the said goods and chattels or other assets, or any part thereof, nor for any act or omission on the part of the said trustee, excepting such acts or omissions as shall amount to gross negligence, and that the said trustee shall have power to make any compromise or other settlement in respect of any of the book accounts, promissory notes, bills receivable, or choses-in-action which he may deem advisable or expedient.

4. It is further distinctly understood and agreed that neither the bill of sale or this agreement shall be deemed to be in any way a satisfaction of or settlement of the existing liability of the said debtor to the said creditors, or any of them, nor shall the same prejudice or affect the present or accruing rights of the said creditors in respect of their claims against the said debtor, nor operate as a merger thereof, nor prejudice or affect any security or securities now or hereafter held by the said creditors, or by any of them, but the said debtor shall remain liable to the said creditors for the amount of his existing indebtedness to them, unaffected by these presents, or by the said bill of sale.

5. It is further agreed between the parties hereto that the said trustee may nominate, constitute or appoint any other person, firm or corporation to act as his attorney or attorneys, to carry out the provisions, terms or trusts contained in this agreement, or to act in any way in his place and stead in connection with this agreement, or the said bill of sale as the said trustee shall deem advisable or expedient.

6. In order that the said trustee may know the exact amount of the claims of the various creditors set out in the Schedule "A" each creditor as required by the trustee shall forthwith make a statutory declaration verifying his claim against the debtor, and the debtor hereby acknowledges that no creditor holds any security in connection with his claim, other than the landlord of the debtor, W. H. Gardner, who has the right to distrain for three month's rent.

10 Both bill of sale and trust agreement were delivered to the defendant Newton.

11 He assumed the burden of the trust and took possession of the goods and book accounts, for which purpose he went upon the demised premises. On April 28 he sold the goods and they were on that day removed from the premises by the purchaser. He has received the proceeds from such sale and now holds same for distribution in accordance with the trust agreement.

12 The plaintiff received notice of this transfer and agreement and on May 19, 1915, he sent to the trustee a statutory declaration made by himself proving his claim under the lease. In it he claimed as rent overdue up to and including April, 1915, the sum of $5,800, and of this he claimed that the sum of $4,600 was a preferred claim. He also claimed the further sum of $38,800, being the balance still unpaid of the total rent reserved for the entire term, less the said $5,800 overdue.

13 On June 22, 1915, the assignee notified the plaintiff that under the advice of his solicitors he would not admit plaintiff's claim for $38,800, and that he proposed to divide the moneys in his hands immediately unless the plaintiff entered an action to establish his right.

14 This action was then brought by the plaintiff against the assignee and The Clothes Shop, Ltd., for a declaration that he is entitled to receive his distributive share of the $38,800 as well as upon the portion of the claim admitted by the assignee.

15 It is admitted that The Clothes Shop, Ltd., vacated the premises on April 28, 1915, in the sense that it no longer carried on business there; but it has since that time authorized other people to go into and use the premises.

16 The lease is still subsisting and the term demised still remains vested in the lessees, The Clothes Shop, Ltd. It was not contended that there had been any surrender of the lease either by act of the parties or by operation of law. The plaintiff has declined to exercise the option contained in the lease of declaring the same void because of the lessee's assignment for the benefit of creditors and has declined to re-enter or release the premises.

17 The question to be decided is whether the plaintiff is a "creditor" in respect of rent which had not become due and payable by effluxion of time when the trust for creditors was created within the meaning of the documents creating the trust.

18 Creditors under *The Assignments Acts* of Ontario with which the Manitoba Act is *in pari materia* are those only whose claims are *debitum in presenti*, although they may be *solvendum in futuro*. For this reason a person having a claim for unliquidated damages not reduced to a judgment at the time of the assignment, whether arising out of tort: *Ashley v. Brown*, 17 A.R. 500, *Gurofski v. Harris*, 27 O.R. 201, or breach of contract: *Grant v. West*, 23 A.R. 533, *Magann v. Ferguson*, 29 O.R. 235, is not a creditor within the meaning of these acts. One of the reasons which influenced the courts in arriving at this conclusion

was that The Assignments Acts make no provision whereby a person claiming unliquidated damages may substantiate his claim against the estate.

19 In *Grant v. West, supra*, Chief Justice Hagarty said *arguendo*, in answer to the argument that the claim for damages was groundless —

> The objection to the right to rank seems to me to be far deeper. There does not seem to be any provision in *The Assignments Act* allowing a person claiming damages to substantiate that claim against the estate.

20 In his judgment he states that in his opinion the word "creditor" is used in the act as meaning one to whom a debt is owing — correlative to debtor. Mr. Justice Osler begins his judgment with the statement that:

> The point taken by the learned Chief Justice on the argument is in my opinion fatal to the appeal.

21 Farther on he refers to the fact that

> A claim for damages is nowhere in terms mentioned in the Act. Wherever a claimant is referred to the language seems to point to a claim against one who is a debtor, a word which does not aptly describe one who is only sought to be made liable for unliquidated damages.

22 Not only are unliquidated damages excluded from proof under these Acts, but so also are contingent claims, that is, a claim which may or may not ever ripen into a debt, according as some future event does or does not happen.

23 In *Mail Printing Co. v. Clarkson*, 25 A.R. 1, the judgment turned upon the fact that at the date of the assignment the contract was still wholly executory. There was no absolute certainty that the Printing Company would ever publish any portion of the advertising matter contracted for. It might under the terms of the contract refuse all the matter tendered, or before any space had been used and before the expiration of the year over which the contract extended the newspaper might have suspended publication. In either event the company would have no claim. Upon these considerations the court held that the company was not a creditor entitled to rank on the estate.

24 In *Clapperton v. Mutchmor*, 30 O.R. 595, the right to rank was denied to the plaintiff by Boyd, C., because at the date of the assignment his position was that he held the debtor's guarantee for the payment of certain promissory notes still current at the time of the assignment made by a company also in liquidation, of which the debtor was president. The learned Chancellor said:

> There was no debt in this case at the time of the assignment. There would be no debt until the notes matured and default arose in their payment by the company. Though this time has now elapsed and all the notes are overdue and unpaid still I do not think that the status of creditor obtained after the assignment can entitle the plaintiff to rank with those who were creditors at the date of the assignment.

25 There the only contingency which might intervene to prevent the plaintiff's claim becoming a debt payable by the assignor was the possibility that the maker of the notes guaranteed — a company which went into liquidation three days after the assignment — would pay them when they became due.

26 In *Carswell v. Langley*, 3 O.L.R. 261, it was held that an annuitant to whom an annuity of $100 per quarter had been granted during her natural life was not a creditor having a right to rank for future quarterly payments upon the estate of the grantor of the annuity under *The Assignments Act*. Whether or not there would ever be a debt due from the grantor to the grantee of the annuity depended upon the contingency of the grantee living until the next quarterly payment matured.

27 Before the amendment of the English *Winding Up Act* permitting a petition to be presented by a creditor including any contingent or prospective creditor, it was held that the word "creditor" as then used in the Act did not include a person having a claim for unliquidated damages and that such a person was not entitled to present a petition notwithstanding that under another section of the Act

all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages

28 were admissible to proof. *In re Pen-y-Van Colliery Co.*, 6 Ch. D. 477. It was further held that a guarantor of a debt of the company who had not paid the claim was not a creditor: *In re Vron Colliery Co.*, 20 Ch. D. 442, 51 L. J. Ch. 389, nor was a landlord such a creditor for accruing rent not yet payable: *Re United Club and Hotel Co., Ltd.*, 60 L. T. (N. S.) 665.

29 The earlier bankruptcy laws contained no provision admitting contingent debts and those sounding in damages to proof, and the existence of such claims, it was held, did not constitute the claimant's creditors entitled to rank on the bankrupt's estate: *Hamond v. Toulman*, 7 Term. R. 612, 101 E.R. 1159. *Robson on Bankruptcy*, 273. To remedy this defect in the law Acts were passed, 6 Geo. IV., 1849, 1861, 1869, 1883. Now all debts and liabilities present or future, certain or contingent are provable, including unliquidated damages arising out of breach of contract or trust, and provision is made for valuing such claims.

30 The above cases all deal with the definition of the words "debtor" and "creditor" in particular statutes. They show that in the absence of anything to indicate that a more comprehensive meaning was intended that which is ascribed to them in every day usage is to be applied. In its largest sense "creditor" is one who has a right to require the fulfilment of an obligation or contract; but its general and almost universal meaning is a person to whom a debt is payable. *Stroud, Judicial Dictionary*, p. 423, *Nicolin v. Weiland*, 56 N. W. R. at p. 588, and all argument from analogy to the Bankruptcy, Assignment and Winding Up Acts is opposed to giving the word a larger meaning than that which ordinary usage attaches to it.

31 The definition of "creditor" as here used does not depend upon the construction of a statute. I must construe the deeds by which this trust was created according to their express terms in the light of all the circumstances and not strain them to bring them within the alleged intention of any of these statutes.

32 The plaintiff by the lease divested himself of the right to the possession of the premises for the whole term subject to the right of re-entry on default of the lessee. The contract was completely executed on his part when he executed the lease. In this respect this case differs from *Mail v. Clarkson, supra*. It is true he covenanted for quiet enjoyment and to heat the premises, but a breach by the landlord of either covenant would not terminate the lease; it would but give the tenant a right of action for the breach. The tenant on its part covenants to pay the whole rent by monthly instalments on the first of each month in advance. The tenant has ceased to carry on business on the premises, but there has been no surrender of the lease, and there is no evidence that the tenant is not able to pay the monthly instalments of rent as they fall due or that the same cannot be collected from it by suit. The premises still belong to the tenant and it may either leave them vacant or resume possession. If there had been no trust for creditors created by the tenant it is clear that the landlord's only right would be to sue for the gales of rent as they come due. He would have no right to sue at once for the whole unpaid portion of the rent reserved, even if the tenant had declared that it had given up the premises and would pay no more rent: *Connolly v. Coon*, 23 A.R. 37. The contention of the plaintiff is that the tenant has, however, conferred upon him the right to prove for, and in that way possibly recover, all the unpaid rent at once, without waiting for the expiration of the times fixed for payment by the lease. There was no evidence that the tenant is insolvent or unable to pay its debts in full or that the estate is not sufficient to pay in full all the creditors named including the disputed claim of the plaintiff. If that be so, the plaintiff, if allowed to rank upon the estate, will receive the whole rent reserved long before he would have been entitled to it if there had been no assignment by the tenant. There is no contract or agreement in the lease on which a claim to payment of the whole rent in advance could be based.

33 Then, is there anything in the deeds to indicate that such was the intention of the tenant? The bill of sale recites that The Clothes Shop, Limited, is "indebted" to certain "creditors" and has agreed to sell and transfer the goods named to the trustee for the purpose of selling the same and distributing the proceeds *pro rata* amongst the creditors named. In the trust deed The Clothes Shop, Limited, is designated "the debtor," throughout and Newton is referred to as the trustee for the "creditors." He is empowered to sell the goods and to distribute the proceeds first in payment of costs and charges; secondly, in payment of preferred claims, and thirdly, "in payment *pro rata* amongst the general creditors mentioned in the schedule."

34 By s. 4 the agreement is not to be deemed a satisfaction of the "existing liability" of the debtor to the creditors nor affect "present or accruing rights" of the creditors in respect of their "claims" against the "debtor," but the "debtor" shall "remain liable

to the said creditors for the amount of his existing indebtedness to them." By s. 6 that the "trustee may know the exact amount of the claims" of the "creditors" each creditor is to make a statutory declaration verifying his "claim" against the "debtor."

35 Nothing can be inferred from the fact that the plaintiff's name was inserted in the schedule, because there was a large sum due and payable for rent already accrued in respect of which he was properly named as a creditor.

36 The documents contain no provision such as that found in *The Assignments Act* for ascertaining the present value of a debt not yet accrued by deducting interest or such as that found in the Bankruptcy Acts and the Winding Up Acts for ascertaining the present value of a contingent claim or one sounding in damages. Hagarty, C.J. and Osler, J. in *Grant v. West, supra*, thought the omission from *The Assignments Act* of a provision allowing a claim for damages to be substantiated indicated an intention that such a claim should not be allowed to rank. A similar inference might be drawn from the omission of such a provision from these deeds.

37 I can see nothing to indicate that the word "creditor" in these documents was used other than in its popular sense — correlative to "debtor" but much to indicate that such was the intention of the parties. The trust agreement speaks from the date of its execution. At that time no part of the disputed claim had accrued due nor was there any absolute certainty that any future rent would ever accrue. The lease provides that if the building should burn down or be rendered unfit for the purposes of the lessee, the rent and all remedies for recovering it shall be at once suspended until the premises are rebuilt. Whether or not in the event of injury the premises shall be rebuilt or repaired depends upon the unfettered will of the plaintiff. The plaintiff relies upon the company's covenant to pay the rent, but the covenant would at once cease to be enforceable if the premises were destroyed by fire. In view of the possibility of that event happening it would, it seems to me, be highly unjust and contrary to the contract of the parties that the plaintiff should be admitted to prove now for the full rent. The very most he would be entitled to do would be to prove for the present value of his claim. But how is that value to be arrived at even if the trust instruments made provision for assessing it? The premises might have been destroyed the next day or they may remain intact until the expiration of the lease. No tribunal, however wide its powers, could possibly name a sum which will certainly accrue to the plaintiff. It seems to me quite impossible to say that a man is a "creditor" even using the word in its largest sense, in respect of a sum of money not one penny of which may ever become payable.

38 I have found no authority directly in point, but *King v. Malcott*, 9 Hare, 692, is somewhat analogous. In that case premises were leased for 99 years at a rent of £450 per annum. The lease contained a covenant on the part of the lessee himself, his heirs and executors to pay the rent. The lessee died when only a small fraction of the term had elapsed, having previously assigned the demised premises to another, leaving a will charging his debts upon his real and personal estate. The lessor brought an action against the executors for administration and to have a sufficient part of the proceeds of the estate set apart and invested as a due provision for the payment of the rent then due or thereafter to accrue due on the lease. It was not claimed as here that there was an immediate right to rank as a creditor upon the estate; all that was asked was that a sufficient portion of the estate be empounded to provide for future rent accruing and being unpaid by the assignment of the lease. In that case as the Vice Chancellor pointed out, not only was there no rent due, but there was no certainty that anything ever would be due on the covenant, for, if the rent was paid when due no action would ever lie, and the action was dismissed.

39 *King v. Malcott* was applied in *In re Haytor Granite Co.*, L.R. 1 Eq. 11, where a very similar application was made under *The Winding-Up Act*. There a company which had become the lessee of a granite quarry for a term of years at an annual rent which it had covenanted to pay was ordered to be wound up, while several years of the term still remained. The landlord took out a summons to be admitted to prove for the future rent. As in the previous case the Company had assigned the lease but its liability upon its covenant to pay still remained. The application was based upon s. 158 of *The Winding-Up Act* 1862, under which all claims present or future, certain or contingent, ascertained or sounding only in damages were admissible to proof, a just estimate being made as far as possible of the value of all claims, subject to a contingency or sounding only in damages. The Master of the Rolls held that it was impossible to estimate the chance of the present or some future owner of the lease not paying the rent, the result of which would only be that the landlord would get back the property in the state it then was and refused the application. On appeal, L.R. 1 Ch. 77, 35 L.J. Ch. 154, the order of the Master of the Rolls was varied but only to this extent that the landlord was permitted to enter a claim for the whole rent but only to prove for rent actually accrued due.

40 The next case in which the question is discussed, *In re London and Colonial Co. (Horsey's Claim)*, L.R. 5 Eq. 561, 37 L.J. Ch. 393, is distinguished from the *Haytor Case* by the fact that the lease had not been assigned but remained with the liquidator. The landlord on the authority of the *Haytor Case* had been permitted to enter a claim for the entire future rent, but as there was then nothing in arrears he could prove for nothing. The liquidator declared several dividends and the landlord applied for an order directing the liquidator to pay into court a sum representing the dividends which would have been payable to him upon his total estimated rent for the unexpired portion of the term to secure his dividends as his claim matured. The Vice Chancellor held that such a claim for future rent was not within s. 158 of *The Winding-Up Act*, and refused the application. He said:

> From the terms of this section it follows either that the claimant has a right to immediate proof and payment or ... that he has no present right at all. I am of opinion that he is entitled to no present right at all; or in other words, that the section does not apply to the case of a lessor who has the lease always as an absolute security — a continual remedy by distress — a remedy by re-entry if he desires it — who has been paid all arrears of rent which have accrued due since the winding-up — and with respect to whom it must be said that the chances of any future breaches of covenant or of there being or not being a sufficient distress cannot be the subject of calculation.
>
> It would be strange too if his proof should be admitted and that such a proof and payment in competition with the other creditors should not be taken as a satisfaction of his remedies by covenant, distress or re-entry — no matter what the amount of the dividend might be; and yet there is no provision in the Act providing for his giving up those rights, nor am I aware as at present advised that the court could impose any such terms on him.

41 The reasoning of that case is distinctly against the plaintiff's right to prove in this case. If a claim for future rent cannot be admitted to proof in a winding-up proceeding, notwithstanding the very wide terms of s. 158 of *The Winding-Up Act*, it follows that it cannot be admitted to proof under the terms of an agreement which contains nothing equivalent to that section.

42 *The Judicature Act*, 1875, s. 10, made the Bankruptcy rules "as to debts and liabilities provable" applicable to winding-up proceedings. In two cases afterwards decided, viz., *Hardy v. Fothergill*, 13 App. Cas. 351, 58 L.J.Q.B. 44, and *Midland Coal and Coke Co., In re Craig's Claim*, [1895] 1 Ch. 267, 64 L.J. Ch. 279, it was intimated but not decided that this change altered the law and that therefore a landlord's right to prove for future rent must be conceded. A few months after the decision in *Craig's Claim*, the point arose again in *In re New Oriental Corpn.*, [1895] 1 Ch. 753, 64 L.J. Ch. 439, and Vaughan Williams, L.J. held that these two cases had no application to a case where the lease is still subsisting and adopting the principle of *Haytor Granite Co.* and *Horsey's Claim*, he allowed a claim to be entered for the whole future rent, but only to prove for what was overdue, although the company was insolvent. This case was followed in *In re Panther Lead Co.*, [1896] 1 Ch. 978, 65 L.J. Ch. 499, the facts of which were practically identical with the *Oriental Bank Case*, with this exception, that in the latter case the lease was still subsisting and the lessor refused to accept a surrender, whereas in the *Panther Lead Case* the lessor offered to do so on terms of his being allowed to prove for the loss thereby sustained, and Romer, J. intimated his opinion that the liquidator should accept the offer and left it to the parties to carry out an arrangement to that effect. The learned judge said if the lessor had as in the *Oriental Bank Case* refused to accept a surrender he would have found great difficulty in doing more than was done by Vaughan Williams, L.J. in that case.

43 While these cases were decided under *The Winding-Up Act*, they are of assistance in determining the plaintiff's rights in so far as they enunciate general principles of justice. They lay down this guiding principle that a lessor cannot "have both the rent and possession," that is, cannot prove for future rent and retain his reversion with the rights of distress, action on the covenant and re-entry incident to it: *Emden on Winding-Up of Companies*, 7th ed. 168.

44 I have therefore come to the conclusion, notwithstanding the very able argument of Mr. Pitblado, that upon the proper construction of the documents creating this trust, as well as upon principle and authority, the plaintiff's claim cannot be maintained.

45 The action will be dismissed with costs.

Action dismissed with costs.

TAB 42

In the Court of Appeal of Alberta

Citation: HSBC Bank Canada v. Fuss, 2013 ABCA 235

Date: 20130625
Docket: 1203-0029-AC
Registry: Edmonton

2013 ABCA 235 (CanLII)

Between:

HSBC Bank Canada

Respondent
(Plaintiff)

- and -

David Fuss and Rhonda Thuna

Appellants
(Defendants)

- and -

**1100336 Alberta Ltd., carrying on business as
Incredible Electronics Wholesale, Electronics Wholesale (Edmonton) Ltd.,
Incredible Electronics Inc., Ariza Technology Inc.,
HBC Business Credit Inc. and Cameron Kendrick**

Not Parties to the Appeal
(Defendants)

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice E.A. Marshall
Dated the 1st day of December, 2011
Filed on the 23rd day of January, 2012
(2011 ABQB 748, Docket: 0403 19158)

2013 ABCA 235 (CanLII)

Memorandum of Judgment

The Court:

INTRODUCTION

[1] The appellants, David Fuss and Rhonda Thuna, appeal a trial judgment which found they committed the tort of unlawful conduct conspiracy against the respondent bank and awarded damages of $1,761,901.14 against them: 2011 ABQB 748. Applying the five elements of the tort set out in ***Agribrands Purina Canada Inc v Kasamekas***, 2011 ONCA 460, 106 OR (3d) 427 at para 26, the trial judge found:

> 1. the appellants, along with Cameron Kendrick (not a party to the appeal), acted by agreement to divert business activities from 828326 Alberta Ltd. (828) to other companies, Electronics Wholesale (Edmonton) Ltd. (EWE) and 1100336 Alberta Ltd. (1100);
>
> 2. the appellants' conduct was unlawful;
>
> 3. the appellants' conduct was directed at the respondent because the scheme would defeat the respondent's attempt to recover the funds it loaned 828;
>
> 4. injury to the respondent was likely to result if 828's assets were stripped; and
>
> 5. the appellants' conduct caused injury to the respondent because it could not recover the loaned funds from 828.

[2] The appellants advance three grounds of appeal. First, they argue the trial judge misapplied the law of unlawful conduct conspiracy. They say the trial judge could not find a conspiracy because he concluded the appellants were not aware of the fraud perpetrated by Kendrick. They also say the trial judge failed to deal with causation and that no acts or omissions on their part caused the respondent's loss. Second, they argue the trial judge misapplied the law relating to a director's statutory duties. Third, they argue the trial judge erred in calculating damages. They say they should not be liable for damages calculated pursuant to the terms of a general security agreement (GSA) between 828 and the respondent.

FACTS

[3] The respondent began providing financing to 828 through an operating line of credit in 2001. 828 executed a GSA which provided that any money collected or received by 828 was subject to a trust in favour of the respondent. At that time, Kendrick was 828's only director and shareholder.

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828 operated under the name Electronics Wholesale and was a wholesale and retail distributor of satellite systems and other electronics.

[4] Fuss was a director of two Ontario corporations that were suppliers of 828, Ariza Technology Inc. (Ariza) and Incredible Electronics Inc. (Incredible). He was also a director of HBC Business Credit Inc. (HBC), a third Ontario corporation that became a 50% shareholder of 828.

[5] When HBC became a 50% shareholder of 828, Thuna, Fuss' wife, was made a director of 828. Thuna was also a director of Ariza and HBC. EWE was incorporated in July 2003. Thuna was a director of that corporation as well.

[6] During 2003, 828 often exceeded the limit of its operating line of credit with the respondent. On January 29, 2004, the respondent returned some of 828's cheques for insufficient funds and notified 828 that further cheques would be dishonoured. On February 4, the respondent began dishonouring all of 828's cheques.

[7] Kendrick and Fuss decided to continue the business of 828 by opening an account with TD Canada Trust (TD). That account was opened, in EWE's name, on February 4, 2004. Kendrick and the appellants were signing officers for the account. All receivables coming to 828, and proceeds from the sale of 828's inventory, were deposited in the TD account.

[8] The respondent was advised of the TD account but was not advised that 828's business was operating under EWE or that the TD account belonged to that corporation. Over $1.2 million was deposited in the TD account by the end of May 2004. None of the funds went to 828 or the respondent.

[9] On March 8, 2004, the respondent made a demand for payment. The principal amount owing by 828 was $690,747.58. Between March 17 and May 7, $202,350.82 was paid to Ariza from EWE's TD account.

[10] 1100 was incorporated on April 1, 2004. Fuss and Kendrick's father were the directors of that corporation. 1100 took over the operation of 828's business, including its stock, receivables and employees. The respondent was not advised of 1100's involvement with 828's business.

[11] In June 2004, the respondent appointed Price Waterhouse Coopers to serve as the privately appointed receiver and manager of the business and undertakings of 828.

[12] In July 2004, the respondent petitioned 828 into bankruptcy. Its recovery was negligible. 828's remaining stock had little value and its electronic records had been destroyed. In September, the respondent sued Kendrick, Fuss, Thuna and the corporations they controlled alleging they conspired to prevent it from realizing the debt owing by 828. 1100 ceased operation in 2005.

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THE TRIAL DECISION

[13] The trial judge did not find the appellants to be credible witnesses. He concluded Fuss was dishonest about certain things and Thuna attempted to minimize her knowledge and participation in the scheme.

[14] The trial judge found that 828's property and operations were transferred to EWE and 1100 and that the transfers were not for fair market value. He concluded that EWE's business, and the funds in the TD account, actually belonged to 828 and that EWE's role was merely a front under which 828's business was continued while Fuss and Kendrick set up 1100. Once 1100 was set up, it received 828's remaining property, employees and business activities.

[15] The trial judge concluded that the transfers from 828 to 1100, and the use of EWE's TD account, were an intentional and deliberate process designed to sequester 828's assets in 1100 and leave 828 with the liability to the respondent. Put another way, he concluded the plan was to leave the respondent with a right to advance its claim on an empty, worthless corporation. He held that 1100 had no legitimate business purpose and was created solely for the purpose of defeating the respondent's claim.

[16] The trial judge found that Kendrick was responsible for producing misleading or incorrect financial information for 828 and destroying that corporation's electronic records. He found this was fraudulent conduct. Although he did not find that the appellants were aware of Kendrick's fraud, the trial judge concluded they were aware of, endorsed and participated in the transfer of 828's business to 1100.

[17] The trial judge found that Fuss was a full participant in the effort to move 828's business and assets to a new corporate shelter. He said, while Fuss may not have known the details of how that plan was executed, he was aware of Kendrick's overall intentions and cooperated to that end. The trial judge accepted that Thuna was generally directed by Fuss but found she was more involved in the plan than she claimed to be.

[18] The trial judge considered whether each of the elements of the unlawful conduct conspiracy tort had been proven. He concluded Kendrick and the appellants acted by agreement after making several findings. He found that Fuss assisted in the formation of 1100 and its receipt of 828's business and assets and that, during that process, he knew 1100 did not receive those things for fair market value. He found that Kendrick and Fuss agreed to: prevent the respondent from recovering 828's receivables by depositing them in EWE's TD account, and later in 1100; continue the business

of 828 under the EWE "flag of convenience"; transfer 828's business and assets to 1100, with no apparent intention of having 1100 repay 828's debts; and repay some of the debt to Ariza in preference to making any payments to the respondent. He found that Thuna was well aware that 828 was in trouble and that its business was taken over by EWE and then transferred to 1100. He found she participated in the agreement by willingly carrying out Fuss' instructions, knowing their effect. The trial judge found the common scheme was to divert 828's business activities to EWE and then 1100, regardless of whether this would benefit 828.

[19] In considering whether the conduct of Kendrick and the appellants was unlawful, the trial judge found that the intention of those directing minds was to defeat the respondent's claim and sink 828 with its debt. He said that was unlawful conduct.

[20] The trial judge also considered a director's duties under s. 122(1) of the *Business Corporations Act*, RSA 2000, c B-9. He concluded that Kendrick's fraud, and efforts to defeat the respondent's legitimate interest, breached the statutory duty of care he owed to the respondent (as a creditor of 828) and the statutory fiduciary duty he owed to 828. He also concluded that Thuna and Fuss breached the statutory fiduciary duties they owed to 828 and 1100, respectively. The trial judge found the appellants adopted a strategy that doomed 828 to bankruptcy. He said Thuna had a director's duty to take steps to meet 828's obligation to the respondent and that the transfer of 828's business and assets to 1100 was not only against 828's interests, it sabotaged any possibility that 828 would ever meet its obligation. He said Fuss would have breached the director's duty he owed to 1100 if he authorized it to take 828's business and assets where the transfer had no legitimate business purpose and was, in effect, a knowing appropriation of another's trust property. The trial judge held that the appellants' unlawful conduct flowed from their failure to discharge their obligations to 828, and the creation of 1100.

[21] The trial judge said the incorporation of 1100, and the transfer of 828's business and assets to that corporation, satisfied him that the conduct of Kendrick and the appellants was directed towards the respondent. He said it was evident that a very significant purpose of the actions of Kendrick and Fuss was to prevent the respondent from realizing on its security. He made no specific finding against Thuna in his discussion of this element of the tort.

[22] The trial judge concluded that Kendrick and the appellants knew that, in the circumstances, injury to the respondent was likely to result. He said, through the operation of EWE and 1100, which stripped 828 of its assets, Kendrick and the appellants would have known that the respondent would sustain very substantial loss. He said that loss was not only likely and foreseeable but a necessary consequence of the conspirators' objective.

[23] The trial judge found that, as a result of the conduct of Kendrick and the appellants, the respondent suffered injury because it was unable to recover the funds it loaned 828.

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[24] The trial judge found that the respondent had established *prima facie* proof that, in early February 2004, there were sufficient assets available to pay the respondent's claim in full. He awarded the respondent $1,761,901.14, representing the principal amount owing on the operating line of credit and amounts owing pursuant to the GSA, including insurance costs, interest, receiver costs and legal fees.

STANDARDS OF REVIEW

[25] The standard of review on questions of law is correctness. The application of a correct legal principle to the facts is a question of mixed fact and law subject to the palpable and overriding error standard. Fact findings and inferences drawn from the facts are also reviewed on the palpable and overriding error standard: ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235 at paras 8, 25 and 37.

ANALYSIS

[26] It is common ground that the trial judge stated the correct test for unlawful conduct conspiracy.

Agreement

[27] The defendants must act in combination, that is, in concert, by agreement or with a common design: ***Agribrands*** at para 26. They must know the facts of the alleged agreement and intend to be a party to the combining: ***Maguire v Calgary (City)*** (1983), 146 DLR (3d) 350, 43 AR 268 at para 12 (CA); ***Mraiche Investment Corp v McLennan Ross LLP***, 2012 ABCA 95, 524 AR 151 at para 43. Often, direct evidence of the agreement is not available and resort must be had to circumstantial evidence: ***Capital Estate Planning Corp v Lynch***, 2011 ABCA 224, 510 AR 244 at para 81.

[28] The appellants argue that, in order for them to act in combination, they would have to have agreed to participate in Kendrick's fraud. As the trial judge did not find that they were aware of, or involved in, Kendrick's fraud, he erred in concluding they acted in combination with Kendrick. This argument misconceives the trial judge's findings. The agreement the trial judge found was not based on Kendrick's fraud. It was based on the common design to divert 828's business and assets firstly to EWE and then to 1100 and, thereby, deprive the respondent of the ability to recover 828's debt. The trial judge found that the effect of this agreement was that Fuss and Kendrick also agreed to repay some of the debt to Ariza in preference to making any payments to the respondent. He found that Thuna knew that 828 was in trouble and that its business was taken over by EWE and then transferred to 1100. He found that she participated in the common design by willingly carrying out Fuss's instructions, knowing their effect. These fact findings and inferences are supported by the

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evidence and owed deference. They establish the first element of the tort of unlawful conduct conspiracy.

Unlawful conduct

[29] The conspirators' conduct must be unlawful. Unlawful conduct encompasses acts that are wrong in law. Unlawful conduct need not be actionable. Highly competitive commercial activity does not qualify as unlawful conduct provided it is not otherwise unlawful: ***Agribrands*** at paras 26 and 38.

[30] The appellants say the trial judge erred in finding that Thuna breached the statutory fiduciary duty she owed to 828. They say he erred in finding that, as a director of 828, Thuna was obliged to ensure that 828 repaid its debt to the respondent. They also assert that the trial judge erred in finding that Fuss breached the statutory fiduciary duty he owed to 1100.

[31] It is unnecessary for us to analyze the trial judge's conclusions on directors' duties because he attributed other conduct to the appellants which was clearly unlawful. The appellants, along with Kendrick, were the directing minds of corporations involved in a series of transactions. Thuna was a director of 828, which transferred its business and assets to EWE and 1100. The transfers were facilitated by the opening of the TD account in the name of EWE. Thuna was a director of EWE and the appellants were signing authorities on the TD account. The business and assets of 828 were ultimately transferred to 1100, in which Fuss was a director. The transfer of 828's property was not for fair market value. Therefore, the appellants committed unlawful conduct by converting the property of 828: ***Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce***, [1996] 3 SCR 727 at para 31.

[32] Moreover, substantial funds were paid from the TD account to Ariza for invoices that pre-dated the opening of the TD account. The appellants were directors of Ariza. The trial judge found that an effect of their actions was that some of 828's debt to Ariza was paid in preference to making payments to the respondent. This is a clear finding of a preference which also establishes unlawful conduct on the part of the appellants. The finding is consistent with long-standing principles relating to preferences in the context of bankruptcy and insolvency law and is factually supported on the record: *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, s 95; ***GS & D Construction Ltd (Trustee of) v Benallack***, [1976] 2 SCR 168.

Directed towards the respondent

[33] The conspirators' conduct must be directed towards the plaintiff: ***Agribrands*** at para 26. The appellants say, if their conduct was unlawful, the trial judge erred in finding that it was directed at the respondent. They argue they owed their statutory fiduciary duties to the companies in which they were directors, not to the respondent. Therefore, breaches of those duties could not be directed at the respondent. The trial judge found as a fact that a very significant purpose of the actions of Kendrick and Fuss was to prevent the respondent from realizing on its security. Although he made no specific finding against Thuna in his discussion of this element of the tort, it is clear from his decision as a

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whole that the trial judge found that Thuna willingly participated in the common scheme knowing its effect. The trial judge also found that it was the intention of Kendrick and the appellants to defeat the respondent's claim and sink 828 with its debt. He found that the use of EWE's TD account, and the transfer of 828's business and assets to 1100, was a deliberate scheme to defeat the respondent's debt interest. These fact findings and inferences are supported on the record and are entitled to deference. They establish that the appellants' conduct was directed at the respondent.

Knowledge

[34] The conspirators should know that, in the circumstances, injury to the plaintiff is likely to result: ***Agribrands*** at para 26. This element requires a finding of constructive intent: ***Golden Capital Securities Ltd v Holmes***, 2004 BCCA 565, 205 BCAC 54 at para 62. The trial judge concluded that Kendrick and the appellants knew that, through the operation of EWE and 1100, which stripped 828 of its assets, the respondent would sustain a very substantial loss. This conclusion is unassailable on the facts found by the trial judge.

Injury

[35] The conspirators' conduct must cause injury to the plaintiff: ***Agribrands*** at para 26. The appellants argue the trial judge failed to consider whether the respondent's loss was caused by the conspiracy. They say the loss was caused by Kendrick's fraud and the respondent's decision to overextend its loan to 828, rather than any unlawful conduct on their part. The trial judge found that the respondent suffered substantial injuries from the actions of Kendrick and the appellants. He found that, in early February 2004, there were sufficient assets available to 828 to allow it to pay the respondent in full. The trial judge further found that Kendrick and the appellants participated in a scheme to transfer those assets and 828's business to EWE and 1100, with no apparent intention of repaying 828's debt. The respondent was not advised that the TD account was opened in the name of EWE nor that 828's business and assets were transferred to EWE and 1100. Accordingly, but for the conduct of the conspirators, the respondent would have been paid in full. In these circumstances, it cannot seriously be argued that the loss was caused by Kendrick's failure to provide accurate accounting information or the respondent's decision to overextend the loan. The trial judge's fact findings are supported on the record and clearly establish that the respondent's injury was caused by the conspirators' conduct.

Damages

[36] The appellants argue the trial judge erred in calculating damages based on the terms of the GSA, a contract to which they were not parties. They assert that the respondent failed to adduce evidence to establish that 828 had sufficient assets to pay the debt to the respondent. They argue that 828 was insolvent and would have been placed into receivership in any event. Therefore, if the respondent suffered a loss, it was not attributable to their conduct. They also assert that the trial

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judge's damages award cannot be sustained given the paucity of evidence on the record. They say the respondent should have taken steps to obtain evidence from 828, EWE and 1100 to establish the state of 828's business and the amount that would have been available to satisfy the respondent's claim had 828's business and assets not been transferred to EWE and 1100.

[37] The difficulty facing the respondent and the trial judge was that some of 828's documents had been destroyed and others were inaccurate. The trial judge noted that 828's documents showed inventory and accounts receivable of between $1.5 million and $2 million. This finding is supported by documentation showing that, in November 2003, 828 reported that it had accounts receivable and inventory of approximately $2 million. The trial judge also noted that over $1.2 million passed through the TD account. This is supported by the TD account records. The trial judge concluded the respondent had established *prima facie* proof that there were sufficient assets available to pay the respondent's claim in full in early February 2004 had 828 been permitted to do so. It is no answer to the respondent's damages claim to argue that 828 was insolvent at that time and would have been placed into receivership in any event. The respondent was a secured creditor with priority over the inventory and receivables which were enough to satisfy its claim in full. It is noteworthy that the appellants' own company, HBC, also held a GSA over the assets of 828 (however subordinate to the respondent's) which provided for the recovery of the very sort of legal and other enforcement costs that were awarded by the trial judge to the respondent under the terms of its GSA.

[38] Although it would have been preferable for the trial judge to have detailed evidence of the state of the business and assets of 828, EWE and 1100, the failure to lead that evidence is largely attributable to a lack of records from entities controlled by the appellants. In these circumstances, the trial judge was entitled to assess damages on the basis of the available evidence. On that evidence, he concluded the respondent was entitled to $690,747.58, the principal amount owing by 828. Based on the liability imposed by the security documents, he calculated the total claimed, with unpaid interest, insurance premiums, costs paid to the receiver and legal fees, at $1,761,901.14 and allowed judgment accordingly. In essence, he found that, it was reasonably foreseeable that the respondent would not recover the funds it loaned 828 if 828 was stripped of its business and assets. The costs and fees incurred in placing 828 into bankruptcy and pursuing the respondent's claim under the GSA were foreseeable and directly attributable to the conspirators' tortious conduct. We find no reviewable error in the trial judge's calculation of damages.

RESULT

[39] The appeal is dismissed.

Appeal heard on June 7, 2013

Memorandum filed at Edmonton, Alberta
this 25th day of June, 2013

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Costigan J.A.

Slatter J.A.

Authorized to sign for: McDonald J.A.

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Appearances:

G.R. McKenzie, Q.C. / N.J. Forster / P. Ko
for the Respondent

M.A. Davis / J. Laxer / J.T. Curry
for the Appellants

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TAB 43

In the Court of Appeal of Alberta

Citation: JBRO Holdings Inc v Dynasty Power Inc, 2022 ABCA 140

Date: 20220420
Docket: 2101-0193AC
Registry: Calgary

2022 ABCA 140 (CanLII)

Between:

JBRO Holdings Inc., Jason Brown, Jason Brown as Trustee of the Brown Family Trust, JBRO Investments Inc. and JDFA Holdings Inc.

Respondents
(Plaintiffs/Applicants)

- and -

Dynasty Power Inc., Dynasty North America Holdings Inc., Dynasty Energy California Inc., Dynasty Property Holdings Inc., 1713845 Alberta Ltd., Allan Cho, 1691399 Alberta Ltd., Nancy Cho, Quacho Holdings Ltd., Gaurav Sharma, Christopher Quilley, Andrew Hoang, Kelly Elias, and Todd McRae

Appellants
(Defendants/Respondents)

- and -

Michelle Bullas and AIM Law Group

Not parties to the appeal
(Respondents)

The Court:

The Honourable Justice Michelle Crighton
The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice B.E. Romaine
Dated the 14th day of June, 2021
(2021 ABQB 463, Docket: 1801 03952)

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Memorandum of Judgment

The Court:

I. Overview

[1] The defendants/appellants, collectively "Dynasty", appeal an order of a special chambers judge made June 14, 2021 granting partial summary disposition of certain claims of oppression brought by the plaintiffs/respondents, collectively "JBRO" and "JDFA", arising out of a series of shareholder disputes. It is alleged that Dynasty operated in a manner that was oppressive, unfairly prejudicial to, or unfairly disregarded the interests of JBRO and JDFA as minority shareholders.

[2] In particular, the special chambers judge ordered that JBRO and JDFA be granted partial summary judgment against Dynasty Property, Dynasty California, and their directors Allan Cho and Gaurav Sharma. JBRO and Jason Brown were awarded indemnity costs for litigation involving a cash call, as against Dynasty Property, Mr Cho, and Mr Sharma, jointly and severally. JDFA and Mr Brown were awarded indemnity costs for litigation involving voiding of shares, as against Dynasty California, Mr Cho, and Mr Sharma, jointly and severally.

[3] The shares in Dynasty California were ordered to be reinstated to JDFA retroactive to the date they were improperly voided, March 13, 2017, and JDFA was directed to release the subscription price currently held in trust to Dynasty California. JDFA was entitled to all dividends that ought to have been paid to it but for the oppressive conduct of Dynasty California, Mr Cho, and Mr Sharma, and was entitled to release of previous amounts held in trust, including dividends paid by Dynasty North America in the amounts of $237,641.51 CAD and $466,981.13 USD, plus interest.

[4] JBRO and JDFA were entitled to the release of dividends declared by Dynasty Power and held in trust pursuant to an order of Master Robertson dated June 19, 2018 in the amount of $98,000.

[5] JBRO and Mr Brown were entitled to access all documents, records, and financial statements of Dynasty Property. JDFA and Mr Brown were entitled to access all documents, records, and financial statements of Dynasty North America and Dynasty California. Mr Brown was entitled to receive written notice of all meetings of directors of Dynasty Property, and the meetings of directors and shareholders of Dynasty Property were to be recorded.

[6] Finally, the applications of JBRO or JDFA for interim costs, appointment of an inspector, and removal of Mr Cho and Mr Sharma as directors of Dynasty Property, Dynasty North America, and Dynasty California were dismissed. The court reserved for a future date the relief sought against Michelle Bullas and AIM Law Group. The reasons also acknowledged that there were many issues yet to be determined between the parties, and said the "next step should be a

procedural order that [ensures] that the JBRO group interests in the Dynasty group can be bought out in a fair and reasonable manner".

[7] The parties seek to admit new evidence on appeal.

[8] Dynasty's application to admit new evidence is dismissed. JBRO and JDFA's application to admit new evidence is dismissed. The appeal is allowed in part.

II. Facts

[9] The present action is one of three related actions. The other two are Mr Brown's wrongful dismissal action, Queen's Bench Action 1801-01651, and his litigation against Ms Bullas and AIM Law Group, corporate counsel for Dynasty, Queen's Bench Action 1901-01850. It is appropriate to set out only those facts relevant to this action.

[10] The parties are engaged in the trading of electricity and power contracts in Canada and the United States.

[11] Mr Brown, Mr Cho, Mr Sharma, and others, met in their previous roles in the energy marketing industry initially at TransAlta Corporation and Twin Cities Power-Canada ULC between 2005 and 2010. In February 2011 Twin Cities closed its Calgary offices and Mr Brown, Mr Cho, Mr Sharma, and others incorporated Dynasty Power. On March 2, 2011, Mr Brown invested $175,000 in exchange for 10.38% of the shares in Dynasty Power. In 2012 those shares were converted and assigned to JBRO. The parties entered into a unanimous shareholders' agreement in Dynasty Power on July 1, 2013. Mr Brown served as a director and chief financial officer of Dynasty Power from its inception until September 28, 2016, and again as a director from April 25, 2017 until December 20, 2017.

[12] In November 2013 the parties established a "sister company", Dynasty Property, and entered into a second unanimous shareholders' agreement. Shares were issued on March 2, 2014, and a dividend was declared by Dynasty Power on March 21, 2014 so the proceeds could be used by shareholders to fund the Dynasty Property issuance. JBRO is a shareholder of this company.

[13] In 2015 Dynasty Power expanded its trading operations through incorporation of Dynasty North America and Dynasty California to participate in the American energy markets. On April 10, 2015, 275,000 class A shares were issued by Dynasty California to JDFA, a company wholly owned by Mr Brown.

[14] On April 18, 2016 Dynasty Power declared a further dividend for the purpose of funding the Dynasty California share issuance. All shareholders, but for Mr Brown through JDFA, paid for the shares from this distribution by June 2016. At some time, JDFA provided a bank draft to its lawyer as trust property in the necessary amount to pay for the shares.

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[15] On September 28, 2016 Mr Brown's employment with Dynasty Power was terminated allegedly for cause and Mr Brown was removed as a director of Dynasty Power. Mr Brown says it was his understanding that JDFA's shares in Dynasty California would be addressed in the negotiations over his departure from Dynasty Power.

[16] On February 10, 2017, during post-termination discussions with Mr Cho, Mr Brown was asked to execute a revised unanimous shareholders' agreement for Dynasty Power which he thought substantially impaired his rights, including his ability to nominate a director, and which made revisions to the definition of the fair market value of shares. He refused to sign the agreement.

[17] On March 13, 2017 Mr Brown was removed as director of Dynasty California and Dynasty cancelled JDFA's shares in Dynasty California on the basis that they had not been paid for. Mr Brown was not advised of that cancellation until May 17, 2017. It was this unilateral cancellation of shares that the chambers judge found to be the first instance of oppression.

[18] In April 2017 Dynasty issued a shotgun buy/sell notice to JBRO under which they proposed to acquire JBRO's shares for $1,919,500 or to sell the shares of all other shareholders to JBRO for $16,572,793. JBRO rejected the buy/sell on the basis that it did not comply with the terms of the unanimous shareholders' agreement.

[19] On May 11, 2017 Dynasty Power initiated legal proceedings seeking a declaration that the buy/sell notice had been properly issued and was binding upon JBRO.

[20] On June 15, 2017 Dynasty North America transferred the majority of its trading assets to Dynasty California for consideration of $788,000 USD.

[21] In December 2017 Mr Brown received dividends from Dynasty North America in respect of JBRO's shareholdings in the amounts of $466,981.13 USD and $237,641.51 CAD, currently held in trust.

[22] On December 20, 2017 Dynasty discontinued the May 2017 application seeking to compel the acquisition of JBRO interests and, using a power of attorney contemplated in the unanimous shareholders' agreement, closed the buy/sell thereby acquiring JBRO's shares for $2,033,979.39 plus outstanding dividends from Dynasty Property of $98,000, also currently held in trust.

[23] On January 10, 2018 despite Mr Brown having nominated himself for a director position for Dynasty Property, a right granted pursuant to the terms of the unanimous shareholders' agreement, he was not elected as a director.

[24] On December 19, 2018 the annual general meeting of Dynasty Property proposed a cash call in Mr Brown's absence and without it being noted on the meeting agenda. He received the notice of cash call on December 20, 2018. On January 3, 2019 Mr Brown deposited the amount

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that JBRO Investments was to pay pursuant to the cash call in trust with his counsel. Mr Brown protested that the cash call did not comply with the Dynasty Property unanimous shareholders' agreement, absent a special meeting and notice to shareholders.

[25] On January 14, 2019, the chambers judge granted an interlocutory injunction enjoining Dynasty Property or its shareholders from taking any steps against JBRO pursuant to the Dynasty Property unanimous shareholders' agreement, directing Dynasty Property to produce specified information to JBRO for the purposes of evaluating the notice of cash call and requiring JBRO to pay the cash call amount into trust.

[26] In March 2019 the Dynasty cash call was rescinded and funds paid into trust were returned to Mr Brown. The issuance of the cash call by Dynasty Property was the second instance of oppression cited by the chambers judge.

[27] On December 18, 2019 the chambers judge heard the application and on June 14, 2021 made the order from which this appeal is taken.

III. New Evidence Applications

[28] Dynasty, and JBRO and JDFA apply to admit new evidence on appeal.

[29] Dynasty seeks to admit six new affidavits:

(a) the affidavit of Milan Kandic sworn July 16, 2021;

(b) the affidavit of Jeff Pellarin sworn July 16, 2021;

(c) the affidavit of Michelle Bullas sworn July 19, 2021;

(d) the affidavit of Kirk Lamb sworn October 21, 2021;

(e) the second affidavit of Jeff Pellarin sworn October 26, 2021; and

(f) the affidavit of Katie Osleeb sworn December 17, 2021.

[30] In response JBRO and JDFA seek to admit three new affidavits and three transcripts from cross-examination on affidavits:

(a) the affidavit of Jason Brown sworn October 4, 2021;

(b) the affidavit of Don Newell sworn September 24, 2021;

(c) the affidavit of Peter Letal affirmed October 1, 2021;

(d) transcript of the cross-examination on affidavit of Michelle Bullas dated October 27, 2021, with answers to undertakings;

(e) transcript of the cross-examination on affidavit of Milan Kandic dated October 27, 2021; and

(f) transcript of the cross-examination on affidavit of Jason Brown dated October 28, 2021.

[31] The test for admission of new evidence is set out in ***Palmer v The Queen***, [1980] 1 SCR 759, 775, 106 DLR (3d) 212:

> (a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial (here, the application of December 18, 2019 and subsequent further written and oral submissions), provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
>
> (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial (here, the application of December 18, 2019 and subsequent further written and oral submissions);
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial (here, the application of December 18, 2019 and subsequent further written and oral submissions), be expected to have affected the result.

[32] The overriding consideration in application of these principles must be the interests of justice: ***Palmer***, 775.

(a) Dynasty application

[33] The chambers judge received extensive oral and written submissions, and correspondence from the parties, including affidavits of Mr Brown of June 14, 2018; January 8, 11 and 14, 2019; May 29, 2019; June 4, 2019 and December 11, 2019; affidavits of Mr Cho of January 11, 2019 and May 2, 2019; and transcripts of questioning of Mr Brown and Mr Cho on their affidavits and responses to undertakings. The chambers judge also received the written submissions of the parties filed January 9 and 14, 2019; December 9, 12, and 18, 2019; October 2, 15, and 22, 2020; and correspondence from the parties dated December 20, 2019; January 3, 8 and 13, 2020. She heard further oral submissions from the parties on September 22, 2020, received further written submissions in response to a request from the court dated March 12, 2021, and updated factual information from the parties dated March 19, 22, 25, and 31, 2021; April 7, 14 and 15, 2021.

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[34] In her reasons, the chambers judge referenced this "flurry of correspondence" and briefs which she said included "re-argument and new arguments", and "new evidence".

[35] The chambers judge had extensive evidence before her that canvassed the facts set out above. The proposed new evidence of Dynasty includes further affidavits on matters dating from mid-2015 to late 2019, including share subscriptions and payment for shares in Dynasty California, dividends by Dynasty Power, directors' resolutions on share purchases, minute book entries, and particulars with respect to the wrongful dismissal litigation and Bullas litigation. That information was largely available and certainly could have been available to the chambers judge by June 14, 2021.

[36] In particular, Dynasty says as to the affidavits of Jeff Pellarin sworn July 16 and October 26, 2021, and the affidavit of Kirk Lamb sworn October 21, 2021, that this proposed expert evidence on financial and tax consequences should be admitted because the reason it was not before the chambers judge is that the remedy granted, retroactive reinstatement of JDFA's shares in Dynasty California, was not sought. However, as discussed below, JDFA specifically requested in para 7(a) of its application filed January 11, 2019 "an Order …. reinstating the shares of JDFA ... in [Dynasty California] in exchange for delivery of the subscription price for those shares". Additionally, it would be exceptional for proposed new expert evidence to be before this Court when it was not before the special chambers judge in this form.

[37] Dynasty's fresh evidence application fails on the first criterion in ***Palmer***. Dynasty's application for new evidence is dismissed.

(b) JBRO and JDFA application

[38] JBRO and JDFA participated in the oral submissions, written briefs, and correspondence set out above, all before the chambers judge.

[39] A review of the proposed new evidence of JBRO and JDFA shows that it covers the period from April 2015 to April 2019. It addresses the issuance of the class A voting shares in Dynasty California, payment requirements with respect to those shares, minute book entries in Dynasty California, communications with respect to the Dynasty California shares, and the notice of the meeting of Dynasty California shareholders of March 13, 2017. As with the Dynasty proposed new evidence, virtually all of that material, in one form or another, was or could have been before the chambers judge. The JBRO and JDFA application likewise fails on the first and fourth ***Palmer*** criteria, and it is dismissed.

[40] JBRO and JDFA also seek to admit new proposed expert evidence of Peter Letal, an affidavit affirmed October 1, 2021, in response to the proposed expert evidence sought to be introduced by Dynasty. As Dynasty's application to adduce expert evidence is dismissed, so must the JBRO and JDFA application to adduce such evidence be dismissed, for the same reasons.

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IV. Grounds of Appeal

[41] Dynasty says the chambers judge erred:

(a) by failing to consider the relevant test for a partial summary judgment;

(b) in finding that the Dynasty Property cash call and rescission were oppressive;

(c) in finding that the Dynasty California voiding of JDFA's shares, without notice to Mr Brown, was oppressive, including by failing to consider s 27(3) of the *Business Corporations Act*, RSA 2000, c B-9, and the business judgment rule, and by finding that Mr Brown reasonably expected he would be given advance notice of any intention to void the shares; and

(d) ordering a remedy that created *res judicata* and issue estoppel implications on the valuation date issue, was not specifically sought by the parties, has significant unintended consequences for non-parties to the litigation, and went beyond merely remedying the conduct complained of.

V. Standard of Review

[42] The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: ***Housen v Nikolaisen***, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235.

[43] Decisions involving summary disposition are discretionary and absent an error of law are reviewed for reasonableness. Absent palpable and overriding error, a chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination as to whether summary disposition is appropriate, is entitled to deference: ***Baim v North Country Catering Ltd***, 2017 ABCA 206, para 8, citing ***Pyrrha Design Inc v Plum and Posey Inc***, 2016 ABCA 12, para 6.

[44] The determination of whether a party's expectations of corporate actions are reasonably held is a question of fact and reviewable on the standard of palpable and overriding error: ***1216808 Alberta Ltd (Prairie Bailiff Services) v Devtex Ltd***, 2014 ABCA 386, para 24, 35 BLR (5th) 1.

[45] Statutory interpretation is a question of law, reviewable on the correctness standard: ***Geophysical Service Incorporated v EnCana Corporation***, 2017 ABCA 125, para 75, 51 Alta LR (6th) 259. Failure to consider a relevant statutory provision is an error of law.

[46] The business judgment rule is a common law rule of deference to business decisions, applicable to the court's evaluation of the reasonableness of directors' decisions: ***Peoples Department Stores Inc (Trustee of) v Wise***, 2004 SCC 68, paras 64-65, [2004] 3 SCR 461, quoting

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Maple Leaf Foods Inc v Schneider Corp (1998), 113 OAC 253, para 36, 42 OR (3d) 177 (CA). When the rule is applicable, the failure to consider it, or the misapplication of the doctrine is an error of law reviewable on the standard of correctness.

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VI. Analysis

(a) Partial summary judgment

[47] Dynasty submits that although the chambers judge reviewed the test for summary disposition (***Hyrniak v Mauldin***, 2014 SCC 7, para 49, [2014] 1 SCR 87; ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49, para 47, [2019] 6 WWR 567), she failed to reference or apply the more stringent test for a partial summary disposition. They say it should be considered a rare procedure where the issues addressed can be bifurcated from remaining issues without resulting in overlapping evidence that could lead to inefficient duplication or material risk of inconsistent findings or outcomes.

[48] JBRO and JDFA say it was apparent from the chambers judge's reasons that she properly accounted for all considerations relevant to an application for partial summary judgment, and was satisfied it was appropriate in the context of the whole litigation and would serve the objectives of proportionality, efficiency, and cost effectiveness. They say that since 2016 Dynasty has elected to proceed separately, in multiple applications, on the various issues raised.

[49] Under r 7.3(1), a party may apply for summary judgment in respect of all or part of a claim. Partial summary judgment is expressly contemplated by the words of the rule. Provided the issue can be decided discretely and fairly, partial summary judgment may be granted: ***Baim***, paras 10-11.

[50] While partial summary judgment (for example, granting summary judgment against a single defendant) may run the risk of duplicative proceedings or inconsistent findings of fact, resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach: ***Hryniak***, para 60. It must be demonstrated that partial summary judgment would achieve a just result: see ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187, para 54, 88 Alta LR (6th) 1.

[51] 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: ***Weir-Jones***, para 25.

[52] The chambers judge was satisfied on the basis of relevant uncontested admissible evidence that the issues respecting the allegations of oppression could be resolved summarily. She found that JBRO and JDFA had established there was no merit or defence on the basis of the uncontested facts, and Dynasty had not demonstrated there was a genuine issue requiring a trial. Significantly,

the chambers judge concluded that deciding the issues before her would better equip the parties to proceed to resolve the remaining issues.

[53] The chambers judge applied the proper test for summary disposition. Her ultimate determination that partial summary disposition was appropriate is entitled to deference, and we see no basis to interfere.

(b) Oppression findings

[54] Oppression is an equitable corporate remedy that seeks to ensure fairness, justice, and equity in the context at hand and in regard to the relationships at play: ***BCE v 1976 Debentureholders***, 2008 SCC 69, paras 58, 59, 71, [2008] 3 SCR 560. It is inherently fact-specific: ***BCE***, paras 59, 62, 71.

[55] "Oppression" describes conduct that is coercive, abusive, or in bad faith. "Unfair prejudice" denotes a "less culpable state of mind" that nevertheless has unfair consequences, and "unfair disregard" of interests extends the remedy to ignoring an interest as being unimportant, all of which describe ways in which corporate actors may fail to meet the reasonable expectations of stakeholders: ***BCE***, para 67.

[56] Where oppressive conduct is made out, the Court may intervene. Section 242(2) of the *Business Corporations Act* provides:

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

[57] The Court's powers are delineated in s 242(3), and allow the Court to make any interim or final order it thinks fit to rectify the matters subject to complaint: ***Toor v 1176520 Alberta Ltd***, 2019 ABCA 334, para 30; ***Connelly v Connelly-McKinley Ltd***, 2010 ABQB 515, para 12.

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[58] The test for determining whether conduct is oppressive, unfairly prejudicial or unfairly disregards security holders' interests has two elements:

(a) does the evidence support a reasonable expectation asserted by the claimant?

(b) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression," "unfair prejudice" or "unfair disregard" of a relevant interest?

The claimant bears the burden of establishing the asserted expectation, the reasonableness of the expectation, and the violation of the expectation by conduct that was oppressive, unfairly prejudicial or that unfairly disregarded a relevant interest: ***BCE***, paras 56, 68, 119, 137; ***1216808 Alberta Ltd***, para 39.

[59] To determine whether a stakeholder's expectation is reasonable, the Court may consider "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders": ***BCE***, para 72.

[60] The Supreme Court has provided guidance on remedies. The court's broad discretion is not limitless; it must be exercised within legal bounds, and as a starting point, within the bounds expressly delineated by the statute. The purpose of the oppression remedy is corrective, and an order should go no further than necessary to correct the injustice or unfairness between the parties: ***Wilson v Alharayeri***, 2017 SCC 39, [2017] 1 SCR 1037, paras 26-27 (referring to CBCA equivalent sections).

[61] As such, where oppressive conduct is made out, the court must intervene in as minimal a way as possible in the circumstances to address the imbalance or the conduct which is the subject of complaint. The ultimate test requires an assessment of the best interests of the corporation, its shareholders, directors and officers. It involves a balancing of competing interests: ***Toor***, para 32; ***Caron v Canadian Energy Inc***, 2017 ABQB 767, para 51; ***Melin v Melin***, 2018 ABQB 1056, para 69.

(i) *The cash call*

[62] Dynasty submits that the Dynasty Property cash call and its subsequent rescission did not constitute oppression. In their view, because the cash call of December 19, 2018 was rescinded in March 2019, there was no wrongful conduct or causation, and JBRO suffered no compensable injury, although it did incur legal expenses for which it has been awarded indemnity costs. JBRO responds that compensable injury is not a prerequisite to a finding of oppression, and that the court is entitled to rectify an unjust situation even when monetary loss is not an issue, with the goal of preventing ongoing misconduct.

[63] As explained above, a court may intervene for the purpose of balancing the parties' competing interests, with broad discretion to remedy conduct which is coercive, abusive, or done in bad faith.

[64] The chambers judge observed that the notice of annual meeting of Dynasty Property for December 19, 2018 did not contemplate a cash call. Mr Brown asked for and received confirmation that the notice set out all of the business to be discussed at the meeting. He sent an email asking that his name be put forward as a director, despite his inability to attend due to a family emergency. Mr Brown was not elected as a director, nor did he receive notice of the cash call. The cash call itself was not in accordance with the provisions of the Dynasty Property unanimous shareholders' agreement.

[65] The remaining shareholders and directors of Dynasty Property acted to the exclusion of Mr Brown, as indicated by the chambers judge, "in order to acquire his shares at a discount pursuant to the default provisions of the USA".

[66] Mr Brown and JBRO reasonably expected that Dynasty Property would comply with the provisions of the unanimous shareholders' agreement, and provide appropriate notice that a cash call was to be discussed at the meeting. The chambers judge found the cash call was made in breach of Mr Brown's and JBRO's reasonable expectations, was unfairly prejudicial to them, and unfairly disregarded their interests. Having come to that conclusion, she determined they were entitled to a remedy in oppression.

[67] We see no error in the chambers judge's conclusion as to the cash call. There is no reason to interfere with that decision, to which deference is owed.

(ii) The voiding of shares

[68] Dynasty submits it was appropriate for Dynasty California to void the shares of JDFA for non-payment. It says the shares were issued on April 10, 2015 and it still had not received payment by the date of cancellation, March 13, 2017. It relies on s 27(3) of the *Business Corporations Act* which prohibits the issuance of shares in a corporation unless they have been paid in full. It says that is a complete answer to JDFA's claim for the Dynasty California shares.

[69] JDFA responds that the issuance of a share certificate is nothing more than evidence of a share transaction, is not definitive that the transaction has or has not occurred, and is irrelevant to a party's rights in the claim for relief from oppression. Additionally, JDFA says it was the usual business practice of Dynasty companies to issue shares, have them funded by distributions from Dynasty Power, and receive payment thereafter.

[70] Mr Brown says he planned to pay the subscription price due in September 2016, but on August 23, 2016 learned that Dynasty Power had set in motion steps to terminate his employment. As a result, he assumed the outstanding subscription price would become one of the issues

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discussed in respect of his termination from Dynasty Power. Mr Cho conceded that payment of the subscription price for the shares was discussed during the settlement negotiations.

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[71] None of Dynasty California, Mr Cho nor Mr Sharma notified Mr Brown of their intention to void his shares. The chambers judge said it was a reasonable expectation that as a director and shareholder he would first be given a demand for payment and later notice of intention to void his shares. Additionally, given the transfer of the majority of the trading assets of Dynasty North America to Dynasty California, the only distinguishing factor between the shareholders of Dynasty California and Dynasty North America was that "Mr. Brown's holding company [was] not now a shareholder of Dynasty California", the operating company.

[72] In finding that the voiding of the shares was oppressive, the chambers judge said Dynasty California and its directors "acted in bad faith" with an intention "to deprive the JBRO group from any profit arising from the Dynasty California trading operations".

[73] We see no error in the chambers judge's conclusion as to the voiding of these shares.

(iii) The business judgment rule

[74] With respect to the voiding of the Dynasty California shares without advance notice to Mr Brown, Dynasty invokes the business judgment rule, described above. See ***Peoples Department Stores***, para 65; ***BCE***, paras 40, 99.

[75] In ***Caron***, para 50, commenting on the rule, the court said:

> Business disputes or business decisions are at the root of many oppressive conduct claims. Courts are not in the business of telling people how to run their businesses, what investments to make, or what opportunities to pursue or forego. Courts are in the business of telling directors, officers and shareholders what they cannot do, which is to unfairly disregard the legitimate interests of other stakeholders.

[76] Dynasty says that even though it did not make an express demand for Mr Brown to pay for the Dynasty California shares, nor was there any notice that the shares were to be voided, it was not reasonable for him to believe that JDFA could hold shares for which it had not paid.

[77] However, JDFA responds that a corporation cannot hide behind the business judgment rule as a means of justifying conduct that is inconsistent with the reasonable expectations of shareholders and which have no corporate purpose. It says the failure to make a demand for payment and provide no notice of intent to void was "clearly not done in good faith" and had no business purpose.

[78] Under appropriate circumstances, it may have been warranted to void the shares of JDFA in Dynasty California, but that was done without formal demand and reasonable notice. That was

the finding of the chambers judge. These were not reasonable business decisions with a justifiable business purpose. Therefore the business judgment rule does not protect Dynasty from scrutiny and a finding of oppression: see ***2082825 Ontario Inc v Platinum Wood Finishing Inc*** (2009), 248 OAC 266, paras 29-30, 310 DLR (4th) 754 (Sup Ct).

(c) Minimally intrusive remedy

[79] Dynasty submits the special chambers judge failed to fashion an appropriate remedy because the remedy ordered has *res judicata* implications on the outstanding valuation date issue. They say in finding that JDFA is entitled to payment of dividends from the voiding of the Dynasty California shares, she implicitly set a valuation date for those shares. They also say she ordered a retroactive reinstatement of the shares, for which the tax ramifications and financial consequences are unknown.

[80] The chambers judge did say, and JDFA concedes, that the appropriate valuation date of any buyout in the future is a matter still to be determined. But the chambers judge held the appropriate relief was to reinstate JDFA's shares in Dynasty California, retroactive to the date they were improperly voided, March 13, 2017, and for the subscription price to be released to Dynasty California within three business days thereafter. It is clear the reinstatement was to be effected at a date certain and the purchase price to be paid in the amount determined as at that date.

[81] On whether JDFA had requested the remedy of reinstatement of its shares in Dynasty California as at the voiding date, as indicated above JDFA specifically requested in para 7(a) of its application filed January 11, 2019 "an Order …. reinstating the shares of JDFA ... in [Dynasty California] in exchange for delivery of the subscription price for those shares". That is what the chambers judge ordered, and she set a date for that to occur. There is no merit to any claim that this remedy was not requested of the court.

[82] The special chambers judge articulated the correct test for a minimally intrusive remedy, that "[a] court may only remedy the oppression, and go no farther than necessary to correct the injustice or unfairness found between the parties, citing ***Wilson*** at para 53.

[83] However, a review of the evidence before the special chambers judge demonstrates she did not have the necessary evidentiary record before her, particularly with respect to the tax ramifications and financial consequences to all parties of the determination that the shares in Dynasty California were to be reinstated to JDFA retroactive to the date they were improperly voided. Nor was she advised of the full effect of JDFA dividend payments that ought to have been paid but for the oppressive conduct of Dynasty California, or JDFA being entitled to release of previous amounts held in trust pursuant to the order of Master Robertson.

[84] Without that essential information, the special chambers judge could not craft the minimally intrusive remedy for all parties or craft a remedy that would "go no further than necessary to correct the injustice or unfairness between the parties". In light of the test for a remedy

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in an oppression action, she should have been provided with evidence and submissions about all ramifications of the remedy. Therefore, we allow the appeal only as to remedy. We return this proceeding to the court below to determine the appropriate remedy.

VII. Conclusion

[85] Dynasty's application to admit new evidence is dismissed. JBRO and JDFA's application to admit new evidence is dismissed. The appeal is allowed in part. The special chambers judge's grant of partial summary judgment is upheld; her finding that the Dynasty Property cash call was oppressive is upheld; and her finding that the Dynasty California voiding of JDFA's shares was oppressive is upheld. The appeal is allowed only as to the remedy crafted. This matter is returned to the court below to grant an appropriate remedy to address the imbalance and oppressive conduct found.

Appeal heard on April 7, 2022

Memorandum filed at Calgary, Alberta
this 20th day of April, 2022

Authorized to sign for: Crighton J.A.

Authorized to sign for: Strekaf J.A.

Feehan J.A.

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Appearances:

P.M. Osadetz
for the Respondents

L.Y. Pan, Q.C./C.J. Lee/C. Zhu
for the Appellants

R.M. Phillips
for Michelle Bullas and AIM Law Group

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TAB 44

Unofficial English Translation

SUPERIOR COURT

2012 QCCS 211 (CanLII)

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

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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

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[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.

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[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

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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.

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[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,

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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.

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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*

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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.

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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

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[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.

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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.*

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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”.

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[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.

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19 *Supra* note 1.
20 Supra note 10.
21 *Supra* note 1.
22 *Ibid*.

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[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.

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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.

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[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 F*ederal 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 England[34] 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 word 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.)

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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").

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[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

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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

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41 *Gilles Bédard (Syndic de)*, 2005 CanLII 20483 (QC Sup Ct).
42 *Supra* note 10.

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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.

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

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[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* (section136).[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.*

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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.

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[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.

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

[50] *Supra* note 41.

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[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

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[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

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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

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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 ofthe claimant or to the claimant wiht 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;

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(*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

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(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' 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.

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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.

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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.

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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 45

Saskatchewan Supreme Court

KING'S BENCH

Citation: McBride's Limited v. Rooke
Date: 1941-06-24

Auditors — Failure to Detect Defalcations — Negligence — Damages.

The defendants, a firm of auditors, were employed by the plaintiff to audit its books from 1936 to the beginning of 1939. During the period of the defendants' audits one I., a trusted employee of the plaintiff, was carrying on systematic defalcations, which were covered by "kiting cheques. The defendants failed to discover these defalcations due to a lack of thoroughness in checking the plaintiff's bank statements, deposit slips and other records. One of the defendants' employees engaged in the 1936 audit had given the defendants a memorandum indicating that there was a possibility that "kiting" of cheques was going on. The defendants failed to follow up this suggestion and investigate whether there had been any "kiting." Had such an investigation been made I.'s defalcations would have been discovered.

Held that the defendants had performed their duties in a negligent manner. An auditor is not required to commence his audit in a spirit of suspicion toward the employees, but if anything of a suspicious nature appears it is his duty to probe it to the bottom. *In re Kingston Cotton Mill Co.* (No. 2) [1896] 2 Ch. 279, 65 L.J. Ch. 673; *London Oil Storage Co. v. Seear & Co.* (1904) (reported in *Dicksee on Auditing,* 11th ed., at pp. 785 and 786) followed. In failing to investigate thoroughly after a suspicion had arisen that "kiting" of cheques was going on defendants were therefore guilty of negligence. They were further negligent in not properly checking the bank statements, deposit slips and other original records. *Guardian Insur. Co. of Canada v. Sharp* [1941] S.C.R. 164, referred to.

With regard to the question of damage, *held* that the defendants were liable in damages for the amount of I.'s defalcations after the completion of the 1936 audit; since, if the defendants had properly carried out the 1936 audit, I.'s frauds would have been exposed at that time and his subsequent defalcations would have been avoided.

The plaintiff having asked that the defendants be required to return the auditors' fees paid them by the plaintiff, *held* that since the defendants had been required to make good the damages resulting from their negligence, they should not be required to return the remuneration for their services.

[Note up with 2 C.E.D. (C.S.) *Damages,* sec. 13; 3 C.E.D. (C.S.) *Negligence,* sec. 45; *Professions and Trades,* sec. 12.]

Council:
M. A. MacPherson, K.C., and B. C. Leslie, K.C., for plaintiff.
P. G. Hodges, K.C., and B. D. Noonan, K.C., for defendants.

July 24, 1941

[1] MACLEAN, J. — The plaintiff is a company incorporated in this province, carrying on a chain-store business in groceries and allied commodities, with its head office or chief place of business and several retail stores in Regina, and several other retail stores in various towns in Southern. Saskatchewan. The plaintiff operates about 40 or more stores.

[2] The defendants are chartered accountants and auditors, practising their profession in Regina, and elsewhere in the province of Saskatchewan.'

[3] Some time in August, 1936, the plaintiff engaged the defendants as auditors of the plaintiff's

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books of business. The contract between the plaintiff and the defendants was verbal—a conversation between E. W. Fisher, the office manager and secretary of the plaintiff, and R. R. Thomas, the second member of the defendant partnership.

[4] While at trial there was some argument and questioning as to the exact nature of the contract, there is practically no difference between the Thomas version of the conversation and Fisher's version. The difference is in the form of words rather than in the substance. I accept Thomas' version. His version includes all that was said in reference to the contract by Fisher. Thomas said in his examination for discovery: "Mr. Fisher told me that they wanted a shareholders' type of audit" Next answer "Yes—he mentioned that it was really for the shareholders, that they were in the States." Later another answer by Thomas:

> "But it was distinctly mentioned as a shareholders audit in compliance with the *Companies Act,* that the chief shareholders were in the States, and they had to have an auditors' course. It was also mentioned that they would like to have quarterly visits. He [referring to Fisher] did not know whether any of the audit had been done for 1936 or not, he was not sure about that, and that they were not to go behind the previous auditors' statement signed as of December 31, '35. There was no necessity to go behind that."

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[5] The previous auditors were highly spoken of as being competent in their profession. Their working papers for three or four previous audits were available to the defendants. The defendants were expected to carry on their work in the general manner in which the work had been carried on by their predecessors; but I take it from the evidence, and so find, that in conducting their work the defendants were not limited to doing what their predecessors considered it advisable to be done, but while being guided by the general method of their predecessors, they (the defendants) were required or expected to do anything in addition which might occur to them as being necessary.

[6] The audit reports prepared by the defendants during the period of employment are obviously made to conform with the requirements of an auditor's report under *The Companies Act,* R.S.S., 1940, ch. 113. I find that the contract between the plaintiff and defendants was not limited to being a balance sheet audit (a term of indefinite meaning); the only limitation was in respect to the inventory of merchandise — it was not required of the defendants to report on merchandise excepting as shown by the certificate of the directors. The defendants were expected to make quarterly examinations of the books of records of the plaintiff, but that precaution was largely for the purpose of expediting the work of preparing the annual audit at the end of the fiscal year. The defendants, that is, Rooke and Thomas, were not themselves expected to do the actual work, but they were particularly cautioned against sending inexperienced students or employees, and Thomas assured Fisher that the men placed on the work would be competent men who were either chartered accountants or well on their way toward that status. Subject to that provision selection of the men sent to the plaintiff's office to do the work was entirely a matter for the defendants. There was some evidence put in at trial that the defendants had not been appointed auditors at a shareholders' meeting. The remuneration was agreed upon by Fisher and Thomas. In the following year a further arrangement between the same two men took place and the defendants' services were continued. The defendants accepted the position, performed the services and accepted the remuneration. The mere fact that the contract was not confirmed at a shareholders' meeting does not seem to me to affect the merits of this case.

[7] Early in 1939 some circumstances in connection with the auditing moved one Campbell, a competent employee of the defendants, to suggest that original bank deposit slips and other bank statements should be inspected. This could only be done with the consent of the plaintiff, and the consent

was readily given. Fisher accompanied Campbell to the bank, and from the inspection made it became evident that a trusted employee of the plaintiff, one Ingram, had been stealing the plaintiff's moneys. Immediately a special investigation of Ingram's dealings was instituted, which investigation was expedited to some extent by conversations between Ingram and the defendants. This investigation disclosed that during the years Ingram had been in the employ of the plaintiff, that is, a number of years before the defendants became auditors, and during the time the defendants were auditors, Ingram had stolen something over $14,000.

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[8] Another firm of auditors, Read, Smith and Co., were engaged to make a special audit in respect to Ingram. Ingram had been bonded in the sum of $5,000 and this later special audit was for the purpose (among others) of satisfying the bonding company as to Ingram's defalcations. This special audit, compared with the investigation made by the defendants, showed only a very few dollars difference in the results arrived at by the two audit firms. For the purpose of this action I take the defendants' own findings and conclusions as to the extent of Ingram's default. The investigation also showed what Ingram's defalcations amounted to in each of the years 1936, 1937, 1938 and a few months of 1939. The bonding company paid the plaintiff the amount of the bond, $5,000, less $1,250. Why this sum is not quite clear, and in so far as this action is concerned it is immaterial. There was no subrogation to the bond company.

[9] The plaintiff now brings action against the defendants, alleging that the defendants were negligent, careless and unskilful in the performance of their work; that as a result of such negligence, carelessness and unskilfulness the defendants failed to discover the irregularities, false entries and other evidence of Ingram's thefts; and that the failure of the defendants through such negligence, carelessness and unskilfulness to discover Ingram's thefts earlier in their work, resulted in further losses to the plaintiff. That raises of course the question as to the duties of the defendants as auditors to the plaintiff.

[10] The outstanding judicial pronouncements on this question are collected and reviewed in the recent judgment of the Supreme Court of Canada in *Guardian Insur. Co. of Canada v. Sharp* [1941] S.C.R. 164. The conclusion I derive from the authorities there collected is that auditors should bring into their work such reasonable degree of care and skill that is usually required of professional men engaged as they were to conduct a general, but a thorough, examination of the plaintiff's books and records of business — a degree of care and skill perhaps less onerous than if they were called upon to make a special investigation of some particular phase, as in the case where the firm of Read and Smith were called upon to investigate the defalcations of a certain employee. It is not required of auditors that they should approach their work with the suspicion that someone employed or having charge of the plaintiff's business has been dishonest. Although the auditor is not required to suspect dishonesty on the part of any employee, and although he is not engaged to carry on the duties of a detective, yet he should enter upon the duties leading up to verification of books and records in the attitude of not taking for granted anything that he himself can ascertain or confirm through books and records. In other words, instead of taking the verbal statement of some employee as to what is being recorded in some book or record, he should peruse such book or record and get his knowledge first hand. Under this particular contract the auditor was relieved from examining or inquiring into purchase of merchandise as well as stock on hand. There by the terms of his contract he is permitted to take the certificate of the directors as to what is contained.

[11] But although the auditor is not required to commence his work with suspicion, yet if, in the carrying on of his work circumstances arouse or excite his suspicion, then there is undoubtedly a duty upon him to investigate thoroughly until he satisfies himself as to whether there are or are not grounds for that suspicion, and to report to the shareholders accordingly. In *In re Kingston Cotton Mill Co.* (No. 2) [1896] 2 Ch. 279, at 288-9, 65 L.J. Ch. 673, Lopes, L.J. says he is entitled to assume that they (the

employees of the company in whom confidence is placed) are honest. If there is anything calculated to incite suspicion he should "probe it to the bottom," and Lord Alverstone, C.J. in *London Oil Storage Co. v. Seear & Co.* (1904) reported in *Dicksee on Auditing,* 11th ed., at pp. 785 and 786, uses these words:

> "If circumstances of suspicion arise it is the duty of the auditor in so far as these circumstances relate to the financial position of the Company, to probe them to the bottom."

[12] Apart from his legal duties it appears that the duty of an auditor on commencing his duties with any client is to familiarize himself with the system of bookkeeping conducted by his client. In doing so he should get his information from direct examination of the books, with such explanation from employees in charge of records as may be required to supplement that examination, as may be necessary for proper examination of the bookkeeping system. The auditor should ascertain in his examination of the bookkeeping system whether the bookkeeping operates as an internal check, whether it is so intended to operate, and, if it is so intended to operate as an internal check, then the extent and thoroughness of that internal check; the auditor having ascertained where the internal check, if any, ends, should begin his audit from that point on. If there were no internal check he should have to commence his work from the earliest point, perhaps the cash register. If an efficient internal check carries on further, the audit should begin where that ends.

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[13] Here, the plaintiff did have a system of bookkeeping which was supposed to operate as an internal check, and probably a reasonably efficient check. The defendants, in familiarizing themselves with that form of internal check, seem to have taken too much for granted. They did not commence where the internal check as explained to them should require a commencement.

[14] Part of the plaintiff's records consisted of a set of sheets headed "Daily Cash Recap." The several representatives of the defendant who carried on that work testified that they had never seen those sheets. In the internal bookkeeping of the company, at least three different employees in addition to Ingram perused those recap, sheets daily, during which time of course at least one sheet would be for some time on the desk of someone of the three employees. The sheets were kept by Ingram. There is no definite evidence that he attempted to conceal them, although undoubtedly as it turned out it would be in his interest to do so. The strange fact is that during nearly three years the defendants' representatives never saw those sheets, which were an important part of the plaintiff's bookkeeping system. I accept of course as correct the evidence of the defendants and their employees. At this point, although there was no evidence put in, I think I can take the opportunity of stating what is very generally known, that the defendants, in this province, enjoy a high reputation as competent and reliable auditors.

[15] Now, wherein have the defendants been negligent, careless or unskilful, if at all, in carrying on their work? Among the exhibits filed there are the working papers of the defendants in respect to preparing their audit reports for 1936 and also for 1937.

[16] In preparing for the first audit the defendants assigned two men to do the work. One left the defendants' employ early in 1937, before the auditors' report was issued. He is a chartered accountant holding a responsible position in the province. The other left the defendants' employ some time later. He also is a chartered accountant holding a responsible position in some other part of Canada. On the margin of one of those work sheets, p. 20 in Ex. P. 2, there is a memorandum in pencil, "Possibility of kiting." There is evidence that that memorandum is in the handwriting of one of the employees doing the audit work. That memorandum must have been made during the period when the books were being examined and the annual report prepared. There is no memorandum showing that the matter was inquired into or that anything was done about it. On the several work sheets there are several memoranda suggesting

that some matter should be looked into, and near by there is usually another memorandum indicating that the matter has been looked into or explained. There is no such memorandum in regard to the kiting. In Thomas' examination for discovery and referring to this memorandum of the possibility of kiting, he said in answer to question:

> "Yes, there is no doubt that was mentioned to Mr. Fisher as well.
>
> "Q. You took that up with Mr. Fisher, the possibility of kiting? A. I am saying that this note was given to me and these notes were given to me as reference and I would refer to them all and cover it very fully. I am not prepared to swear that I took that particular thing up with Mr. Fisher, but it seems to me quite logical that I would point out the possibility of kiting. It is a natural sequence that there was that possibility."

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[17] From which I conclude and find that the matter of the possibility of kiting was not taken up. It does not necessarily follow that the possibility of kiting in the mind of him who made the memorandum was the instance of kiting referred to shortly hereafter, for as it subsequently developed there were numerous instances of kiting. As it turned out, there were good grounds for that suspicion of kiting, for Ingram had on December 31, indulged in kiting as between the plaintiff's bank at Moose Jaw and the plaintiff's bank at Regina to the extent of $5,400. Here it appears that there were circumstances which properly justified the suspicion on the part of the auditor, and yet nothing was done about it. I think I am justified in saying that nothing was done about it, for if anything had been done, the first natural step in investigation would have disclosed the kiting. The plaintiff's fiscal year, up to 1936, ended on the last day of the calendar year, that is, December 31. Some time late in 1936 the directors decided to end their fiscal year on the Saturday nearest December 31. The fiscal year therefore ended not on December 31, 1936, but on January 2, 1937. Ingram on December 31, 1936, had deposited with the plaintiff's bank at Regina two requests for transfer of money, one for $4,000 and one for $1,400. These transfers of money were simply requests by the plaintiff to one of the many banks with which they had accounts to transfer from the plaintiff's funds at the one bank a specified sum to the plaintiff's credit in the account at the principal bank, which is in Regina. The depositing of those transfers with the bank in Regina, and credited then in the ordinary course to the plaintiff's account in Regina, showed that additional $5,400 to the plaintiff's credit at that bank; yet because January 1 was a bank holiday those transfers were not debited to the plaintiff's account at Moose Jaw until January 2.' The defendants in preparing their audit, and having received in fact verifications from all the banks with which the plaintiff dealt, took those verifications for the purpose of their audit as of December 31, except from the bank at Regina. The audit was prepared as for the state of the plaintiff's business on January 2, 1937, consequently these two transfer items totalling $5,400 appeared to the plaintiff's credit in two different banks (Regina and Moose Jaw) at the same time. Had the defendants required bank verifications as for January 2, 1937, the day for which the audit was prepared, it would immediately appear that there had been some irregularity, and on Very slight examination it would appear that Ingram had indulged in kiting. In other words, there were circumstances which aroused the suspicion of the auditors as to the irregularity of kiting, and nothing has been done, for the first step to be taken would have disclosed real grounds for the suspicion. Had that been done, Ingram's irregularities would have been discovered then, early in January, or early in February, 1937. It is I think reasonable to assume that Ingram's services would have been dispensed with then, as they were dispensed with when his irregularities were discovered in April of 1939. And with the dismissal of Ingram in January or February of 1937 there would not have been further defalcations through 1937, 1938 and a few months of 1939. Given that, it seems to me very obvious that the defendants through their chosen representatives or employees were careless and unskilful to a degree that amounted to negligence, particularly in preparing the audit report for as of the end of business on January 2, 1937, based on bank verifications as of December 31, 1936.

[18] The defendants in carrying on their work, it seems to me, failed to make a thorough examination of the plaintiff's system of bookkeeping, or in any event failed to commence their audit where that internal check as explained to them required a commencement. I accept their several statements that they had never seen the recap. sheets. It is obvious therefore that a hiatus existed between their audit and the plaintiff's internal check system without the recap. sheets.

[19] During the trial one Hessford was called on behalf of the defendants to give expert and opinion evidence on auditing. In several places in his testimony it is quite obvious that Hessford is at pains to soften his implied criticism of the defendants. Hessford on being asked:

> "Now, had you been conducting an audit like that, would you have inquired whether there were recap. sheets? A. I think eventually I would. I mean, I would not.
>
> "Q. How long would it take you to get around to it? A. Oh that depends how smoothly the other tie-up was going.
>
> "Q. Yes? A. It might have been months."

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[20] Eventually the witness Hessford qualified his answer down, that it might have taken him two years to find out.

[21] Bearing in mind the manner of Hessford in softening the effect of his answers, it is quite clear that his opinion is that there was a hiatus between the point at which the audit commenced and where it should have commenced, assuming that the defendants had concluded their knowledge of the bookkeeping system as it would have existed without recap. sheets.

[22] In conducting their audit the defendants paid practically no attention to the credit side of the cash book; and some of them contended that it was not necessary to do so. Hessford under some pressure admitted the credit side of the cash book should be examined. On the other hand, Smith, who was called as an expert for the plaintiff, and who assisted in the special investigation in respect to Ingram, maintained that the credit side of the cash book is the important side and that on this investigation particularly the credit side of the cash book is the point of issue. More important still, the witness Campbell, an employee of the defendants, the one who suggested the inspection at the bank in April, 1939, says in answer to a question: "If we had been checking the credit side of the cash book and looking up the adjustments, there is no doubt about it." ("It" there refers to discovering Ingram's defalcations.) Then later at the end of March or beginning of April, 1939, when practically the same circumstances existed in the plaintiff's office in respect to bookkeeping as existed during all the time the defendants were engaged as auditors, Campbell suggested the investigation already referred to being made at the bank. I do not know that anything unusual existed then that did not exist in January or February, 1937, and there was the additional circumstance in 1937 of the suspicion of the kiting. Had the defendants' representative then acted as Campbell did in 1939, there is no question the defalcation would have been discovered, and Campbell was only doing what a reasonably competent auditor should always do, with probably less ground for doing it than the two representatives had in January and February, 1937.

[23] It seems to me that the defendants in not following up the suspicion of kiting, in beginning their audit at a point too far removed from the internal check system as they understood it, and in not making occasional inspections of original deposit slips in the bank, were falling far short of their duties as auditors. I do not include here their failure to discover the recap. sheets, for it was in Ingram's interest to keep them out of sight, and at the beginning there was no reason why they should suspect Ingram or any other

employee.

[24] Now arises the question as to whether the defendants are liable for damages to the plaintiff. The defendants themselves, in their special investigation undertaken at the request of the plaintiff, showed that Ingram's defalcations during 1937 amounted to $1,366.79, and in 1938, to $2,088.90, and from January 3 to April 1, 1939, to $523.04, a total of $3,978.73.

[25] A direction to a jury by Lord Alverstone in the *London Oil Storage Co.* case, *supra,* speaking on an auditor's liability, said:

> "Was he guilty of a breach of duty, and if so, what loss was occasioned to the Company by that breach of duty? You must not put upon him the loss by reason of theft occurring afterwards or before, but you must put upon him such damages as you consider in your opinion were really caused by his not having fulfilled his duty as auditor of the Company."

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[26] In that case the jury awarded five guineas against the auditors, although the loss to the company was a very very much larger sum.

[27] The failure of the defendants to "probe to the bottom" the circumstances as to the suspicion of kiting seems to me to have been a breach of duty. Not only were the circumstances not probed to the bottom, but they were not even probed beneath the surface, for the first step in probing beneath the surface, the simple step of comparing the bank statement at Moose Jaw with the bank statement at Regina for December, 1936, and January, 1937, would have disclosed immediately Ingram's irregularities — that in addition to many irregularities during the time the defendants had been in charge of the audit. There were very many instances where the defendant auditors in conducting their audit were on the verge of disclosing irregularities, yet they failed to take the next step that would have shown these irregularities. It is not necessary for me now to review the very many instances where Ingram took advantage of money transfers from country stores to head office — from country bank transfers to head office or to Regina bank, and where through bills payable he was covering up his petty thefts. The consequence of that breach of duty was that Ingram was allowed to continue in the plaintiff's employ; and the kiting incident at the close of December, 1936, was necessary on his part to cover up some of his defalcations which had then amounted to nearly $10,000.

[28] The negligence here is negligence of omission rather than negligence of commission. In most of the cases of negligence of omission involving auditors there appears to be great difficulty in determining the auditor's liability, but under all the authoritative decisions since *Hadley v. Baxendale* (1854) 9 Ex. 341, 23 L.J. Ex. 179, with the numerous qualifications of the rule in that case, it seems to be clear that liability for negligence follows closely on the principle stated in that decision. When the defendants neglected their duty in not probing the possible circumstances of kiting they must be taken to have known that if any employee had been guilty of kiting he would not be dismissed from his employment because they, the defendants, had not reported what they suspected, and it follows it seems to me quite logically that they should know that that employee would continue his kiting, and also as auditors they should know that kiting on the part of an employee certainly meant the covering up of thefts.

[29] I hold therefore that the natural consequence of the defendants' breach of duty, which amounted to negligence, resulted in the plaintiff's loss of Ingram's defalcations in 1937, 1938 and a few months in 1939. It is not definite what Ingram's defalcations in 1937 amounted to before say the first of February the date which I fix for the defendants' first definite breach of duty, but I fix that roughly at $100 as the amount of Ingram's defalcations up to February 1, 1937 (which is taken roughly as the date on which I can say

that the defendants were suspicious of kiting). It seems to me the loss or damage to the plaintiff flowing from the defendants' negligence is the amount of Ingram's defalcations from January 1, 1937, until he was dismissed in April, 1939 — this is the only logical measure of damages which occurs to me. It is not a case for nominal damages — I do not think it to be a case for exemplary damages, but I should take the loss subject to a rough calculation of Ingram's defalcations between January 1, 1937, and February 1, 1937, as $100 and I deduct that from the total amount of his defalcations for 1937, 1938 and 1939, leaving $3,878.73.

[30] It may be asked why previous auditors, who have been spoken of as competent, should not have discovered his defalcations, which at the end of 1935 amounted to $8,700. Well, that question is not being investigated, but it does not follow, because defalcations escaped the attention of one set of competent auditors, that that is a defence for other auditors such as the defendants in failing to make the inquiries and investigations which circumstances arising in the course of their duty required them to do.

[31] Plaintiffs also claim for return of the remuneration paid to the defendants, and also for payment of a sum equal to that paid to the special investigators, Read and Smith. I do not think the plaintiffs are entitled to the latter sum. That was a matter of separate contract beween the plaintiff and the other auditors, and that special audit was needed to satisfy the bonding company. In respect to the claim for fees paid to the defendants, I think that when the defendants are called upon to make good damages resulting from negligence, they should not at the same time be asked to return their remuneration for their work. The audit excepting in regard to Ingram's defalcations was of value to the plaintiff and there was much more to the plaintiff's business than the defalcation of one employee. The claims for the fees paid to Read and Smith and for the return of the fees paid to the defendants are refused.

[32] There will be judgment in favour of the plaintiff for the sum of $3,878.73 with costs. There will be. a stay of execution for 30 days, during which time I shall fix counsel fees.

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TAB 46

Johnny Mennillo *Appellant*

v.

Intramodal inc. *Respondent*

Indexed as: Mennillo *v.* Intramodal inc.

2016 SCC 51

File No.: 36124.

2015: December 8; 2016: November 18.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Commercial law — Corporations — Oppression — Reasonable expectations of shareholder — Shareholder resigning as officer and director of corporation — Whether resignation extended to shareholder status and shares transferred accordingly — Whether evidence supported reasonable expectation asserted by shareholder of being treated as such and, if so, whether reasonable expectation was violated — Whether shareholder unlawfully deprived of shareholder status as a result of corporation's conduct — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 241.

In 2004, M and R, two friends, discussed the possibility of creating a road transportation company. M would contribute the money to start up the business while R would bring skills to ensure its success. R had the company incorporated on July 13, 2004, and that same day, the company's board of directors passed a resolution to accept notices of subscription to securities by R and M and to issue 51 shares to R and 49 shares to M. Both the notices of subscription and the resolution were signed by R alone. Thereafter, R and M rarely complied with the requirements of the *Canada Business Corporations Act* ("*CBCA*") and almost never put anything in writing. They had neither a partnership nor a shareholders' agreement, and there was no written contract or any other legal formality relating to M's advances of substantial amounts of money to R.

Johnny Mennillo *Appelant*

c.

Intramodal inc. *Intimée*

Répertorié : Mennillo *c.* Intramodal inc.

2016 CSC 51

N° du greffe : 36124.

2015 : 8 décembre; 2016 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit commercial — Sociétés par actions — Abus — Attentes raisonnables de l'actionnaire — Démission d'un actionnaire à titre de dirigeant et d'administrateur d'une société — La démission valait-elle également pour la qualité d'actionnaire et, dans l'affirmative, les actions ont-elles de ce fait été transférées? — La preuve étaye-t-elle l'allégation selon laquelle l'actionnaire s'attendait raisonnablement à être traité comme tel et, dans l'affirmative, cette attente raisonnable a-t-elle été frustrée? — Le comportement de la société a-t-il eu pour effet de dépouiller illégalement l'actionnaire de sa qualité d'actionnaire? — Loi canadienne sur les sociétés par actions, L.R.C. 1985, c. C-44, art. 241.

En 2004, deux amis, M et R, ont envisagé la possibilité de créer une entreprise de transport routier. M devait avancer les fonds de démarrage et R, mettre à contribution ses compétences pour assurer la réussite de l'entreprise. Le 13 juillet 2004, R a constitué la société et, le même jour, le conseil d'administration de cette dernière a adopté une résolution à l'effet d'accepter les avis de souscription de valeurs mobilières de R et de M et d'émettre 51 actions à R et 49 à M. Tant les avis de souscription que la résolution n'ont été signés que par R. Subséquemment, R et M n'ont que rarement observé les exigences de la *Loi canadienne sur les sociétés par actions* (« *LCSA* ») et n'ont presque jamais rien consigné par écrit. Ils n'ont pas non plus conclu de contrat de société ou de convention d'actionnaires, et les avances de fonds substantielles consenties par M à R n'ont pas fait l'objet d'un contrat écrit ou de quelque autre formalité juridique.

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On May 25, 2005, M sent a letter to the corporation in which he indicated that he was resigning as an officer and director of the company. M asserts that he never intended to stop being a shareholder, but the corporation contends that M also resigned as a shareholder and accordingly transferred his shares to R. Claiming that the corporation and R unduly and wrongfully stripped him of his status as a shareholder, M applied for an oppression remedy pursuant to s. 241 of the *CBCA*.

The trial judge dismissed M's oppression claim based on the factual finding that M had undertaken to remain a shareholder only so long as he was willing to guarantee the corporation's debts and later was no longer willing to do so. A majority of the Court of Appeal dismissed the appeal.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Abella, Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ.: The trial judge's factual findings are not reviewable on appeal because no palpable and overriding error is present here. M's oppression claim must accordingly be approached on the basis of the trial judge's factual findings to the effect that from May 25, 2005 onwards, M did not want to be a shareholder, did not want to be treated as such and, as a result, transferred his shares to R.

There are two elements of an oppression claim. The claimant must first identify the expectations that he or she claims have been violated and establish that the expectations were reasonably held. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder.

In the present case, M's oppression claim is groundless. M could have no reasonable expectation of being treated as a shareholder: he no longer was and expressly demanded not to be so treated. As against the corporation, the most that can be said is that it failed to carry out M's wishes as a result of not observing certain necessary corporate formalities. But in light of these findings, it cannot be said that the corporation acted oppressively or that it illegally stripped him of his status as a shareholder. What happened is that the corporation failed to make sure that all the legal formalities were complied with before registering the transfer of shares to R. The acts of the corporation which M claims to constitute oppression were in fact taken, albeit imperfectly, in accordance with his express wishes.

Le 25 mai 2005, M a fait parvenir à la société une lettre dans laquelle il démissionnait à titre de dirigeant et d'administrateur de l'entreprise. Il affirme n'avoir jamais eu l'intention de cesser d'être actionnaire, mais la société soutient qu'il a également démissionné à titre d'actionnaire et transféré de ce fait ses actions à R. En application de l'art. 241 de la *LCSA*, M a intenté un recours pour abus, alléguant que la société et R l'avaient dépouillé indûment et illégalement de sa qualité d'actionnaire.

Le juge de première instance a rejeté le recours pour abus après avoir conclu des faits que M ne s'était engagé à demeurer actionnaire que tant qu'il serait disposé à garantir le passif de la société et que, à un moment ultérieur, il n'avait plus été disposé à le faire. Les juges majoritaires de la Cour d'appel ont rejeté l'appel.

Arrêt (la juge Côté est dissidente) : Le pourvoi est rejeté.

Les juges Abella, Cromwell, Karakatsanis, Wagner, Gascon et Brown : Les conclusions de fait du juge de première instance ne sont pas susceptibles de révision en appel car elles ne sont entachées d'aucune erreur manifeste et dominante. Il faut donc statuer sur le recours pour abus de M à partir des conclusions de fait du juge de première instance selon lesquelles, à compter du 25 mai 2005, M n'a plus voulu être actionnaire, n'a plus voulu être traité comme tel et a de ce fait transféré ses actions à R.

Deux choses incombent à celui qui allègue l'abus. D'abord, il doit préciser quelles attentes ont censément été frustrées et en établir le caractère raisonnable. Ensuite, il doit démontrer que ces attentes raisonnables ont été frustrées par un comportement que vise le libellé de la loi, à savoir le fait d'abuser des droits d'un détenteur de valeurs mobilières ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts.

Dans la présente affaire, le recours pour abus est sans fondement. M ne pouvait pas raisonnablement s'attendre à être traité comme un actionnaire : il ne l'était plus et il avait expressément demandé à ne plus être traité comme tel. On peut tout au plus reprocher à la société de ne pas avoir donné suite au vœu de M en omettant d'observer certaines formalités requises de sa part. Cependant, on ne saurait affirmer au vu de ces conclusions qu'elle a agi abusivement à l'égard de M ou qu'elle l'a dépouillé illégalement de sa qualité d'actionnaire. En fait, la société a omis de s'assurer de l'observation de toutes les formalités d'ordre juridique avant d'inscrire le transfert des actions à R. Les mesures de la société que M tient pour abusives ont en fait été prises, bien que de manière imparfaite, selon la volonté qu'il avait exprimée.

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The fact that a corporation fails to comply with the requirements of the *CBCA* does not, on its own, constitute oppression. What may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the *CBCA*. In the present case, the failure to observe the corporate formalities in removing M as a shareholder in accordance with his express wishes to be so removed cannot be characterized as an act unfairly prejudicial to the extent that this omission deprived him of his status as a shareholder. The corporation failed to observe the formalities of carrying out his wish not to be a shareholder. Nor can the failure to properly remove him as a shareholder in accordance with his express wishes make it just and equitable for him to regain his status as a shareholder.

Regarding the issue of whether the share transfer could have been retroactively cancelled, it is not possible to do so by way of simple oral consent. An issuance of shares can be cancelled only if (a) the corporation's articles are amended or (b) the corporation reaches an agreement to purchase the shares, which requires that the directors pass a resolution, that the shareholder in question gives his or her express consent and that the tests of solvency and liquidity be met. Meeting the requirements with respect to the maintenance of share capital cannot be optional, given that it is the share capital that is the common pledge of the creditors and is the basis for their acceptance of doing business with the corporation.

It is common ground that the shares that were transferred were not endorsed by M. Therefore it is true that the corporation proceeded to register a transfer that did not meet all of the criteria stated in the *CBCA*. Since this was an important formality required by law, it was to be observed on pain of nullity of the transfer. But there is no doubt about the fact that M knew that this formality was not complied with when the company proceeded to register the transfer in the corporate books, and that he was aware that he had not endorsed his share certificate when the shares were transferred to R as the trial judge found. As he was aware of the situation of which he now complains more than three years prior, his claim in that regard was and is still prescribed. Even if the transfer was subject to nullity, it did not mean that it was inexistent.

Finally, regarding the possibility of a conditional issuance of the shares, the condition at issue was a result of an agreement between M and R that the former would be a shareholder only if he guaranteed the corporation's debts. This agreement was reached by M and R; the corporation was not a party to this agreement. Accordingly, it does not attract the corporate formalities applicable to a conditional issuance of shares.

L'inobservation des formalités de la *LCSA* par une société ne constitue pas en soi de l'abus. Peut ouvrir droit au recours pour abus le comportement qui frustre l'attente raisonnable, mais pas celui qui est seulement contraire à la *LCSA*. En l'espèce, l'inobservation des formalités nécessaires au retrait de M à titre d'actionnaire, conformément à la volonté qu'il avait exprimée, ne saurait constituer un acte injustement préjudiciable à son égard en ce qu'elle le prive de sa qualité d'actionnaire. La société a omis d'observer les formalités requises pour donner suite à sa volonté de cesser d'être actionnaire. L'omission d'effectuer régulièrement son retrait à titre d'actionnaire, selon la volonté qu'il avait exprimée, ne saurait non plus rendre juste et équitable la réintégration de M au sein de l'actionnariat.

Quant à savoir si le transfert des actions aurait pu être annulé rétroactivement, une telle mesure n'aurait pu intervenir sur simple consentement verbal. Il ne peut y avoir annulation d'une émission d'actions que a) par modification des statuts de la société ou b) par achat de gré à gré des actions par la société, ce qui requiert une résolution des administrateurs, le consentement exprès de l'actionnaire en cause et le respect des critères de solvabilité et de liquidité. La conformité aux exigences relatives au maintien du capital-actions ne saurait être facultative puisque le capital-actions constitue le gage commun des créanciers en fonction duquel ces derniers acceptent de faire affaire avec la société.

Nul ne conteste que les actions transférées n'ont pas été endossées par M. La société a donc bel et bien inscrit un transfert qui ne respectait pas toutes les conditions prévues par la *LCSA*. S'agissant d'une formalité légale importante, son inobservation exposait l'opération à la nullité. Or, il ne fait aucun doute que M savait que cette formalité n'avait pas été accomplie lorsque la société a inscrit le transfert dans ses registres et que son certificat n'était pas endossé lors du transfert de ses actions à R, comme l'a conclu le juge de première instance. Puisque, plus de trois ans auparavant, il connaissait la situation qu'il déplore aujourd'hui, son recours était et demeure prescrit. Même s'il était susceptible d'annulation, le transfert existait tout de même.

Enfin, en ce qui concerne la possibilité que les actions aient été émises conditionnellement, la condition en cause résultait d'un accord entre M et R selon lequel le premier ne serait actionnaire que s'il se portait garant du passif de la société. L'accord est intervenu entre M et R, et la société n'y est pas partie. Il ne requérait donc pas l'observation des formalités liées à une émission conditionnelle d'actions.

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Per McLachlin C.J. and Moldaver J.: It is not necessary to determine whether there was an effective transfer of M's shares to R. This appeal can be disposed of on the basis that M has failed to show a reasonable expectation that he would not be removed as a shareholder from the corporation's books given that he asked to be removed as a shareholder. This is confirmed by the fact that subsequently M ceased to conduct himself as an equity shareholder and advanced money as loans. The trial judge's finding of fact is supported by the evidence. Consequently, the trial judge did not err in denying M's oppression claim.

Per Côté J. (dissenting): Two key principles are deeply rooted in Canadian corporate law and cannot simply be disregarded or ignored: the principle that a corporation's legal personality is distinct from that of its shareholder or shareholders, and the principle or rule of the maintenance of capital. The formalities provided for in corporate legislation are imposed to give effect to these principles, and they are necessary to protect the corporation's patrimony, the common pledge of its creditors.

These principles cannot be variable. The principle that a corporation has a distinct legal personality and the maintenance of capital principle are just as important in the case of a small company as in that of a large one, if not more so. Although expectations may vary from one shareholder to another in the case of a closely held corporation, this does not diminish the importance of these principles. The same is true of the formalities provided for by law to ensure that they are adhered to.

It follows that the conclusion that shares were issued conditionally in this case or that the agreement between the two shareholders regarding M's shares was cancelled retroactively, simply by their consenting to its being cancelled, and that this cancellation had some effect on the corporation even though the necessary formalities were not observed, jeopardizes important pillars of Canadian corporate law.

Along the same lines, the fact that one shareholder claims he and his fellow shareholder entered into an agreement for the transfer of shares does not relieve the corporation of its legal duty to make the necessary inquiries before passing a resolution approving that transfer of shares and registering the transfer in its registers. The *CBCA* imposes some very strict requirements to be met before a transfer of shares is registered, including that the security be endorsed and that the transfer be rightful. The corporation's

La juge en chef McLachlin et le juge Moldaver : Point n'est besoin de décider s'il y a effectivement eu transfert des actions de M à R. On peut statuer sur le pourvoi à partir du fait que M n'a pas démontré qu'il pouvait raisonnablement s'attendre à ce que les registres de la société continuent de faire état de sa qualité d'actionnaire puisqu'il avait demandé à ne plus être actionnaire. Cela est d'ailleurs confirmé par le fait qu'il a cessé par la suite d'agir comme actionnaire participatif et a avancé des fonds sous forme de prêts. La conclusion de fait du juge de première instance trouve appui dans la preuve. Il n'a donc pas eu tort de rejeter le recours pour abus intenté par M.

La juge Côté (dissidente) : Deux grands principes sont profondément enracinés en droit canadien des sociétés par actions et ne peuvent simplement être écartés ou ignorés : il s'agit du principe de la personnalité juridique distincte de la société par rapport à celle de son ou ses actionnaires, et du principe ou de la règle du maintien du capital. Les formalités prévues par les lois relatives aux sociétés par actions sont imposées en raison de ces principes et elles sont nécessaires à la protection du patrimoine de la société, gage commun de ses créanciers.

Ces principes ne peuvent être à géométrie variable. Le principe de la personnalité juridique distincte de la société et celui du maintien du capital sont tout aussi importants — sinon plus — dans le cas d'une petite société que dans celui d'une grande. Bien que les attentes des actionnaires puissent varier de l'un à l'autre dans le cas d'une société par actions à capital fermé, l'importance de ces principes n'est pas pour autant diminuée. Il en va de même des formalités prévues par la loi pour faire respecter ces principes.

Il s'ensuit que la conclusion selon laquelle il y a eu en l'espèce émission conditionnelle d'actions ou encore celle selon laquelle il y a eu en l'espèce annulation rétroactive de l'entente entre les deux actionnaires quant aux actions de M sur simple consentement de ceux-ci et que cette annulation a eu quelque effet que ce soit sur la société, en dépit de l'absence du formalisme requis, mettent en péril des piliers importants du droit canadien des sociétés.

Dans le même sens, la prétention d'un actionnaire suivant laquelle une entente de transfert d'actions est intervenue entre lui et son coactionnaire ne libère pas la société en cause de son devoir légal de faire les vérifications requises avant d'entériner par résolution ce transfert d'actions et de l'inscrire dans ses registres. La *LCSA* soumet l'inscription d'un transfert d'actions à des conditions préalables très strictes, dont l'endossement du titre et le caractère régulier du transfert. L'omission de telles

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failure to make such inquiries in this case was in itself a form of oppression.

M did not, by expressing an intention to withdraw from the corporation as a shareholder, extinguish any reasonable expectations he may have had as regards his remaining on the company's books as a shareholder. To conclude the opposite would amount to saying that the mere expression of an intention to withdraw from a corporation as a shareholder would also extinguish the reasonable expectation that the corporation in question will act in accordance with the law and with its articles and by-laws and will make the necessary inquiries before depriving a person of his or her shareholder status, and would thereby defeat the oppression remedy. However, the *CBCA* itself does not limit access to the oppression remedy in such a manner and, what is more, shareholders are entitled to expect a corporation to act in accordance with its articles and by-laws and, more generally, with the law. These are, so to speak, presumed expectations.

The question of reasonable expectations is of greater relevance to the determination of a shareholder's rights that are not specifically provided for in the legislation and in the corporation's articles and by-laws. Where, as in this case, a corporation is alleged to have acted unlawfully, the focus of the analysis is not so much on the question of reasonable expectations as on that of whether the corporation's conduct was in fact unlawful and, therefore, oppressive. Mere irregularities that are not oppressive or unfairly prejudicial will not be sufficient to justify granting the remedy to the complainant. On the other hand, a failure to comply with a mandatory legislative provision or with the requirements set out in the corporation's articles and by-laws that relate to the very recognition of shareholder status may justify granting the oppression remedy.

In this case, several aspects of the corporation's conduct are problematic. The evidence shows that the share certificate in question was not endorsed. It also shows that the corporation made no inquiries before passing the resolution to transfer M's shares, and that the resolution was passed retroactively and was signed by a single shareholder (namely the majority shareholder). The corporation's conduct in this regard, which violated express provisions of the legislation and of its own articles and by-laws, was prejudicial to M: that conduct unlawfully stripped him of his status as a shareholder. It is difficult to imagine how a business corporation could act more oppressively toward a shareholder than by depriving him or her of that status.

vérifications par la société en l'espèce constituait en soi une forme d'abus.

En exprimant l'intention de se retirer de la société à titre d'actionnaire, M ne mettait fin à toutes attentes raisonnables qu'il pouvait avoir de demeurer dans les registres de la société en tant qu'actionnaire. Conclure le contraire revient à dire que la simple expression de l'intention de se retirer d'une société en tant qu'actionnaire mettrait également fin à l'attente raisonnable que la société en question agisse en conformité avec la loi et ses statuts et règlements et qu'elle procède aux vérifications requises avant de priver une personne de son statut d'actionnaire, faisant ainsi échec au recours pour abus. Or, la *LCSA* elle-même ne limite pas ainsi l'accès au recours pour abus et, de plus, les actionnaires sont en droit de s'attendre à ce que la société agisse en conformité avec ses statuts et règlements et, plus généralement, avec la loi. Il s'agit pour ainsi dire d'attentes présumées.

La question des attentes raisonnables a une plus grande pertinence lorsqu'il s'agit de déterminer les droits d'un actionnaire au-delà de ce qui est spécifiquement prévu dans la loi et les statuts et règlements de la société. Lorsque l'illégalité de la conduite de la société est alléguée, comme c'est le cas en l'espèce, l'analyse ne porte pas tant sur la question des attentes raisonnables que sur celle visant à déterminer si la conduite de la société est effectivement illégale et, partant, abusive. De simples irrégularités, qui ne constituent pas pour autant un abus ou un acte injustement préjudiciable, ne seront pas suffisantes pour donner ouverture au recours du plaignant. À l'inverse, l'omission de se conformer à une disposition impérative de la loi ainsi qu'aux exigences prévues par les statuts et règlements de la société en ce qui concerne la reconnaissance même du statut d'actionnaire pourra donner ouverture au recours pour abus.

En l'espèce, plusieurs aspects de la conduite de la société posent problème. La preuve révèle que le certificat d'actions en cause n'a pas été endossé. Elle révèle également que la société n'a fait aucune vérification avant d'adopter la résolution de transfert des actions de M, et que c'est rétroactivement et avec la signature d'un seul actionnaire (c'est-à-dire l'actionnaire majoritaire) que la résolution a été adoptée. Cette conduite de la société, qui contrevient à des dispositions expresses de la loi, de ses statuts et de ses règlements, a été préjudiciable à M : elle l'a dépouillé illégalement de son statut d'actionnaire. Et il est difficile d'imaginer conduite plus abusive d'une société par actions à l'endroit d'un actionnaire que celle de le priver de ce statut.

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The conduct of a corporation that approves a transfer of shares without making any inquiries and that confuses its interests with those of its majority shareholder, as if it were a mere puppet, is not less oppressive simply because another shareholder at some point expressed an intention to withdraw from the corporation without there being any agreement on the terms of such a withdrawal.

Furthermore, the trial judge did not find that the corporation's shareholders had agreed on a transfer of shares. The interpretation to the effect that he did so find denotes a fragmented reading of the trial judge's reasons and distorts his conclusions. The trial judge instead concluded that, given that M's shares had been issued on condition that he guarantee the corporation's debts, the intention he expressed of withdrawing from the corporation was sufficient for him to be stripped of his status as a shareholder. It is inaccurate to say that the trial judge's finding that the shares had been transferred was independent of their having been issued conditionally.

The parties characterized the agreement that was alleged to have been entered into by the corporation's shareholders in several different ways, at times as a conditional issuance of shares, at times as a retroactive cancellation and at times as a contract of sale or a contract of gift. This reflects a more fundamental problem, namely that, without some speculation, no intention in this regard can be found in the evidence. Indeed, the difficulty the courts below had in characterizing the alleged agreement resulted from the fact that there was no evidence of the juridical operation contemplated by the corporation's shareholders on May 25, 2005 that allegedly resulted in the transfer of M's shares.

Moreover, it is impossible to find, as a matter of law, that M transferred his shares on May 25, 2005. Whatever conclusion might be reached about the credibility of the witnesses in this regard, the intention expressed by M of withdrawing from the corporation had no effect on his rights as a shareholder. In this case, the intention expressed by M was at most an invitation to contract.

The analysis that is required in the circumstances cannot disregard the interplay between Quebec civil law and the *CBCA*. It is contrary to basic principles of Quebec civil law to argue that the intention expressed by M in this case resulted in an agreement of wills even though there was no agreement on the juridical operation being contemplated. To conclude that the expression of such an intention bars M's claim for oppression — thereby approving after the fact the transfer registered by the corporation in

La conduite d'une société qui avalise un transfert d'actions sans vérification aucune, et qui confond ses intérêts avec ceux de son actionnaire majoritaire comme si elle n'était qu'une simple marionnette, n'est pas moins abusive seulement parce que, à un certain moment donné, un coactionnaire a exprimé son intention de se retirer de la société, sans qu'il y ait eu entente quant aux modalités d'un tel retrait.

Par ailleurs, le premier juge n'a pas conclu que les actionnaires de la société s'étaient entendus afin de procéder à un transfert d'actions. Cette interprétation dénote une lecture parcellaire du jugement de première instance et en dénature les conclusions. Le juge de première instance a plutôt conclu que l'intention exprimée par M de se retirer de la société, dans la mesure où ses actions avaient été émises conditionnellement à ce qu'il garantisse le passif de la société, était suffisante pour le dépouiller de son statut d'actionnaire. Il n'est pas exact en l'espèce d'affirmer que le juge de première instance a conclu à la cession des actions, indépendamment du caractère conditionnel de leur émission.

Les parties ont qualifié l'entente qui serait intervenue entre les actionnaires de la société de maintes façons, y voyant tantôt une émission conditionnelle, tantôt une annulation rétroactive, tantôt un contrat de vente ou de donation. Cela traduit un problème plus fondamental : le fait que, sauf conjecture, aucune intention à cet effet ne ressort de la preuve. En fait, la difficulté éprouvée par les juridictions inférieures à qualifier la prétendue entente résulte du fait que la preuve est muette sur l'opération juridique qui aurait été envisagée par les actionnaires de la société le 25 mai 2005 et qui aurait eu comme résultat le transfert de ses actions.

Il est d'ailleurs impossible de conclure en droit que M a transféré ses actions le 25 mai 2005. En effet, peu importe la conclusion quant à la crédibilité des témoins à cet égard, l'intention manifestée par M de se retirer de la société était sans effet sur ses droits en tant qu'actionnaire. En l'espèce, l'intention exprimée par M constituait tout au plus une invitation à contracter.

L'analyse qui s'impose dans les circonstances ne peut ignorer l'interaction du droit civil québécois avec la *LCSA*. Soutenir que l'intention exprimée par M en l'espèce donnait lieu à un accord de volontés, et ce, malgré l'absence d'entente quant à l'opération juridique projetée, va à l'encontre de principes élémentaires du droit civil québécois. Conclure que l'expression d'une telle intention constitue une fin de non-recevoir au recours pour abus de M — avalisant ainsi a posteriori le transfert

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its registers — is contrary to the law, to fairness and to common sense.

In addition to having no basis in law, the finding that M had expressed his intention of withdrawing as a shareholder and had transferred his shares in May 2005 is not supported by the evidence and is thus based on palpable and overriding errors. The trial judge erred in rejecting M's testimony in this regard, since he did so on the basis of an unreasonable interpretation of several pieces of evidence in the record. At most, the evidence shows that M expressed an intention to divest himself of his shares, but no agreement was reached on how he would dispose of them.

Finally, the prescription period applicable to a claim under s. 241 of the *CBCA* will depend on the basis for the claim. Where — as in this case — the complainant has been acknowledged to be a shareholder at some point and is claiming to have been unlawfully stripped of shareholder status by the corporation, the claim is therefore imprescriptible.

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inscrit par la société dans ses registres — heurte la loi, l'équité et le sens commun.

La conclusion suivant laquelle M aurait exprimé son intention de se retirer en tant qu'actionnaire et aurait transféré ses actions en mai 2005, en plus de n'avoir aucun fondement en droit, ne trouve aucune assise dans la preuve et repose donc sur des erreurs manifestes et dominantes. Lorsque le juge de première instance rejette le témoignage de M à cet égard, il commet une erreur puisqu'il le fait en s'appuyant sur une interprétation déraisonnable de plusieurs pièces versées au dossier. Tout au plus, la preuve démontre qu'une intention de se départir de ses actions a été exprimée par M, sans toutefois qu'il n'y ait eu d'entente quant à la façon dont il disposerait de ses actions.

Enfin, le délai de prescription applicable au recours exercé en application de l'art. 241 de la *LCSA* dépendra du fondement du recours. Lorsque le statut d'actionnaire a été à un moment reconnu au plaignant — comme c'est le cas en l'espèce —, et que celui-ci prétend que la société l'en a illégalement dépouillé, le recours est alors imprescriptible.

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Claude Marseille, *Paul Martel* and *Caroline Dion*, for the appellant.

Hubert Camirand and *Marie-Geneviève Masson*, for the respondent.

The judgment of Abella, Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] In this oppression proceeding under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), the underlying question is whether, as the appellant, Johnny Mennillo, alleges, the business or affairs of Intramodal inc. were carried on or conducted in a manner that was oppressive or unfairly prejudicial to or unfairly disregarded Mr. Mennillo's interests: s. 241(2) *CBCA*.

[2] The informal manner in which the parties dealt with each other and their lack of attention to proper documentation gave rise to some technical points of corporate law including how a share transfer can be properly registered and how a share

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Peterson, Dennis H., and Matthew J. Cumming. *Shareholder Remedies in Canada*, 2nd ed., Markham (Ont.), LexisNexis, 2009 (loose-leaf updated August 2016, release 39).
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POURVOI contre un arrêt de la Cour d'appel du Québec (les juges Vézina, Gagnon et St-Pierre), 2014 QCCA 1515, [2014] AZ-51101093, [2014] J.Q. nº 8429 (QL), 2014 CarswellQue 10625 (WL Can.), qui a confirmé une décision du juge Poirier, 2012 QCCS 1640, [2012] AZ-50849648, [2012] J.Q. nº 3574 (QL), 2012 CarswellQue 3855 (WL Can.). Pourvoi rejeté, la juge Côté est dissidente.

Claude Marseille, *Paul Martel* et *Caroline Dion*, pour l'appelant.

Hubert Camirand et *Marie-Geneviève Masson*, pour l'intimée.

Version française du jugement des juges Abella, Cromwell, Karakatsanis, Wagner, Gascon et Brown rendu par

LE JUGE CROMWELL —

I. Introduction

[1] La question qui, aux fins du présent pourvoi, sous-tend le recours pour abus intenté sur le fondement de la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (« *LCSA* »), est celle de savoir si, comme l'allègue l'appelant, Johnny Mennillo, Intramodal inc. a abusé des droits de ce dernier ou s'est montrée injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts, par la façon dont elle a conduit ses activités commerciales ou ses affaires internes (par. 241(2) de la *LCSA*).

[2] Le caractère informel des rapports entre les parties et le peu d'attention que ces dernières ont porté à l'établissement des documents requis soulèvent certains points techniques du droit des sociétés, notamment en ce qui concerne la manière dont

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transfer may be cancelled. However, the answer to the fundamental question of whether Mr. Mennillo was oppressed in the corporate law sense turns on which of two sharply different versions of the facts — one supported by Mr. Mennillo and the other by Intramodal's controlling shareholder, Mario Rosati — ought to be accepted.

[3] Mr. Mennillo claims that he was oppressed because he was an investor in Intramodal who was frozen out of equity participation by Mr. Rosati. Intramodal denies this and says that Mr. Mennillo, far from having been frozen out of the corporation, wanted to be removed as a director and shareholder and transferred his shares to Mr. Rosati.

[4] The trial judge completely rejected Mr. Mennillo's version of events and substantially accepted Intramodal's. The judge found that Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts. He ultimately decided that he did not wish to do so and transferred his shares to Mr. Rosati. The failure to observe the formalities necessary to complete the transfer of the shares, the judge found, resulted from an error or oversight on the part of Mr. Rosati's lawyer.

[5] If the trial judge's findings of fact are accepted, as in my view they ought to be, Mr. Mennillo's oppression claim is groundless. The critical finding is that Mr. Mennillo did not wish to remain a shareholder and told Mr. Rosati to have him removed as such. On those findings, all the corporation can be accused of is sloppy paperwork. But sloppy paperwork on its own does not constitute oppression. Neither does the corporation and its controlling shareholder treating Mr. Mennillo exactly as he wanted to be treated. While some errors were made in the courts below on some points of corporate law, Mr. Mennillo's oppression claim was properly dismissed and I would dismiss his appeal.

un transfert d'actions peut être inscrit régulièrement ou annulé. Toutefois, la question fondamentale de savoir si M. Mennillo a fait l'objet d'un abus au sens du droit des sociétés dépend de la version des faits que l'on retient entre les deux, nettement différentes, offertes par M. Mennillo et Mario Rosati, l'actionnaire contrôlant d'Intramodal.

[3] M. Mennillo allègue l'abus de ses droits. Investisseur dans Intramodal, il aurait été exclu de toute participation au capital par M. Rosati. Intramodal nie l'abus et affirme que, loin d'avoir été évincé de la société, M. Mennillo ne voulait plus faire partie de ses administrateurs et de ses actionnaires et a transféré ses actions à M. Rosati.

[4] Le juge de première instance rejette en bloc la version des faits de M. Mennillo et retient essentiellement celle d'Intramodal. À son avis, M. Mennillo a convenu qu'il ne demeurerait actionnaire que tant qu'il serait disposé à garantir le passif de la société. Finalement, M. Mennillo y a renoncé et a transféré ses actions à M. Rosati. De l'avis du juge, ce serait une erreur ou un oubli de la part de l'avocat de M. Rosati qui expliquerait l'inobservation des formalités nécessaires pour mener à bien le transfert des actions.

[5] Si les conclusions de fait du juge de première instance sont justes, comme j'estime qu'elles le sont, le recours pour abus de M. Mennillo est sans fondement. Selon la conclusion cruciale, M. Mennillo n'a pas souhaité demeurer actionnaire et a demandé à M. Rosati de faire en sorte qu'il ne le soit plus. Partant, la seule chose que l'on peut reprocher à la société est de ne pas avoir observé les formalités. Or, cette inobservation ne saurait en soi constituer de l'abus. La façon dont la société et son actionnaire contrôlant ont considéré M. Mennillo, c'est-à-dire exactement comme il le voulait, ne saurait non plus constituer de l'abus. Bien que les juridictions inférieures aient commis des erreurs sur des points touchant au droit des sociétés, j'estime que l'allégation d'abus a été rejetée à raison et je suis d'avis de rejeter le pourvoi.

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II. Overview of the Legal Context, Parties' Positions and Issues

A. *Legal Context*

[6] To understand the facts and issues, it is important to understand the legal framework in which they must be considered.

[7] All of the relief requested by Mr. Mennillo is based solely on his claim of oppression under s. 241 of the *CBCA*. Other claims that he might have made, but did not make, are irrelevant to this appeal and cannot be considered. That section provides:

241 (1) A complainant may apply to a court for an order under this section.

(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[8] The Court set out the nature and constituent elements of an oppression claim in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at paras. 53-94. The oppression remedy is inspired by the principles of equity: it gives courts a

II. Aperçu du contexte juridique, des thèses des parties et des questions en litige

A. *Contexte juridique*

[6] Pour bien comprendre les faits et les questions en litige, il importe de préciser le contexte juridique dans lequel ils doivent être examinés.

[7] Le redressement demandé par M. Mennillo prend entièrement appui sur son allégation d'abus formulée en application de l'art. 241 de la *LCSA*. Les autres allégations qu'il aurait pu formuler, mais qu'il n'a pas formulées, sont sans pertinence et ne peuvent être prises en compte. Voici le texte de cette disposition :

241 (1) Tout plaignant peut demander au tribunal de rendre les ordonnances visées au présent article.

(2) Le tribunal saisi d'une demande visée au paragraphe (1) peut, par ordonnance, redresser la situation provoquée par la société ou l'une des personnes morales de son groupe qui, à son avis, abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :

a) soit en raison de son comportement;

b) soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;

c) soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[8] Dans l'arrêt *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 53-94, la Cour fait état de la nature de l'allégation d'abus et de ses composantes. Le recours pour abus s'inspire des principes d'equity : le tribunal se

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broad jurisdiction to enforce "not just what is legal but what is fair" (para. 58; see also *Premier Tech ltée v. Dollo*, 2015 QCCA 1159, leave to appeal refused, 2016 CanLII 21792 (S.C.C.)). Whether there has been oppression is judged according to "business realities" not "narrow legalities": *BCE*, at para. 58. Furthermore, "[w]hat is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play": para. 59.

[9] There are two elements of an oppression claim. The claimant must first "identify the expectations that he or she claims have been violated . . . and establish that the expectations were reasonably held": *BCE*, at para. 70. Then the claimant must show that those reasonable expectations were violated by conduct falling within the statutory terms, that is, conduct that was oppressive, unfairly prejudicial to or unfairly disregarding of the interests of any security holder: para. 68; s. 241(2) *CBCA*.

[10] According to the trial judge's findings of fact, Mr. Mennillo agreed that he would remain a shareholder of the corporation on the condition that he guarantee its debts. He decided that he no longer wished to guarantee those debts and transferred his shares to Mr. Rosati. He could, therefore, have no reasonable expectation of being treated as a shareholder thereafter. He also could be thought to reasonably expect the corporation to ensure that the corporate formalities to register this arrangement would be observed. But the failure to do so (i.e. the conduct that "violated" those expectations) cannot be characterized as "oppressive, unfairly prejudicial or unfairly disregarding" of his interests. This was a two-person, private company in which the dealings between the parties were marked by extreme informality. As this Court said in *BCE*, "[c]ourts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company": para. 74. In substance, Mr. Mennillo was not oppressed but treated as he wanted the corporation to treat him. The failure of the company's lawyer to

voit conférer le vaste pouvoir d'imposer « le respect non seulement du droit, mais [aussi] de l'équité » (par. 58; voir aussi *Premier Tech ltée c. Dollo*, 2015 QCCA 1159, autorisation de pourvoi refusée (2016 CanLII 21792 (C.S.C.)). L'existence d'un abus tient à la « réalité commerciale », pas seulement aux « considérations strictement juridiques » (*BCE*, par. 58). En outre, le tribunal détermine ce qui est juste et équitable « selon les attentes raisonnables des parties intéressées en tenant compte du contexte et des rapports en jeu » (par. 59).

[9] Deux choses incombent à celui qui allègue l'abus. D'abord, il doit « préciser quelles attentes ont censément été frustrées [. . .] et en établir le caractère raisonnable » (*BCE*, par. 70). Ensuite, il doit démontrer que ces attentes raisonnables ont été frustrées par un comportement visé par le libellé de la loi, à savoir le fait d'abuser des droits d'un détenteur de valeurs mobilières ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts (par. 68; par. 241(2) de la *LCSA*).

[10] Suivant les conclusions de fait du juge de première instance, M. Mennillo avait convenu qu'il demeurerait actionnaire de la société à la condition d'en garantir le passif. Il avait ensuite fait savoir qu'il ne souhaitait plus être garant de ce passif et il avait cédé ses actions à M. Rosati. Il ne pouvait donc pas raisonnablement s'attendre à être considéré comme un actionnaire par la suite. Il était par contre concevable qu'il s'attende raisonnablement à ce que la société s'assure de l'observation des formalités alors requises pour inscrire l'accord. Mais l'omission de la société de s'en assurer (soit le comportement par lequel elle a « frustré » les attentes de l'intéressé) ne saurait être assimilée au fait d'abuser des droits de M. Mennillo ou de se montrer injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts. La société en cause était une société fermée constituée de deux personnes dont les rapports entre elles se caractérisaient par une absence totale de formalisme. Comme le dit la Cour dans *BCE*, « [i]l est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une

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comply with the corporate law requirements to give effect to that intention is not oppression.

[11] Contrary to what my colleague Justice Côté concludes, the fact that a corporation fails to comply with the requirements of the *CBCA* does not, on its own, constitute oppression: paras. 166 and 195. The oppression remedy is a discretionary one that is equitable in nature: D. S. Morritt, S. L. Bjorkquist and A. D. Coleman, *The Oppression Remedy* (loose-leaf), at p. 5-10.4; D. H. Peterson and M. J. Cumming, *Shareholder Remedies in Canada* (2nd ed. (loose-leaf)), at p. 17-14. What may trigger the remedy is conduct that frustrates reasonable expectations, not simply conduct that is contrary to the *CBCA*. As I see it, my colleague's approach not only represents a significant departure from our jurisprudence, but as applied here permits Mr. Mennillo to use oppression proceedings as an instrument of oppression rather than as a remedy for it.

B. *Parties' Positions*

[12] Mr. Mennillo submits that he was unlawfully removed from the list of shareholders of the corporation through an amended declaration filed with the Registraire des entreprises of Quebec ("REQ") on July 18, 2005. He also argues that as a shareholder, he had the right to access the corporate records of the company during the usual business hours, a right which was denied to him until the fourth day of the trial in the Superior Court. Simply put, his oppression claim is that he is a shareholder and investor who was frozen out of the corporation.

[13] For its part, Intramodal says that Mr. Mennillo resigned as a director, asked not to be a shareholder and transferred his shares to Mr. Rosati. His advances of funds were fully repaid with a healthy bonus. Putting the corporation's position in its simplest terms, Mr. Mennillo did not want to be an equity shareholder and, as we shall see, he is no longer one.

petite société fermée qu'à ceux d'une société ouverte de plus grande taille » (par. 74). En somme, M. Mennillo n'a pas été victime d'abus, mais a été traité par la société comme il l'avait souhaité. Le fait que l'avocat de celle-ci n'a pas observé les formalités du droit des sociétés pour donner effet à cette volonté ne constitue pas de l'abus.

[11] Contrairement à ce que conclut ma collègue la juge Côté, l'inobservation des formalités de la *LCSA* par une société ne constitue pas en soi de l'abus (par. 166 et 195). Le recours pour abus est de nature discrétionnaire et a pour assise l'equity (D. S. Morritt, S. L. Bjorkquist et A. D. Coleman, *The Oppression Remedy* (feuilles mobiles), p. 5-10.4; D. H. Peterson et M. J. Cumming, *Shareholder Remedies in Canada* (2e éd. (feuilles mobiles)), p. 17-14). Peut ouvrir droit au recours le comportement qui frustre l'attente raisonnable, mais pas celui qui est seulement contraire à la *LCSA*. J'estime que non seulement l'approche de ma collègue rompt sensiblement avec la jurisprudence de la Cour, mais aussi que, en l'espèce, elle permet à M. Mennillo de faire du recours pour abus un instrument d'abus plutôt que de redressement.

B. *Thèses des parties*

[12] M. Mennillo soutient qu'Intramodal a illégalement rayé son nom de la liste des actionnaires dans une déclaration modificative déposée auprès du Registraire des entreprises du Québec (« REQ ») le 18 juillet 2005. Il prétend par ailleurs que, en tant qu'actionnaire, il avait le droit de consulter les registres de la société pendant les heures normales de bureau, mais qu'on lui a refusé l'exercice de ce droit jusqu'au quatrième jour du procès en Cour supérieure. Autrement dit, il s'agirait d'un actionnaire et investisseur qu'on aurait évincé de la société.

[13] Intramodal rétorque que M. Mennillo a démissionné de son poste d'administrateur, qu'il a demandé à ne plus être actionnaire et qu'il a cédé ses actions à M. Rosati. Il y a eu remboursement intégral des sommes avancées par M. Mennillo et versement d'une prime généreuse à ce dernier. L'entreprise soutient en somme que M. Mennillo ne voulait pas être un actionnaire participatif et, comme nous le verrons, qu'il ne l'est plus.

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C. *Issues*

[14] Putting aside questions of prescription and remedy, Mr. Mennillo raises two legal points and one factual point on appeal.

[15] In relation to the law, he maintains:

(a) The trial judge erred in finding that he had transferred his shares to Mr. Rosati when no such transfer was validly effected in law (2012 QCCS 1640); and

(b) The majority of the Court of Appeal erred in concluding that a share subscription could be retroactively cancelled by simple verbal agreement and without complying with the required legal formalities (2014 QCCA 1515).

[16] In relation to the facts, Mr. Mennillo relies on the conclusions of the dissenting judge in the Court of Appeal and says that the trial judge erred in rejecting his claim that he is a shareholder of the corporation.

[17] I agree with Mr. Mennillo in relation to the second legal point relating to corporate law. However, this point has no impact on the result of the oppression proceedings. The trial judge found that in May 2005, Mr. Mennillo did not want to remain a shareholder because he no longer wanted to be guarantor of all Intramodal's debts. Some corporate formalities of the transfer of shares from Mr. Mennillo to Mr. Rosati were not completed as a result of an error or oversight on the part of Mr. Rosati's lawyer. From that date, Mr. Mennillo agreed to be simply a lender to his friend Mr. Rosati. As of May 25, 2005, Mr. Mennillo ceased to be a shareholder in the corporation. That is exactly how the corporation treated him. In my view, the dissenting justice in the Court of Appeal was wrong to overturn these findings of fact. There was, to be sure, some very sloppy paperwork. But in light of the key findings of fact, the corporation in substance simply treated Mr. Mennillo as he wanted to be treated and he was repaid all of the money he had loaned with a substantial bonus.

C. *Questions en litige*

[14] M. Mennillo soulève en appel deux points de droit et un point de fait sur lesquels je me penche sans égard aux questions de prescription et de redressement.

[15] S'agissant du droit, il fait valoir ce qui suit :

a) Le juge de première instance conclut à tort qu'il a cédé ses actions à M. Rosati alors qu'aucun transfert valable en droit n'a été effectué (2012 QCCS 1640);

b) Les juges majoritaires de la Cour d'appel ont tort de conclure qu'il est possible d'annuler rétroactivement une souscription d'actions par simple entente verbale, sans accomplir les formalités juridiques requises (2014 QCCA 1515).

[16] S'agissant des faits, M. Mennillo invoque les conclusions du juge dissident de la Cour d'appel et soutient que le juge de première instance rejette à tort sa prétention selon laquelle il est actionnaire de l'entreprise.

[17] Je donne raison à M. Mennillo quant au deuxième point qui touche au droit des sociétés, mais cela n'a aucune incidence sur l'issue du recours pour abus. Le juge de première instance conclut que, en mai 2005, M. Mennillo ne souhaitait plus être actionnaire, car il ne voulait plus être garant de la totalité du passif d'Intramodal. Certaines des formalités nécessaires au transfert des actions de M. Mennillo à M. Rosati n'ont pas été accomplies à cause d'une erreur ou d'un oubli de la part de l'avocat de M. Rosati. Dès ce moment, M. Mennillo a consenti à n'être qu'un simple prêteur vis-à-vis de son ami, M. Rosati. Le 25 mai 2005, M. Mennillo a cessé d'être actionnaire de la société et c'est exactement ainsi que la société l'a traité. À mon avis, le juge dissident de la Cour d'appel a tort d'infirmer ces conclusions de fait. Il y a certes eu un grand manque de formalisme, mais à la lumière de ces conclusions de fait cruciales, la société a pour l'essentiel simplement traité M. Mennillo comme il avait souhaité l'être et ce dernier a été remboursé de toutes les sommes prêtées en plus de toucher une prime substantielle.

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III. Analysis

A. *The Factual Issue*

(1) Preliminary Observations

[18] The main question on which the outcome of the appeal depends is whether the trial judge made a reviewable error in finding that in May 2005, Mr. Mennillo did not wish to remain a shareholder because he no longer wanted to be the guarantor of all of Intramodal's debts and transferred his shares to Mr. Rosati. If these factual findings stand, Mr. Mennillo's oppression action is groundless: it was not oppressive, unfairly prejudicial to, or unfairly disregarding of his interests for the corporation to treat Mr. Mennillo as he himself asked to be treated. I recall that, as the Court said in *BCE*, in considering a claim in oppression, the courts should look at business realities not merely narrow legalities: para. 58.

[19] The appeal also raises some points of corporate law and of the law of prescription. These legal points, however, have no bearing on the ultimate disposition of the appeal. I will briefly address them after I set out my reasons for affirming the trial judge's fundamental conclusions.

(2) Overview of the Basic Facts

[20] In the winter of 2004, Messrs. Johnny Mennillo and Mario Rosati, two friends, discussed the possibility of creating a company. Mr. Mennillo would contribute the money to start up the business while Mr. Rosati would bring skills to ensure the success of a road transportation company. Mr. Rosati reserved the name "Intramodal" in April 2004.

[21] Mr. Rosati had the company incorporated on July 13, 2004. That same day, Intramodal's board of directors passed a resolution to accept notices of subscription to securities by Mr. Rosati and Mr. Mennillo and to issue 51 class "A" shares to Mr. Rosati and 49 shares of the same class to Mr. Mennillo. Both the

III. Analyse

A. *Le litige factuel*

(1) Remarques préliminaires

[18] L'objet principal du pourvoi est de savoir si le juge de première instance commet une erreur susceptible de contrôle lorsqu'il conclut que, en mai 2005, M. Mennillo ne souhaitait plus être actionnaire, car il ne voulait plus être garant de la totalité du passif d'Intramodal, de sorte qu'il a cédé ses actions à M. Rosati. Si ces conclusions de fait demeurent, le recours pour abus exercé par M. Mennillo est sans fondement : la société n'a pas abusé des droits de M. Mennillo et elle ne s'est pas montrée injuste à son égard en lui portant préjudice ou en ne tenant pas compte de ses intérêts puisqu'elle l'a traité comme il l'avait demandé. Rappelons que, comme le dit la Cour dans *BCE*, le tribunal saisi d'une allégation d'abus doit tenir compte de la réalité commerciale et pas seulement des considérations strictement juridiques (par. 58).

[19] Le pourvoi soulève par ailleurs quelques points en droit des sociétés ainsi qu'en droit de la prescription. Ces points de droit n'ont cependant aucune incidence sur l'issue du pourvoi. Je les examinerai brièvement une fois exposés les motifs pour lesquels je suis d'avis de confirmer les principales conclusions du juge de première instance.

(2) Aperçu des faits essentiels

[20] À l'hiver 2004, deux amis, MM. Mennillo et Rosati, ont envisagé la création d'une entreprise. M. Mennillo devait avancer les fonds de démarrage et M. Rosati, mettre ses compétences à contribution pour assurer la réussite d'une société de transport routier. En avril 2004, M. Rosati a réservé la dénomination « Intramodal ».

[21] Le 13 juillet 2004, M. Rosati constituait Intramodal en personne morale. Le même jour, le conseil d'administration d'Intramodal adoptait une résolution par laquelle les avis de souscription d'actions de MM. Rosati et Mennillo étaient acceptés et 51 actions de catégorie « A » étaient émises à M. Rosati,

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notices of subscription and the resolution were signed by Mr. Rosati alone.

[22] It is worth mentioning at this point that many of the legal difficulties in this case have arisen as a result of the virtually complete lack of formality that accompanied the parties' business dealings. They rarely complied with the requirements of the *CBCA* and in fact almost never put anything in writing. They had neither a partnership nor a shareholders' agreement. They rarely or never exchanged emails or letters. Before Intramodal was incorporated, the roles that Messrs. Mennillo and Rosati respectively intended to fulfill in the company were agreed upon by a simple handshake. Once Intramodal was incorporated (on July 13, 2004), they became its directors and shareholders, but neither of them paid for their shares, contrary to the requirements of s. 25(3) *CBCA* and Mr. Mennillo's share certificate was never signed as required by s. 49(4)(a) *CBCA*.

[23] There was no written contract or indeed any other legal formality relating to Mr. Mennillo's advances of substantial amounts of money to Mr. Rosati. As evidence of the money provided for Intramodal by Mr. Mennillo, there are only two sheets of a Rolodex, marked up by Mr. Mennillo and initialed by Mr. Rosati.

[24] On May 25, 2005, Mr. Mennillo sent a letter to Intramodal in which he indicated that he was resigning as an officer and director of the company. He and Mr. Rosati give different accounts as to the reasons for and extent of his resignation. Whereas Intramodal argues that Mr. Mennillo transferred his shares to Mr. Rosati, Mr. Mennillo asserts that he never intended to stop being a shareholder of the company. On July 18, 2005, Daniel Ovadia, Intramodal's lawyer, filed an amending declaration with the REQ to indicate that Mr. Mennillo had been removed as a director and shareholder of the company.

[25] Between September 2005 and December 5, 2005, Mr. Mennillo advanced $145,000 to

49 à M. Mennillo. Tant les avis de souscription que la résolution n'ont été signés que par M. Rosati.

[22] Il convient de mentionner que, dans la présente affaire, bon nombre des problèmes d'ordre juridique tiennent à l'absence quasi totale de formalisme dans les relations d'affaires. Les parties n'ont que rarement observé les exigences de la *LCSA* et n'ont en fait presque jamais rien consigné par écrit. Elles n'ont pas non plus conclu de contrat de société ou de convention d'actionnaires. Elles ont rarement échangé des courriels ou des lettres, ou ne l'ont jamais fait. Avant la constitution d'Intramodal, MM. Mennillo et Rosati convenaient par une simple poignée de main des fonctions de l'un et de l'autre dans l'entreprise. Une fois Intramodal constituée en société (le 13 juillet 2004), ils en sont devenus les administrateurs et les actionnaires, mais aucun n'a versé la somme nécessaire pour libérer ses actions, contrairement aux exigences du par. 25(3) de la *LCSA*. En outre, le certificat d'actions de M. Mennillo n'a jamais été signé comme l'exige l'al. 49(4)a) de la *LCSA*.

[23] Les avances de fonds substantielles de M. Mennillo à M. Rosati n'ont été constatées par aucun contrat écrit et n'ont d'ailleurs fait l'objet d'aucune autre formalité juridique. La preuve des sommes ainsi versées à Intramodal se résume à deux fiches de *Rolodex* annotées par M. Mennillo et paraphées par M. Rosati.

[24] Le 25 mai 2005, M. Mennillo a fait parvenir à Intramodal sa lettre de démission à titre d'administrateur et de dirigeant de la société. Les versions de MM. Mennillo et Rosati diffèrent tant sur les motifs de ce geste que sur sa portée. Intramodal soutient que M. Mennillo a transféré ses actions à M. Rosati, tandis que M. Mennillo affirme qu'il n'a jamais eu l'intention de cesser d'être actionnaire de la société. Le 18 juillet 2005, l'avocat d'Intramodal, Me Daniel Ovadia, a déposé auprès du REQ une déclaration modificative faisant état du retrait de M. Mennillo à titre d'administrateur et d'actionnaire de la société.

[25] Du mois de septembre 2005 au 5 décembre de la même année, M. Mennillo a avancé 145 000 $

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Mr. Rosati. Intramodal began operating in December 2005, and Mr. Mennillo continued to advance money to Mr. Rosati. The amounts he advanced totalled $440,000, which included the $145,000 that had been paid in 2005. The two men met on two occasions in July 2007, and they do not agree about what took place at those meetings.

[26] According to Mr. Mennillo, he was with Mr. Rosati and another friend at the Rib'N Reef restaurant on July 14, 2007 when he noted that Intramodal was thriving and Mr. Rosati was now living very well. Upset about this, Mr. Mennillo complained that he was not sharing in the company's success. At a second meeting, on July 21, 2007, Mr. Mennillo asked that the amounts of his loans be repaid and that he receive his share of the profits generated by Intramodal. He rejected at that time an offer to transfer his shares to Mr. Rosati.

[27] According to Mr. Rosati, following the July 14 meeting, Mr. Mennillo was quite unhappy about having received no return on his $440,000 investment that had resulted in the start-up of a lucrative business. Mr. Rosati suggested that they meet a week later to resolve their differences. At that meeting, Mr. Rosati asked Mr. Mennillo what amount might satisfy him in order to put an end to their dispute. Mr. Mennillo fixed the amount at $150,000, which meant that the total debt amounted to $690,000, including interest at the annual rate of 10 percent and a bonus of $100,000.

[28] In October 2007, Mr. Rosati and Mr. Mennillo met several times together with Antoine Papadimitriou, Mr. Mennillo's accountant. According to Mr. Mennillo, the purpose of these meetings was to fix a price for the redemption of his shares. He claimed that it was at these meetings that his advisers had suggested that his advances ($440,000) be repaid using false invoices. Mr. Papadimitriou had also suggested that the $440,000 principal amount be increased by approximately 35 percent because the tax owing on it would be paid by Mr. Mennillo's management company, 147488 Canada Inc. This would raise the amount of the repayment to $690,000.

à M. Rosati. Les activités d'Intramodal ont débuté en décembre 2005, et M. Mennillo a continué de verser des sommes à M. Rosati. Au total, il aura avancé 440 000 $, ce qui comprend les 145 000 $ déjà versés en 2005. En juillet 2007, les deux hommes se sont rencontrés deux fois, mais conservent chacun un souvenir différent de ces rencontres.

[26] Selon la version de M. Mennillo, c'est lors d'un repas avec M. Rosati et un autre ami, le 14 juillet 2007, au restaurant Rib'N Reef, qu'il aurait constaté qu'Intramodal était devenue prospère et que M. Rosati menait un grand train de vie. Contrarié par la situation, il se serait plaint de ne bénéficier aucunement de la réussite de l'entreprise. Lors de la seconde rencontre, le 21 juillet 2007, il aurait demandé le remboursement des sommes prêtées et le versement de sa part des profits d'Intramodal. Il aurait alors rejeté l'offre de transférer ses actions à M. Rosati.

[27] Selon la version de M. Rosati, après la rencontre du 14 juillet, M. Mennillo se serait montré assez mécontent de l'absence de rendement de son investissement de 440 000 $, qui avait permis le démarrage d'une entreprise lucrative. M. Rosati aurait proposé une rencontre une semaine plus tard pour régler le différend puis, lors de cette rencontre, il aurait demandé à M. Mennillo de lui indiquer quel montant pourrait le satisfaire et mettre fin à la mésentente. M. Mennillo aurait alors fixé ce montant à 150 000 $ de sorte que la créance totale s'élève à 690 000 $, y compris l'intérêt au taux annuel de 10 p. 100 et une prime de 100 000 $.

[28] En octobre 2007, de nombreuses rencontres ont eu lieu entre MM. Rosati et Mennillo et le comptable de ce dernier, Antoine Papadimitriou. Selon M. Mennillo, ces rencontres avaient pour but de fixer le prix de rachat de ses actions. Il prétend que c'est à l'occasion de ces rencontres que ses conseillers lui ont proposé d'obtenir le remboursement de ses avances (440 000 $) au moyen de fausses factures. M. Papadimitriou aurait en outre proposé de majorer d'environ 35 p. 100 le capital de 440 000 $ puisque cette somme serait imposée entre les mains de la société de gestion de M. Mennillo, 147488 Canada inc. Suivant ce scénario, le montant du remboursement se serait élevé à 690 000 $.

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[29] As for Mr. Rosati, he claims to have attended these meetings alone. He also claims that the purpose of the negotiations was instead to increase the amount of the repayment that had previously been agreed upon in July 2007. He maintains that Paolo Carzoli, a tax specialist, suggested that, to enable Mr. Mennillo to claim the capital gains exemption, the company's books be corrected such that Mr. Mennillo would receive 49 common shares, which he would then sell to Mr. Rosati. Mr. Rosati rejected this.

[30] The money Mr. Mennillo had advanced to Mr. Rosati was repaid in its entirety between July 2006 and December 7, 2009. This was done by means of cheques issued by Intramodal for the payment of false invoices issued by 147488 Canada Inc. for "consultation fees" or "management fees". The total amount paid by Intramodal to Mr. Mennillo's management company was $690,000.

[31] On December 7, 2009, at a meeting in a restaurant, Mr. Rosati gave Mr. Mennillo a cheque for $40,000 marked "Full and Final Payment". A few days later, Mr. Mennillo consulted his lawyer, Israel Kaufman, about this note. According to Mr. Mennillo, that was when he first understood that he was no longer a shareholder of Intramodal.

[32] On February 25, 2010, Mr. Kaufman sent Intramodal a demand letter. Claiming that Intramodal and Mr. Rosati had unduly and wrongfully stripped him of his status as a shareholder, Mr. Mennillo applied for an oppression remedy against Intramodal on September 7, 2010.

(3) Findings of Fact at First Instance

[33] Poirier J. began by stating that the case before him essentially turned on the credibility of the witnesses. He then rejected Mr. Mennillo's version of the facts in its entirety. He concluded that as of May 25, 2005, Mr. Mennillo

[29] M. Rosati dit pour sa part s'être présenté seul à ces rencontres et que les négociations visaient plutôt à augmenter le montant du remboursement déjà convenu en juillet 2007. Afin que M. Mennillo puisse profiter de la déduction pour gains en capital, un avocat fiscaliste, Me Paolo Carzoli, lui aurait conseillé de rectifier les registres de la société de façon qu'il reçoive 49 actions ordinaires et les vende à M. Rosati, ce que ce dernier aurait refusé.

[30] Les avances de fonds de M. Mennillo à M. Rosati ont été entièrement remboursées entre le mois de juillet 2006 et le 7 décembre 2009. Le remboursement s'est fait par chèques d'Intramodal sur présentation de fausses factures établies par 147488 Canada inc. pour des « consultations » (« *consultations fees* ») ou de la « gestion » (« *management fees* »). La somme totale versée par Intramodal à la société de gestion de M. Mennillo se monte à 690 000 $.

[31] Le 7 décembre 2009, lors d'une rencontre dans un restaurant, M. Rosati a remis à M. Mennillo un chèque de 40 000 $ portant la mention « *Full and Final Payment* » (règlement total et définitif). Quelques jours plus tard, M. Mennillo a consulté son avocat, Me Israel Kaufman, au sujet de cette mention. C'est alors qu'il aurait compris qu'il n'était plus actionnaire d'Intramodal.

[32] Le 25 février 2010, Me Kaufman a fait parvenir une mise en demeure à Intramodal. Le 7 septembre 2010, M. Mennillo a intenté contre Intramodal un recours pour abus dans le cadre duquel il alléguait qu'Intramodal et M. Rosati l'avaient dépouillé indûment et illégalement de sa qualité d'actionnaire.

(3) Conclusions de fait tirées en première instance

[33] Le juge Poirier affirme d'abord que l'issue de l'affaire dont il est saisi repose essentiellement sur la crédibilité des témoins, puis il rejette en bloc la version de M. Mennillo. Il conclut que, à compter du 25 mai 2005, M. Mennillo

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[TRANSLATION] refused to participate in this venture [that is, to be an equity shareholder in Intramodal] and asked to be removed from the company as a shareholder and a director effective May 25, 2005. As of that date, Mennillo agreed only to be a lender of $440,000 to his friend Rosati. The failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer.

Since May 25, 2005, Mennillo has no longer been a shareholder or director of Intramodal. [paras. 74-75 (CanLII)]

[34] It is clear from a careful reading of the trial judge's reasons that he understood that Mr. Mennillo would cease to be a shareholder as a result of transferring his shares to Mr. Rosati. In the judge's view, Mr. Mennillo had more than a mere intention of being removed from the company; he found that Mr. Mennillo transferred his shares to Mr. Rosati and ceased to hold any shares in Intramodal. There was a basis for this conclusion in the evidence notwithstanding that the evidence was admittedly confused and confusing. However, the critical finding for the purposes of the substance of the oppression claim was that as of May 25, 2005, Mr. Mennillo did not wish to be a shareholder and asked to be removed. On that point, Mr. Rosati's evidence was unshaken and accepted by the trial judge.

[35] The judge's conclusions and his rejection of Mr. Menillo's version of events were based on the following findings of fact:

(i) The reason given by Mr. Mennillo for his resignation as a director of Intramodal (i.e. that Mr. Rosati didn't want a potential client, namely Labatt Breweries ("Labatt"), to know that Mr. Mennillo was involved in the corporation) was false.

(ii) The funds advanced by Mr. Mennillo, starting before Intramodal had been incorporated, were loans and were not advanced as investments in the corporation.

(iii) The figure 250,000 appearing on the "Rolodex record", which also showed all the amounts

a refusé cette aventure [soit le fait d'être actionnaire participatif d'Intramodal] et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005. À compter de cette date, [M.] Mennillo a accepté de n'être que le prêteur d'une somme de 440 000 $ à son ami [M.] Rosati. Le fait que la cession des actions de [M.] Mennillo à [M.] Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de [M.] Rosati.

Depuis le 25 mai 2005, [M.] Mennillo n'est plus détenteur d'aucune action ni administrateur de Intramodal. [par. 74-75 (CanLII)]

[34] Il ressort de la lecture attentive de ses motifs que, pour le juge, M. Mennillo cessait d'être actionnaire dès le transfert de ses actions à M. Rosati. À son avis, M. Mennillo n'a pas seulement eu l'intention de se retirer de la société, mais a cédé ses actions à M. Rosati et cessé d'être actionnaire d'Intramodal. Cette conclusion a une assise dans la preuve même si, de l'avis de tous, cette dernière est confuse et source de confusion. Toutefois, selon la conclusion cruciale sur le bien-fondé de l'allégation d'abus, en date du 25 mai 2005, M. Mennillo ne souhaitait plus être actionnaire et a demandé son retrait. Sur ce point, le témoignage de M. Rosati demeure constant, et le juge y ajoute foi.

[35] Les conclusions du juge et le rejet par ce dernier de la version de M. Mennillo reposent sur le constat des faits suivants :

(i) Le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur d'Intramodal (à savoir que M. Rosati ne voulait pas que La Brasserie Labatt (« Labatt »), un client éventuel, sache que M. Mennillo avait des intérêts dans la société) était faux.

(ii) Les sommes avancées par M. Mennillo avant la constitution en société d'Intramodal étaient des prêts, non des investissements dans la société.

(iii) Le montant de 250 000 $ qui figure sur le *Rolodex*, lequel fait état de toutes les sommes

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advanced by Mr. Mennillo, corresponded to the amount that Mr. Mennillo and Mr. Rosati had agreed on in July 2007 and that had served to establish the amount of the final payment ($440,000 + $250,000 = $690,000).

(iv) Two documents relating to an insurance policy taken out on the lives of Mr. Mennillo and Mr. Rosati, the beneficiary of which was Intramodal, proved, first, that Mr. Rosati believed as of August 15, 2006 that he was the sole shareholder and director of Intramodal and, second, that Mr. Mennillo was only a creditor of the company.

(v) In a letter from Mr. Kaufman, Mr. Mennillo's lawyer, dated October 31, 2007, no mention was made of financing for the purchase of shares, as what was referred to was instead the acknowledgment of a debt.

(vi) In a memorandum dated November 26, 2007, Mr. Carzoli, a tax adviser retained by Mr. Papadimitriou (Mr. Mennillo's accountant), described the ownership of shares in Intramodal as of the fall of 2007 and concluded from it that Mr. Mennillo was no longer a shareholder of the company at that time.

(vii) The demand letter sent to Intramodal by Mr. Kaufman on February 25, 2010 showed that Mr. Mennillo knew he was no longer a shareholder and that this had been the case since May 2005, when he had resigned as a director and transferred his shares.

(viii) As could be seen in Intramodal's books, there was a common shares certificate in Mr. Mennillo's name. However, it was not signed, and the same was true on the share transfer form on the back, which contained only the nominative information. These books also contained a resolution dated May 25, 2005 concerning the transfer of the shares from Mr. Mennillo to Mr. Rosati. If the transfer was not completed, this was the result of an error or oversight on the part of Mr. Rosati's lawyer.

avancées par M. Mennillo, correspond à la somme dont ont convenu MM. Mennillo et Rosati en juillet 2007 et qui a servi à établir le montant du remboursement total (440 000 $ + 250 000 $ = 690 000 $).

(iv) Les deux documents relatifs à l'assurance contractée sur la vie de M. Mennillo et celle de M. Rosati et dont le bénéficiaire était Intramodal établissent, d'une part, que M. Rosati se croyait, depuis le 15 août 2006, seul actionnaire et administrateur d'Intramodal et, d'autre part, que M. Mennillo n'était que créancier de la société.

(v) Dans une lettre de l'avocat de M. Mennillo, Me Kaufman, datée du 31 octobre 2007, il n'est nullement fait mention du financement d'un éventuel achat d'actions, mais plutôt d'une reconnaissance de dette.

(vi) Dans un mémorandum en date du 26 novembre 2007, Me Carzoli, un avocat fiscaliste dont M. Papadimitriou (le comptable de M. Mennillo) retenait les services, décrit l'actionnariat d'Intramodal à l'automne 2007 et conclut que M. Mennillo n'est plus, à ce moment, actionnaire de la société.

(vii) La mise en demeure transmise par Me Kaufman à Intramodal le 25 février 2010 montre que M. Mennillo savait qu'il n'était plus actionnaire, et ce, depuis mai 2005, lorsqu'il avait démissionné à titre d'administrateur et transféré ses actions.

(viii) Les registres d'Intramodal révèlent l'existence d'un certificat d'actions ordinaires au nom de M. Mennillo. Or, celui-ci n'est pas signé, non plus que le formulaire de transfert d'actions figurant à l'endos, qui ne contient que des renseignements nominatifs. Par ailleurs, ces registres contiennent une résolution datée du 25 mai 2005 portant sur le transfert des actions de M. Mennillo à M. Rosati. Si le transfert des actions de M. Mennillo à M. Rosati n'a pas été effectué, c'est à cause d'une erreur ou d'un oubli de la part de l'avocat de M. Rosati.

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(ix) An out-of-court examination of Mr. Mennillo on October 28, 2010 supported the view that he had acknowledged that he no longer wanted to be a shareholder of Intramodal as of May 2005. He mentioned several times in the course of that examination that he had removed himself as a shareholder of Intramodal, but then corrected himself to say that he had only resigned as a director. Moreover, the date he gave as the one at which he had learned he was no longer a shareholder was not the one specified in his motion to institute proceedings and also differed from the one specified in his affidavit of July 29, 2010. The trial judge found that a revelation as important as that should have made an impression on Mr. Mennillo.

(4) Mr. Mennillo's Position With Respect to These Findings

[36] Mr. Mennillo relies on the conclusions of the dissenting judge who found a number of errors in the reasoning of the trial judge which justified setting aside his findings of fact. I will consider each in turn.

(a) *The Reason Mr. Mennillo Gave for Resigning as a Director*

[37] The trial judge found that Mr. Mennillo's explanation of why he had resigned as a director in May 2005 was false.

[38] Mr. Mennillo's version was that Labatt wished to review Intramodal's books and to visit its premises. He said that his involvement with the company would not be favourable in Labatt's eyes because of his activities in hydroponic greenhouses and the sale of tobacco products. Mr. Mennillo placed this visit by Labatt at a time when Intramodal was acquiring important transportation equipment and he referred repeatedly in his testimony to the fact that Labatt would come to visit the premises.

[39] The trial judge found, however, that Mr. Mennillo's resignation could not have been linked to

(ix) L'interrogatoire préalable de M. Mennillo le 28 octobre 2010 confirme l'opinion selon laquelle ce dernier a reconnu avoir souhaité ne plus être actionnaire d'Intramodal à partir du mois de mai 2005. Lors de cet interrogatoire, il a mentionné à quelques reprises qu'il avait démissionné comme actionnaire d'Intramodal, pour se reprendre ensuite et affirmer que cette démission n'était qu'à titre d'administrateur. De plus, la date à laquelle il dit avoir appris qu'il n'était plus actionnaire ne correspond pas à celle indiquée dans sa requête introductive d'instance et diffère également de celle qui figure dans son affidavit du 29 juillet 2010. Selon le juge de première instance, le moment de cette révélation si importante aurait dû imprégner la mémoire de M. Mennillo.

(4) Thèse de M. Mennillo sur ces conclusions

[36] M. Mennillo invoque les conclusions du juge dissident de la Cour d'appel, à savoir que, dans ses motifs, le juge de première instance commet un certain nombre d'erreurs qui justifient l'infirmation de ses conclusions de fait. Je les examine tour à tour.

a) *Le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur*

[37] Le juge de première instance conclut que le motif invoqué par M. Mennillo pour démissionner à titre d'administrateur en mai 2005 était faux.

[38] Selon M. Mennillo, Labatt voulait examiner les registres d'Intramodal et visiter ses locaux. Il dit que Labatt aurait vu d'un mauvais œil sa participation dans l'entreprise à cause de ses activités dans le domaine des serres hydroponiques et celui de la vente de produits du tabac. Il fait coïncider la visite des représentants de Labatt avec l'acquisition d'équipements de transport importants par Intramodal et il mentionne plusieurs fois dans son témoignage la visite des locaux d'Intramodal par Labatt.

[39] Le juge de première instance conclut cependant que la démission de M. Mennillo ne peut avoir

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the examination of Intramodal's books by representatives of Labatt because at the time, Intramodal had no equipment or premises. In any case, Mr. Mennillo's explanation made no sense because his resignation as a director would not make him disappear from the corporation's books if, as he claimed, he was a shareholder. The judge also referred to the inconsistencies in Mr. Mennillo's evidence in relation to this resignation.

[40] The dissenting judge in the Court of Appeal found that the trial judge had erred by setting aside Mr. Mennillo's version of events. He reasoned that although Intramodal did not have any equipment, it was engaging in some public relations activities at the time of the proposed visit. He also thought that Mr. Mennillo's explanation made sense in light of the fact that Labatt would not likely be concerned if Mr. Mennillo's involvement was only as a minority shareholder and, in any event, the problem could have been resolved by Mr. Mennillo transferring his shares to his management company.

[41] Respectfully, there was no basis for the dissenting judge to set aside the trial judge's rejection of Mr. Mennillo's explanation of why he had resigned as a director. As the majority of the Court of Appeal pointed out, Mr. Mennillo linked Labatt's visit to a time when Intramodal was acquiring transportation equipment. But it was clear that Intramodal was not doing so in the time leading up to Mr. Mennillo's resignation in May 2005. I would add that Mr. Mennillo also linked the visit to a time when Labatt could visit the premises. But this made no sense because Intramodal had no premises as of the date of Mr. Mennillo's resignation as a director. Moreover, the trial judge made no error in concluding that if Mr. Mennillo stayed on as a shareholder, his involvement would be obvious not only from the books of the corporation but also from the public register.

[42] There was no clear and determinative error on the part of the trial judge with respect to this point.

été liée à l'examen des registres d'Intramodal par les représentants de Labatt, car Intramodal ne possédait alors ni équipements ni locaux. Quoi qu'il en soit, l'explication de M. Mennillo ne se tient pas, car sa démission à titre d'administrateur n'aurait pas fait disparaître son nom des registres de la société si, comme il le prétend, il était demeuré actionnaire. Le juge invoque également les incohérences de son témoignage sur sa démission.

[40] Le juge dissident de la Cour d'appel conclut que le juge de première instance écarte à tort la version des faits de M. Mennillo. Il explique que même si Intramodal n'avait pas d'équipement, elle se livrait à certaines activités de relations publiques au moment où devait avoir lieu la visite. De plus, l'explication de M. Mennillo se tient puisque Labatt ne se serait pas vraisemblablement inquiétée de la participation de M. Mennillo au seul titre d'actionnaire minoritaire et que, de toute façon, le problème aurait pu être résolu par le simple transfert de ses actions à sa société de gestion.

[41] En tout respect, aucun fondement ne permettait au juge dissident d'écarter la décision du juge de première instance de ne pas ajouter foi à l'explication de sa démission à titre d'administrateur offerte par M. Mennillo. Comme le soulignent les juges majoritaires de la Cour d'appel, M. Mennillo fait coïncider la visite des représentants de Labatt avec l'acquisition d'équipements de transport par Intramodal. Or, il appert clairement que ce n'est pas ce que faisait Intramodal au cours de la période qui a précédé la démission de M. Mennillo en mai 2005. J'ajoute que M. Mennillo fait également coïncider la visite avec une période où Labatt aurait pu visiter les locaux, ce qui était invraisemblable, car Intramodal n'en disposait pas le jour de la démission de M. Mennillo à titre d'administrateur. Qui plus est, le juge de première instance n'a pas tort de conclure que si M. Mennillo était demeuré actionnaire, sa participation dans la société aurait été évidente à la lecture non seulement des registres de l'entreprise, mais aussi du registre public.

[42] Le juge de première instance ne commet aucune erreur manifeste et déterminante sur ce point.

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(b) *The Life Insurance Documents*

[43] The dissenting judge took issue with the trial judge's reliance on documents relating to a life insurance in which Mr. Rosati indicated that he was the sole shareholder of the corporation. The dissenting judge thought that these statements needed to be treated with caution as they originated with Mr. Rosati and, in addition, it was hard to understand why, if Mr. Mennillo was simply a creditor, Intramodal would insure his life. However, as the majority of the Court of Appeal pointed out, Mr. Rosati was dealing with a broker who had done business with Mr. Mennillo for more than 20 years. The trial judge was entitled to take into account that in September 2006, Mr. Rosati was openly claiming, in dealings with Mr. Mennillo's insurance broker, that Mr. Mennillo was not a shareholder in the corporation. The trial judge could well conclude that such behaviour on Mr. Rosati's part enhanced the credibility of his theory. There was certainly no basis to interfere with the trial judge's findings in this regard.

(c) *The Carzoli Memorandum*

[44] The dissenting judge was also of the view that the trial judge had misinterpreted a memo prepared by Mr. Carzoli, a tax specialist retained by Mr. Mennillo's accountant, Mr. Papadimitriou.

[45] The trial judge noted that, in a memo prepared after a meeting with Mr. Mennillo's accountant, Mr. Carzoli wrote that "[t]he minute book of the company indicates that the shares are owned by only one shareholder . . . . The other shareholder . . . was only an investor in the company": para. 50. The judge took this as some evidence that Mr. Mennillo did not believe himself to be a shareholder as of the date of the memorandum (i.e. November 26, 2007).

[46] The dissenting judge thought that this was an erroneous inference because Mr. Carzoli explained in the rest of the memorandum that the register needed correction in order to reflect the reality that Mr. Mennillo was in fact a shareholder.

b) *Les documents relatifs à l'assurance-vie*

[43] Le juge dissident reproche au juge de première instance de se fonder sur des documents d'assurance-vie dans lesquels M. Rosati dit être l'unique actionnaire de la société. Il estime que cette affirmation doit être considérée avec circonspection dans la mesure où M. Rosati en est l'auteur. De plus, on comprend mal pourquoi Intramodal aurait assuré la vie de M. Mennillo s'il n'avait été qu'un simple créancier. Toutefois, comme le font observer les juges majoritaires de la Cour d'appel, M. Rosati retenait les services d'un courtier qui faisait affaire avec M. Mennillo depuis plus de 20 ans. Le juge de première instance pouvait donc tenir compte du fait que, en septembre 2006, M. Rosati affirmait ouvertement, lorsqu'il avait affaire au courtier d'assurance de M. Mennillo, que ce dernier n'était pas actionnaire de la société. Il pouvait très bien conclure que le comportement de M. Rosati ajoutait à la véracité de sa thèse. Il n'y avait assurément aucune raison valable d'intervenir à l'égard des conclusions du juge sur ce point.

c) *Le mémorandum de Me Carzoli*

[44] Le juge dissident est également d'avis que le juge de première instance interprète mal le mémorandum de Me Carzoli, un avocat fiscaliste dont le comptable de M. Mennillo, M. Papadimitriou, retenait les services.

[45] Le juge de première instance indique que, dans un mémorandum rédigé après sa rencontre avec le comptable de M. Mennillo, Me Carzoli écrit : [TRADUCTION] « [l]e registre des procès-verbaux de la société indique que les actions n'appartiennent qu'à un seul actionnaire [. . .] L'autre actionnaire [. . .] n'est qu'un investisseur de l'entreprise » (par. 50). Cet élément prouve selon lui que M. Mennillo ne se croyait pas actionnaire à la date du mémorandum (soit le 26 novembre 2007).

[46] Le juge dissident estime qu'il s'agit d'une inférence erronée, car dans le reste de son mémo, Me Carzoli explique que le registre doit être rectifié afin de constater que M. Mennillo est en fait actionnaire. Il conclut également du mémorandum que

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The dissenting judge was also of the view that the memorandum showed that Mr. Carzoli's strategy was based on the premise that Mr. Mennillo was a shareholder.

[47] However, as the majority in the Court of Appeal pointed out, the statement that there was only one shareholder was made to Mr. Mennillo's accountant and yet passed in silence. Moreover, as the trial judge and the majority further noted, the memorandum was inconsistent with Mr. Mennillo's testimony that he had only learned that he was not a shareholder in winter of 2009 given that the memorandum was dated roughly two years before.

[48] Once again, the trial judge's reliance on the Carzoli memorandum did not provide an appropriate basis for appellate intervention in relation to the trial judge's rejection of Mr. Mennillo's evidence.

(d) *The October 31, 2007 Letter*

[49] The dissenting judge also took issue with the trial judge's reliance on an October 31, 2007 letter from Mr. Mennillo's lawyer, Mr. Kaufman. In the dissenting judge's view, a careful reading of that letter showed that it was not contrary to Mr. Mennillo's position.

[50] The trial judge noted that while Messrs. Kaufman and Mennillo took the position that this letter was directed at putting in place financing to permit Mr. Rosati to buy Mr. Mennillo's shares, the letter itself said nothing about a share purchase but rather was drafted in terms of an acknowledgment of debt. The majority of the Court of Appeal saw nothing wrong with the trial judge's treatment of this letter and nor do I. It was open to the judge to infer from the letter, and particularly the absence of any mention of share purchase in it, that it would be unlikely to omit mention of that element in light of Mr. Mennillo's contention that he had never withdrawn as a shareholder.

la stratégie proposée par Me Carzoli supposait que M. Mennillo soit actionnaire.

[47] Toutefois, comme le signalent les juges majoritaires de la Cour d'appel, la déclaration selon laquelle il n'y a qu'un seul actionnaire a été faite au comptable de M. Mennillo, mais elle a pourtant été passée sous silence. Qui plus est, comme le font observer le juge de première instance et les juges majoritaires de la Cour d'appel, le témoignage de M. Mennillo selon lequel il n'aurait appris qu'à l'hiver 2009 qu'il n'était pas actionnaire ne concorde pas avec le fait que le mémorandum a été rédigé environ deux ans auparavant.

[48] Encore une fois, ce n'est pas parce que le juge de première instance s'appuie sur le mémorandum de Me Carzoli que la Cour d'appel est admise à intervenir quant à sa décision d'écarter le témoignage de M. Mennillo.

d) *La lettre du 31 octobre 2007*

[49] Le juge dissident déplore aussi le fait que le juge de première instance se fonde sur une lettre de l'avocat de M. Mennillo, Me Kaufman, datée du 31 octobre 2007. Selon lui, une lecture attentive révèle que cette lettre ne va pas à l'encontre de la thèse de M. Mennillo.

[50] Le juge de première instance fait remarquer que même si Me Kaufman et M. Mennillo ont fait valoir que cette lettre visait un montage financier qui aurait permis à M. Rosati d'acheter les actions de M. Mennillo, la lettre comme telle ne fait pas mention d'un achat d'actions et revêt plutôt la forme d'une reconnaissance de dette. Les juges majoritaires de la Cour d'appel n'ont rien à redire, et moi non plus, sur ce que le juge de première instance conclut de la lettre. Il lui était loisible d'en inférer, surtout en l'absence de toute mention d'un achat d'actions, que l'omission d'une telle mention était invraisemblable au vu de la prétention de M. Mennillo selon laquelle il n'avait jamais renoncé à sa qualité d'actionnaire.

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(e) *The February 25, 2010 Letter*

[51] Finally, the dissenting judge was of the view that the trial judge had drawn erroneous inferences from the demand letter dated February 25, 2010 sent to Intramodal by Mr. Mennillo's lawyer, Mr. Kaufman. This letter referred to the alleged request that Mr. Mennillo "resign from the company" because of the interest on the part of Labatt and alleged that his share of the company had not been remitted to him following his resignation as promised.

[52] The trial judge used this letter to support the inference that, as of May 2005 when he submitted his resignation as a director, Mr. Mennillo knew that he was no longer a shareholder and, as well, to infer the date at which Mr. Mennillo stopped being a shareholder.

[53] The dissenting judge in the Court of Appeal was of the view that this letter did not support these inferences. In his opinion, the use by a lawyer (Mr. Kaufman) of the phrase "resign from the company" could not refer to anything but Mr. Mennillo's resignation as a director; it could not be understood to encompass Mr. Mennillo's shareholder status. Moreover, the letter insisted that Mr. Mennillo was a 50 percent partner in the corporation. The dissenting judge saw in this letter a clear expression that [TRANSLATION] "Mennillo still considered himself a shareholder of (partner in) Intramodal, holding almost 50% of the shares, and as such he was entitled to a share of the profits in the same proportion": para. 110 (CanLII).

[54] Once again, however, there was no basis for appellate intervention with respect to the trial judge's reliance on this letter. I agree with the reasons of the majority of the Court of Appeal for rejecting the dissenting judge's contention:

[TRANSLATION] It may be possible to disagree about how to interpret this letter, but the Judge's interpretation does not seem to me to be "clearly wrong"; indeed, it is easy to defend. Mennillo is claiming $1M, *inter alia*,

e) *La mise en demeure du 25 février 2010*

[51] Enfin, le juge dissident estime que le juge de première instance tire des conclusions erronées de la mise en demeure du 25 février 2010 que l'avocat de M. Mennillo, Me Kaufman, a fait parvenir à Intramodal. Le document fait mention de la demande qui aurait été faite à M. Mennillo de [TRADUCTION] « démissionner de la société » à cause de l'intérêt manifesté par Labatt et ajoute que la participation de M. Mennillo dans l'entreprise ne lui a pas été rendue après sa démission comme on le lui avait promis.

[52] Le juge de première instance s'appuie sur ce document non seulement pour conclure qu'en mai 2005, lorsqu'il a présenté sa démission à titre d'administrateur, M. Mennillo savait qu'il n'était plus actionnaire, mais aussi pour inférer la date à laquelle M. Mennillo a cessé de l'être.

[53] Le juge dissident de la Cour d'appel estime que la mise en demeure n'étaye pas ces conclusions. À son avis, employée par un avocat (Me Kaufman), la formule [TRADUCTION] « démissionner de la société » ne pouvait viser que la qualité d'administrateur de M. Mennillo, à l'exclusion de sa qualité d'actionnaire. De surcroît, la mise en demeure souligne que M. Mennillo est associé à raison de 50 p. 100 dans l'entreprise. Le juge dissident y voit la manifestation claire du fait que « [M.] Mennillo se considérait toujours actionnaire (*partner*) d'Intramodal à près de 50 % et, à ce titre, [qu']il avait le droit au partage des profits (*share of the profits*) dans la même proportion » (par. 110 (CanLII)).

[54] Mais, encore une fois, le fait que le juge de première instance s'appuie sur cette mise en demeure ne justifie pas une intervention en appel. Je souscris aux motifs pour lesquels les juges majoritaires de la Cour d'appel rejettent l'affirmation de leur collègue dissident :

On peut différer d'opinion sur l'interprétation à donner au texte de cette [mise en demeure], mais celle du Juge ne me paraît pas « manifestement erronée », elle se défend même aisément. [M.] Mennillo réclame 1 M$,

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"for failing to remit to him his share of the company". One cannot claim something one already owns. His claim implies that he is not a shareholder of Intramodal, given that he wants to become one. [para. 184]

(f) *Conclusion Concerning the Trial Judge's Findings of Fact*

[55] The trial judge's factual findings are only reviewable on appeal if they constitute an error that is both palpable and overriding: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 42. I agree with the majority of the Court of Appeal that no such error is present here. While the dissenting judge preferred a different interpretation of some of the evidence than that adopted by the trial judge, he was not entitled to substitute his view absent a palpable and overriding error. When we examine the trial judge's conclusions in light of the record, we find that there was no such error.

[56] We must, therefore, approach the case on the basis that, from May 25, 2005 onwards, Mr. Menillo did not want to be a shareholder, did not want to be treated as such and, as a result, transferred his shares to Mr. Rosati.

[57] On these findings of fact, Mr. Mennillo's oppression claim is groundless. He could have no reasonable expectation of being treated as a shareholder: he no longer was and expressly demanded not to be so treated. As against Intramodal, the most that can be said is that the corporation failed to carry out his wishes as a result of not observing certain necessary corporate formalities. But in light of these findings, it cannot be said that the corporation acted oppressively or that it illegally stripped him of his status as a shareholder as Justice Côté concludes: para. 198. What happened is that the corporation failed to make sure that all the legal formalities were complied with before registering the transfer. The acts of the corporation which Mr. Mennillo claims to constitute oppression were in fact taken, albeit imperfectly,

entre autres, « *for failing to remit to him his share of the company* » [[TRADUCTION] « pour omission de lui rendre sa participation dans l'entreprise »]. On ne saurait réclamer quelque chose que l'on détient déjà. Sa réclamation implique qu'il n'est pas actionnaire d'Intramodal puisqu'il veut le devenir. [par. 184]

f) *Conclusion sur les conclusions de fait du juge de première instance*

[55] Les conclusions de fait du juge de première instance ne sont susceptibles de révision en appel que si elles sont entachées d'une erreur manifeste et dominante (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802, p. 808; *Ingles c. Tutkaluk Construction Ltd.*, 2000 CSC 12, [2000] 1 R.C.S. 298, par. 42). Je conviens avec les juges majoritaires de la Cour d'appel qu'il n'y a aucune erreur de la sorte en l'espèce. Le juge dissident voit certes dans certains éléments de preuve autre chose que le juge de première instance, mais il ne peut pour autant faire primer son opinion, sauf erreur manifeste et dominante. Au vu du dossier, nous estimons que les conclusions du juge ne sont pas entachées d'une telle erreur.

[56] Nous devons donc considérer que, dès le 25 mai 2005, M. Mennillo ne voulait plus être actionnaire et qu'il ne souhaitait pas être tenu pour tel, d'où le transfert de ses actions à M. Rosati.

[57] Eu égard à ces conclusions de fait, le recours pour abus est sans fondement. M. Mennillo ne pouvait pas raisonnablement s'attendre à être traité comme un actionnaire : il ne l'était plus et avait expressément demandé à ne plus être considéré comme un actionnaire. Tout au plus peut-on dire d'Intramodal qu'elle n'a pas donné suite à son vœu du fait qu'elle a omis d'observer certaines formalités requises de sa part. Cependant, on ne saurait affirmer au vu de ces conclusions que la société a agi abusivement à l'égard de M. Mennillo ou qu'elle l'a dépouillé illégalement de son statut d'actionnaire, comme le conclut la juge Côté (par. 198). En fait, la société a omis de s'assurer de l'observation de toutes les formalités d'ordre juridique avant d'inscrire le transfert. Les mesures de la société que M. Mennillo

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in accordance with his express wishes. But it cannot be unfairly prejudicial to Mr. Mennillo for the corporation to register a transfer of shares that he wished to happen, and that, as I will discuss later, he can no longer attack. As a consequence, all of Mr. Mennillo's claims must fail.

[58] The failure to observe the corporate formalities in removing Mr. Mennillo as a shareholder in accordance with his express wishes to be so removed cannot, in my respectful view, be characterized as an act unfairly prejudicial to the extent that this omission deprived him of his status as a shareholder: Côté J., at para. 207. The corporation failed to observe the formalities of carrying out his wish *not* to be a shareholder. Nor can the failure to properly remove him as a shareholder in accordance with his express wishes make it just and equitable for him to regain his status as a shareholder: para. 204.

B. *Corporate Law Points*

[59] Although it is not strictly speaking necessary to do so, I will address three points of corporate law because some clarification of them will be useful: whether the share transfer could have been retroactively cancelled as the majority of the Court of Appeal thought; the consequence of the failure to observe the formalities prescribed by the *CBCA*; and whether the shares could have been issued conditionally.

(1) The Possible Retroactive Cancellation of the Share Transfer

[60] Before the trial judge and the Court of Appeal, Mr. Mennillo argued that he has been a shareholder of Intramodal from its incorporation and remained as such. Before the trial judge, Intramodal presented two different theories in response to Mr. Mennillo's argument. The first one is that Mr. Mennillo would have become a shareholder had he accepted to financially support the corporation and to be the guarantor of the entirety of its debts, but he declined or neglected to do so and

tient pour abusives ont en fait été prises, bien que de manière imparfaite, selon la volonté qu'il avait exprimée. La société ne peut donc pas s'être montrée injuste à son égard en lui portant préjudice du fait qu'elle a inscrit le transfert d'actions qu'il avait lui-même voulu et, comme je l'explique plus loin, qu'il ne peut plus contester. En conséquence, les allégations de M. Mennillo doivent toutes être rejetées.

[58] Soit dit en tout respect, l'inobservation des formalités nécessaires au retrait de M. Mennillo à titre d'actionnaire, conformément à la volonté qu'il avait exprimée, ne saurait constituer un acte injustement préjudiciable [à son égard] dans la mesure où elle le prive de son statut d'actionnaire (la juge Côté, par. 207). La société a omis d'observer les formalités requises pour donner suite à sa volonté de *cesser* d'être actionnaire. L'omission d'effectuer régulièrement le retrait à titre d'actionnaire, selon la volonté exprimée par M. Mennillo, ne saurait non plus rendre juste et équitable sa réintégration en qualité d'actionnaire (par. 204).

B. *Points relevant du droit des sociétés*

[59] Même si, à strictement parler, ce n'est pas nécessaire, je me penche sur trois points du droit des sociétés, car certains éclaircissements à leur sujet seront utiles : le transfert d'actions aurait-il pu être annulé rétroactivement comme le prétendent les juges majoritaires de la Cour d'appel, quelles sont les conséquences de l'omission d'observer les formalités prescrites par la *LCSA* et les actions auraient-elles pu être émises conditionnellement?

(1) La possibilité d'annuler rétroactivement le transfert d'actions

[60] En première instance et en Cour d'appel, M. Mennillo a soutenu qu'il était devenu actionnaire d'Intramodal dès sa constitution en société et qu'il l'était toujours. En première instance, Intramodal a fait valoir deux théories différentes pour réfuter la thèse de M. Mennillo. Elle a d'abord prétendu que M. Mennillo serait devenu actionnaire s'il avait accepté d'appuyer financièrement l'entreprise et de se porter garant de la totalité de son passif, mais qu'il avait refusé ou négligé de le faire, de sorte qu'il

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consequently never became a shareholder. The second one is that Mr. Mennillo resigned as a director of Intramodal and transferred his shares to Mr. Rosati. Intramodal focused on its second theory before the Court of Appeal and argued that the shares were transferred from Mr. Mennillo to Mr. Rosati on May 25, 2005.

[61] The trial judge concluded that Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts and that Mr. Mennillo ultimately decided that he did not wish to do so and transferred his shares to Mr. Rosati. In the Court of Appeal, the majority concluded as follows on this issue:

> [TRANSLATION] . . . Can it be concluded that there was a genuine transfer of the shares from Mennillo to Rosati? It seems to me, rather, that they quite simply agreed on May 25, 2005 to retroactively cancel their agreement to associate with one another that they had originally entered into in 2004. The agreement had been reached informally, as was the cancellation thereof. [para. 225]

[62] It is worth highlighting that this theory of the retroactive cancellation of the agreement was neither adopted by the trial judge nor pleaded by the parties.

[63] Contrary to what the majority of the Court of Appeal suggested, I am of the opinion that it is not possible to retroactively cancel an issuance of shares by way of simple oral consent. As Mr. Mennillo points out, an issuance of shares can be cancelled only if (a) the corporation's articles are amended or (b) the corporation reaches an agreement to purchase the shares, which requires that the directors pass a resolution, that the shareholder in question gives his or her express consent and that the tests of solvency and liquidity be met. Can such an act by the corporation be valid even though these requirements of the *CBCA* have not been met? I do not think so.

[64] The commentators agree that meeting the requirements with respect to the maintenance of share capital cannot be optional, given that it is the share capital that is the common pledge of the creditors and is the basis for their acceptance of doing

n'était jamais devenu actionnaire. Elle a ensuite soutenu que M. Mennillo avait démissionné de son poste d'administrateur et qu'il avait transféré ses actions à M. Rosati. En Cour d'appel, Intramodal a mis l'accent sur sa deuxième théorie et soutenu que M. Mennillo avait cédé ses actions à M. Rosati le 25 mai 2005.

[61] Selon le juge de première instance, M. Mennillo a convenu qu'il ne demeurerait actionnaire que tant qu'il serait disposé à garantir le passif de la société. M. Mennillo a finalement décidé de ne pas se porter ainsi garant et a transféré ses actions à M. Rosati. Voici ce qu'opinent les juges majoritaires de la Cour d'appel sur ce point :

> . . . peut-on conclure qu'il y a eu véritablement cession des actions de [M.] Mennillo à [M.] Rosati? Il me semble plutôt que, tout simplement, ils conviennent le 25 mai 2005 d'annuler rétroactivement leur entente d'association convenue au départ en 2004. L'entente avait été conclue sans aucun formalisme, de même son annulation. [par. 225]

[62] Il convient de souligner que cette thèse de l'annulation rétroactive de l'entente n'est pas retenue par le juge de première instance, ni défendue par l'une ou l'autre des parties.

[63] Contrairement à ce que laissent entendre les juges majoritaires de la Cour d'appel, on ne peut selon moi annuler rétroactivement une émission d'actions sur simple consentement verbal. Comme le souligne M. Mennillo, il ne peut y avoir annulation d'une émission d'actions que a) par modification des statuts de la société ou b) par achat de gré à gré des actions par la société, ce qui requiert une résolution des administrateurs, le consentement exprès de l'actionnaire en cause et le respect des critères de solvabilité et de liquidité. Un tel acte de la société peut-il être valide malgré le non-respect de ces conditions de la *LCSA*? J'estime que non.

[64] Les auteurs reconnaissent que le respect des exigences relatives au maintien du capital-actions ne saurait être facultatif puisque le capital-actions constitue le gage commun des créanciers en fonction duquel ces derniers acceptent de faire affaire

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business with the corporation: P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at pp. 12-17, 12-18 and 14-31; R. Crête and S. Rousseau, *Droit des sociétés par actions* (3rd ed. 2011), at pp. 550-52; F. W. Wegenast, *The Law of Canadian Companies* (1979 (reissue of 1931 ed.)), at p. 313.

[65] Furthermore, certain American commentators point out that strict protection of a corporation's capital stock is necessary in a context in which the liability of shareholders is, for its part, limited:

> Strong entity shielding and limited liability are highly complementary; the presence of one generally calls for the other. . . .
>
> . . . limited liability generally requires strong entity shielding, largely because limited liability increases the incentive for owners to withdraw from the firm when its prospects are doubtful. That incentive, in turn, creates the threat of a run on the firm's assets, which would destroy going-concern value to the detriment of both the firm's creditors and its owners. By denying owners the power to withdraw unilaterally, strong entity shielding prevents such runs. [Footnote omitted.]

(H. Hansmann, R. Kraakman and R. Squire, "The New Business Entities in Evolutionary Perspective", [2005] *U. Ill. L. Rev.* 5, at pp. 11-12)

[66] More concretely, why would the law establish strict requirements primarily to protect creditors' interests if such requirements could validly be ignored? I am unable to find a satisfactory answer to this question, and it is my opinion that the respondent has also failed to provide one.

(2) The Consequence of Non-Compliance With the Formalities of the *CBCA*

[67] The trial judge held that Mr. Mennillo was no longer a shareholder of Intramodal as of May 25, 2005 and that [TRANSLATION] "[t]he failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer": para. 74.

avec la société (P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 12-79 à 12-82, 14-107 et 14-108; R. Crête et S. Rousseau, *Droit des sociétés par actions* (3e éd. 2011), p. 550-552; F. W. Wegenast, *The Law of Canadian Companies* (1979 (réédition de l'éd. de 1931)), p. 313).

[65] Qui plus est, certains auteurs américains relèvent que la protection stricte du capital-actions d'une société est nécessaire dans la mesure où la responsabilité de l'actionnaire est pour sa part limitée :

> [TRADUCTION] La protection stricte de l'entité et la responsabilité limitée sont très complémentaires; l'une appelle généralement l'autre . . .
>
> . . . la responsabilité limitée exige généralement la protection stricte de l'entité, surtout parce qu'elle est de nature à inciter des propriétaires à quitter l'entreprise lorsque son avenir est incertain. À son tour, cette incitation expose le capital-actions à des retraits massifs, lesquels sont susceptibles de réduire à néant la valeur de l'entreprise au détriment de ses créanciers et de ses propriétaires. En refusant aux propriétaires le droit de se retirer unilatéralement, la protection stricte de l'entité empêche de tels retraits. [Note en bas de page omise.]

(H. Hansmann, R. Kraakman et R. Squire, « The New Business Entities in Evolutionary Perspective », [2005] *U. Ill. L. Rev.* 5, p. 11-12)

[66] De manière plus concrète, pourquoi la loi établirait-elle des exigences strictes visant principalement la protection des intérêts des créanciers si de telles exigences pouvaient être ignorées en toute impunité? Je ne puis trouver de réponse satisfaisante à cette question et, à mon avis, l'intimée n'est pas non plus en mesure d'en avancer une.

(2) Les conséquences de l'inobservation des formalités prescrites par la *LCSA*

[67] Le juge de première instance conclut que M. Mennillo a cessé d'être actionnaire d'Intramodal le 25 mai 2005 et que « [l]e fait que la cession des actions de [M.] Mennillo à [M.] Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de [M.] Rosati » (par. 74).

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[68] Needless to say, there is no evidence in writing of such transfer between Mr. Mennillo and Mr. Rosati. But for the reasons I set out at length above, the trial judge made no palpable and overriding error when he rejected Mr. Mennillo's version of events and substantially accepted Intramodal's. For this reason, I accept his finding that Mr. Mennillo refused to take on the role of Intramodal's guarantor and transferred his shares to Mr. Rosati. The evidence on the transfer point is conflicting and inconsistent. The judge adopted a view of the evidence that was open to him given the extreme informality of the parties' dealings and their virtually complete inattention to corporate formalities. As I read his reasons, there was an onerous contract between Mr. Mennillo and Mr. Rosati for the transfer of the shares, a view supported by the evidence: *Martin v. Dupont*, 2016 QCCA 475; art. 1381 *Civil Code of Québec* ("*C.C.Q*").

[68] Il va sans dire qu'aucun écrit n'atteste cette cession. Mais pour les motifs détaillés qui précèdent, le juge de première instance ne commet aucune erreur manifeste et dominante lorsqu'il rejette la version des faits de M. Mennillo et qu'il retient essentiellement celle d'Intramodal. C'est pourquoi je fais mienne sa conclusion voulant que M. Mennillo ait refusé de se porter garant du passif d'Intramodal et transféré ses actions à M. Rosati. La preuve relative au transfert des actions est contradictoire et incohérente. Son interprétation par le juge Poirier est légitime compte tenu du caractère extrêmement informel des rapports entre les parties et de l'inobservation par ces dernières de la quasi-totalité des formalités requises d'une société. Suivant mon interprétation de ses motifs, un contrat à titre onéreux liait MM. Mennillo et Rosati concernant le transfert des actions, ce qui est étayé par la preuve (*Martin c. Dupont*, 2016 QCCA 475; art. 1381 du *Code civil du Québec* (« *C.c.Q.* »)).

[69] It is uncontested that Intramodal did not ascertain whether some of the corporate formalities of the *CBCA* were complied with by Mr. Mennillo and Mr. Rosati when it registered the transfer of shares, but that cannot in and of itself invalidate any transfer between them: *Inspecteur général des institutions financières v. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473 (C.A.); Martel, at pp. 16-28 to 16-30.

[69] Nul ne conteste qu'Intramodal a omis de s'assurer que MM. Mennillo et Rosati s'étaient acquittés de certaines de leurs obligations suivant la *LCSA* lorsqu'elle a inscrit le transfert d'actions. Or, pareille omission ne peut en soi invalider un transfert intervenu entre les deux hommes (*Inspecteur général des institutions financières c. Assurances funéraires Rousseau et frère Ltée*, [1990] R.R.A. 473 (C.A.); Martel, par. 16-103 à 16-108).

[70] On this point, s. 76 *CBCA* states:

[70] À cet égard, l'art. 76 de la *LCSA* dispose ce qui suit :

76 (1) Where a security in registered form is presented for transfer, the issuer shall register the transfer if

(a) the security is endorsed by an appropriate person as defined in section 65;

(b) reasonable assurance is given that that endorsement is genuine and effective;

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty;

(d) any applicable law relating to the collection of taxes has been complied with;

76 (1) L'émetteur doit procéder à l'inscription du transfert d'une valeur mobilière nominative lorsque les conditions suivantes sont réunies :

a) la valeur mobilière est endossée par une personne compétente au sens de l'article 65;

b) des assurances suffisantes sur l'authenticité et la validité de cet endossement sont données;

c) il n'est pas tenu de s'enquérir de l'existence d'oppositions ou il s'est acquitté de cette obligation;

d) les lois relatives à la perception de droits ont été respectées;

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(e) the transfer is rightful or is to a *bona fide* purchaser; and

(f) any fee referred to in subsection 49(2) has been paid.

(2) Where an issuer has a duty to register a transfer of a security, the issuer is liable to the person presenting it for registration for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

[71] In this case, the requirements of s. 76(1)(a) *CBCA* are not fulfilled. It is common ground that the shares that were transferred were not endorsed by Mr. Mennillo. Therefore it is true that Intramodal proceeded to register a transfer that did not meet all of the criteria stated in the *CBCA*. But this is of no assistance to Mr. Mennillo under the circumstances. It is not as a result of an improper registration of this share transfer that Mr. Mennillo is no longer the holder of any shares in Intramodal. It is rather as a result of his transfer of these shares to Mr. Rosati, as found by the trial judge.

[72] In that regard, the endorsement of the shares was required to complete the transfer itself between Mr. Mennillo and Mr. Rosati. It was required for the shares to be delivered, which, in turn, was necessary to complete the share transfer: ss. 60(1) and 65(3) *CBCA*. Since this was an important formality required by law, it was to be observed on pain of nullity of the transfer: arts. 1414 and 1416 *C.C.Q.*; Martel, at pp. 16-26 et seq.

[73] With that being said, there is no doubt about the fact that Mr. Mennillo knew that this formality was not complied with when the company proceeded to register the transfer in the corporate books, some time in 2007. There is also no doubt that he was aware that he had not endorsed his share certificate when the shares were transferred to Mr. Rosati as the trial judge found.

[74] While it might have been possible for Mr. Mennillo to attack the transfer on the basis of the non-compliance with this required formality of the *CBCA*, no such claim was or could have been advanced when he instituted his proceedings in

e) le transfert est régulier ou est effectué au profit d'un acheteur de bonne foi;

f) les droits prévus au paragraphe 49(2) ont été acquittés.

(2) L'émetteur tenu de procéder à l'inscription du transfert d'une valeur mobilière est responsable, envers la personne qui la présente à cet effet, du préjudice causé par tout retard indu ou par tout défaut ou refus.

[71] En l'espèce, la condition prévue à l'al. 76(1)a) de la *LCSA* n'est pas remplie. Nul ne conteste que les actions transférées n'ont pas été endossées par M. Mennillo. Il est donc exact de prétendre qu'Intramodal a inscrit un transfert qui ne respectait pas toutes les conditions prévues par la *LCSA*. Or, cette irrégularité n'appuie pas la thèse de M. Mennillo. Ce n'est pas à cause d'une inscription irrégulière du transfert d'actions qu'il n'est plus actionnaire d'Intramodal, mais parce qu'il a transféré ses actions à M. Rosati, comme le conclut le juge de première instance.

[72] L'endossement des actions était nécessaire pour mener à bien le transfert de M. Mennillo à M. Rosati. Il était requis pour la livraison des actions, laquelle s'imposait à son tour pour qu'il y ait transfert (par. 60(1) et 65(3) de la *LCSA*). S'agissant d'une formalité légale importante, son inobservation exposait l'opération à la nullité (art. 1414 et 1416 *C.c.Q.*; Martel, par. 16-91 et suiv.).

[73] Cela dit, il ne fait aucun doute que M. Mennillo savait que cette formalité n'avait pas été accomplie lorsque, en 2007, la société a inscrit le transfert dans ses registres. Nul ne peut non plus douter qu'il savait que son certificat n'était pas endossé lors du transfert des actions à M. Rosati, comme le conclut le juge de première instance.

[74] M. Mennillo aurait pu contester le transfert en invoquant l'inobservation de cette formalité exigée par la *LCSA*, mais il ne l'a pas fait et n'aurait pas pu le faire au moment d'intenter son recours en septembre 2010. Puisque, plus de trois ans auparavant,

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September 2010. As he was aware of the situation of which he now complains more than three years prior, his claim in that regard was and is still prescribed: art. 2925 *C.C.Q.* Even if the transfer was subject to nullity, it did not mean that it was inexistent. In Quebec civil law, the sanction of nullity needs to be pronounced by a tribunal: S. Gaudet, "Inexistence, nullité et annulabilité du contrat: essai de synthèse" (1995), 40 *McGill L.J.* 291, at pp. 331-35; J.-L. Baudoin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 386; D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 1101. Only once nullity is judicially pronounced is a purported contract "deemed never to have existed": art. 1422 *C.C.Q.* Indeed, a "contract which does not meet the necessary conditions of its formation may be [as opposed to is] annulled": art. 1416 *C.C.Q.* This judicial intervention must be sought within three years of becoming aware of the cause of nullity: arts. 2925 and 2927 *C.C.Q.*

il connaissait la situation qu'il déplore aujourd'hui, son recours était et demeure prescrit (art. 2925 *C.c.Q.*). Même s'il était susceptible d'annulation, le transfert existait tout de même. En droit civil québécois, la sanction qu'est la nullité doit être prononcée par le tribunal (S. Gaudet, « Inexistence, nullité et annulabilité du contrat : essai de synthèse » (1995), 40 *R.D. McGill* 291, p. 331-335; J.-L. Baudoin et P.-G. Jobin, *Les obligations* (7e éd. 2013), par P.-G. Jobin et N. Vézina, par. 386; D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), par. 1101). Ce n'est qu'une fois la nullité prononcée par une cour de justice que le contrat « est réputé n'avoir jamais existé » (art. 1422 *C.c.Q.*). En effet, le « contrat qui n'est pas conforme aux conditions nécessaires à sa formation peut [et non pas doit] être frappé de nullité » (art. 1416 *C.c.Q.*). La mesure judiciaire doit être demandée au plus tard trois ans après que l'intéressé a eu connaissance de la cause de nullité (art. 2925 et 2927 *C.c.Q.*).

(3) The Conditional Issuance of the Shares

[75] In the Court of Appeal, the dissenting judge read the trial judge's reasons as holding that the issuance of the shares to Mr. Mennillo had been conditional on his remaining a guarantor. The dissenting judge went on to say that this conditional status is not set out in the *CBCA* and in any event, even if it were, such status would also have needed to be specified in the books of the company. The dissenting judge also expressed the view that this sort of conditional shareholder status could not depend on an informal agreement between two individuals.

[76] I am in substantial agreement with the dissenting judge about the law on this point. Conditions attaching to the shares need to be specified in the articles of the corporation and in the securities register. Also, the resolution authorizing the issuance of the shares to Mr. Mennillo would have needed to specify their conditional status: ss. 24(4), 49(13) and 50(1)(c) *CBCA*. These formalities were not fulfilled.

(3) L'émission conditionnelle des actions

[75] Le juge dissident de la Cour d'appel conclut des motifs du juge de première instance que les actions ont été émises à M. Mennillo à la condition qu'il demeure garant du passif. Il ajoute que la *LCSA* ne prévoit pas un tel actionnariat conditionnel et que, de toute manière, s'il avait été possible, il aurait fallu qu'il soit indiqué dans les registres de la société. Toujours selon lui, un tel actionnariat conditionnel ne saurait tenir à un accord informel entre deux personnes.

[76] Je suis d'accord pour l'essentiel avec le juge dissident quant au droit applicable sur ce point. La condition dont une action est assortie doit être précisée dans les statuts de la société et dans son registre des valeurs mobilières. De même, la résolution autorisant l'émission des actions à M. Mennillo aurait dû préciser qu'elles étaient assorties d'une condition (par. 24(4) et 49(13) et al. 50(1)c) de la *LCSA*). Ces formalités n'ont pas été accomplies.

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[77] But in my respectful view, the dissenting judge misread the trial judge's reasons. None of the parties argued that they intended the shares to be issued conditionally and in my view the trial judge did not intend to and did not say that any condition was attached to the shares themselves. Rather, when we read his reasons in light of the evidence, we see that he was of the view that the condition to which the trial judge referred was a result of an agreement between Messrs. Mennillo and Rosati that the former would be a shareholder only if he guaranteed Intramodal's debts. This agreement was reached by Messrs. Mennillo and Rosati; Intramodal was not a party to this agreement. Accordingly, it does not attract the corporate formalities applicable to a conditional issuance of shares. Understood in this way, there is no legal error in the trial judge's approach to this issue.

C. *Prescription and Remedy*

[78] The trial judge found that Mr. Mennillo's oppression claim was prescribed. He reasoned that the three-year period in art. 2925 *C.C.Q.* applied and that time began to run in May 2005 when, in his view, Mr. Mennillo knew that he would not be treated as a shareholder. The majority of the Court of Appeal did not deal with this issue. But the dissenting judge found that time had not started to run until December 2009 and in any event that the acts of oppression were continuing. Before this Court, Mr. Mennillo adopts, in a single paragraph of his factum, the reasoning of the dissenting judge on this point. Intramodal adopts the position of the trial judge.

[79] Given the limited judicial consideration of these points in the reasons of the Superior Court and the Court of Appeal, and the conclusion that Mr. Mennillo's oppression claim is groundless on its merits, I prefer not to venture a final opinion on this precise point in the context of this appeal.

[80] As a result of my proposed disposition of the appeal in relation to the dismissal of the oppression claim, it is not necessary for me to address what

[77] Toutefois, à mon humble avis, le juge dissident interprète erronément les motifs du juge de première instance. Aucune des parties ne prétend avoir voulu que les actions soient émises à quelque condition et, à mon sens, le juge de première instance n'entend pas dire et ne dit pas que les actions sont assorties comme telles d'une condition. Au vu de la preuve, il appert plutôt de ses motifs que la condition dont il fait mention résulte d'un accord entre MM. Mennillo et Rosati selon lequel le premier ne serait actionnaire que s'il se portait garant du passif d'Intramodal. L'accord en question est intervenu entre MM. Mennillo et Rosati, et Intramodal n'y est pas partie. Il ne requérait donc pas l'observation des formalités applicables à une émission conditionnelle d'actions. Dans cette optique, la démarche du juge de première instance n'est entachée d'aucune erreur de droit.

C. *Prescription et mesure de redressement*

[78] Le juge de première instance arrive à la conclusion que le recours pour abus de M. Mennillo est prescrit. Il explique que le délai de trois ans imparti à l'art. 2925 du *C.c.Q.* s'applique et qu'il a commencé à courir en mai 2005, soit au moment où, selon lui, M. Mennillo a appris qu'il ne serait plus traité comme un actionnaire. Les juges majoritaires de la Cour d'appel ne se prononcent pas sur la question. Le juge dissident estime cependant que le délai n'a commencé à courir qu'en décembre 2009 et que, de toute façon, l'abus s'était poursuivi. Devant notre Cour, M. Mennillo reprend à son compte, dans un même paragraphe de son mémoire, le raisonnement du juge dissident sur ce point. Quant à Intramodal, elle se range à l'avis du juge de première instance.

[79] Étant donné le peu d'attention que la Cour supérieure et la Cour d'appel accordent à ces questions, et la conclusion selon laquelle le recours pour abus intenté par M. Mennillo doit être rejeté sur le fond, je préfère ne pas me prononcer sur ce point précis de manière définitive dans le cadre du pourvoi.

[80] Vu la manière dont je propose de statuer en l'espèce sur le rejet du recours pour abus, point n'est besoin de me prononcer sur les mesures de

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remedies would be appropriate in the event oppression had been established.

IV. Disposition

[81] I would dismiss the appeal with costs and affirm the costs orders made by the Superior Court and the Court of Appeal.

The reasons of McLachlin C.J. and Moldaver J. were delivered by

[82] THE CHIEF JUSTICE — I would dismiss the appeal for the following reasons.

[83] This is an action for oppression. Mr. Mennillo complains that Intramodal inc. acted oppressively in removing him as shareholder from the books of the company.

[84] To establish oppression, the shareholder must show: (1) a reasonable expectation that the corporation would treat him in a certain way; and (2) that the corporation breached that reasonable expectation (*BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 68). The action is an equitable action to protect reasonable and legitimate shareholder expectations — the "cornerstone of the oppression remedy" (*BCE*, at para. 61). Evidence of shareholder expectations is essential to whether conduct has been oppressive in a particular case (*BCE*, at para. 59; P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at p. 31-67; D. H. Peterson and M. J. Cumming, *Shareholder Remedies in Canada* (2nd ed. (loose-leaf)), at §§ 17.41 to 17.43; D. S. Morritt, S. L. Bjorkquist and A. D. Coleman, *The Oppression Remedy* (loose-leaf), at p. 3-2).

[85] I do not find it necessary to determine whether there was an effective transfer of Mr. Mennillo's shares in Intramodal inc. to Mr. Rosati. Suffice it to say that among other things, assessing the nature of the prestations that the parties decided to provide each other under an "onerous contract" — Mr. Rosati gets Mr. Mennillo's shares in exchange

redressement qui auraient été indiquées si l'abus avait été établi.

IV. Dispositif

[81] Je suis d'avis de rejeter le pourvoi avec dépens et de confirmer les ordonnances de la Cour supérieure et de la Cour d'appel sur les dépens.

Version française des motifs de la juge en chef McLachlin et du juge Moldaver rendus par

[82] LA JUGE EN CHEF — Je suis d'avis de rejeter le pourvoi pour les motifs suivants.

[83] M. Mennillo a intenté un recours pour abus. Il reproche à Intramodal inc. d'avoir agi de façon abusive en le dépouillant de sa qualité d'actionnaire dans les registres de la société.

[84] Pour établir l'abus, l'actionnaire doit prouver (1) qu'il s'attendait raisonnablement à ce que la société le traite d'une certaine manière et (2) que la société a frustré cette attente raisonnable (*BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, par. 68). Issu de l'equity, le recours vise à protéger les attentes raisonnables et légitimes de l'actionnaire, lesquelles constituent la « pierre angulaire [du recours] pour abus » (*BCE*, par. 61). La preuve des attentes de l'actionnaire est essentielle pour qualifier un comportement d'abusif dans une situation donnée (*BCE*, par. 59; P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 31-197 et 31-198; D. H. Peterson et M. J. Cumming, *Shareholder Remedies in Canada* (2e éd. (feuilles mobiles)), § 17.41 à 17.43; D. S. Morritt, S. L. Bjorkquist et A. D. Coleman, *The Oppression Remedy* (feuilles mobiles), p. 3-2).

[85] Je n'estime pas nécessaire de décider s'il y a effectivement eu transfert à M. Rosati des actions de M. Mennillo dans Intramodal inc. Je me contente de dire que, entre autres choses, la question de la nature des prestations que les parties se sont consenties l'une à l'autre par voie de « contrat à titre onéreux » — M. Rosati obtenant les actions de M. Mennillo

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of Intramodal inc. relieving Mr. Mennillo of his obligation to guarantee Intramodal inc.'s debts — is an issue that leaves me somewhat perplexed (a point made by Côté J. at para. 229 of her dissenting reasons).

[86] Be that as it may, in my view, this appeal can be disposed of on the basis that Mr. Mennillo has failed to show a reasonable expectation that he would not be removed as a shareholder from Intramodal inc.'s books. The trial judge found that Mr. Mennillo agreed that his shares should be transferred to Mr. Rosati: [TRANSLATION] "Mennillo refused to participate in this venture [that is, to be an equity shareholder in Intramodal] and asked to be removed from the company as a shareholder and director as of May 25, 2005" (2012 QCCS 1640, at para. 74 (CanLII)).

[87] Having asked to be removed as a shareholder, Mr. Mennillo had no reasonable expectation that he would remain on the books as a shareholder. This is confirmed by the fact that subsequently Mr. Mennillo ceased to conduct himself as an equity shareholder and advanced money as loans. The trial judge's finding of fact is supported by the evidence.

[88] Mr. Mennillo has failed to establish a reasonable expectation that he would remain a shareholder in Intramodal inc. It follows that his action for oppression must fail. Consequently, the trial judge did not err in denying Mr. Mennillo's claim.

[89] I would dismiss the appeal.

English version of the reasons delivered by

CÔTÉ J. (dissenting) —

I. Introduction

[90] It is sometimes essential to go back to the basics of the law to render the decision that is appropriate in the circumstances. It is just as essential to recall some of those basics.

en contrepartie de la libération de ce dernier par Intramodal inc. de son obligation de garantir le passif de la société — me laisse quelque peu perplexe (le point est soulevé par la juge Côté au par. 229 de ses motifs dissidents).

[86] Quoi qu'il en soit, le fait que M. Mennillo n'a pas démontré qu'il pouvait raisonnablement s'attendre à continuer de figurer à titre d'actionnaire dans les registres d'Intramodal inc. permet de statuer sur le pourvoi. Le juge de première instance conclut que M. Mennillo a accepté que ses actions devaient être cédées à M. Rosati : « [M.] Mennillo a refusé cette aventure [c'est-à-dire être actionnaire participatif d'Intramodal] et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005 » (2012 QCCS 1640, par. 74 (CanLII)).

[87] Ayant demandé à ne plus être actionnaire, M. Mennillo ne pouvait pas raisonnablement s'attendre à ce que les registres de la société continuent de faire état de sa qualité d'actionnaire. Cela est d'ailleurs confirmé par le fait qu'il a cessé par la suite d'agir comme actionnaire participatif et a avancé des fonds sous forme de prêts. Cette conclusion de fait du juge de première instance trouve appui dans la preuve.

[88] M. Mennillo n'a pas prouvé qu'il pouvait raisonnablement s'attendre à demeurer actionnaire d'Intramodal inc. Son recours pour abus doit donc échouer. Par conséquent, le juge de première instance n'a pas eu tort de le débouter.

[89] Je suis d'avis de rejeter le pourvoi.

Les motifs suivants ont été rendus par

LA JUGE CÔTÉ (dissidente) —

I. Introduction

[90] Il est parfois essentiel de revenir aux fondements du droit afin de rendre la décision qui s'impose dans certaines circonstances. Il est tout aussi essentiel de rappeler certains de ces fondements.

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[91] Two key principles are deeply rooted in Canadian corporate law and cannot simply be disregarded or ignored: the principle that a corporation's legal personality is distinct from that of its shareholder or shareholders, and the principle or rule of the maintenance of capital.

[92] In my view, both the trial judge and the majority of the Court of Appeal completely disregarded these two principles in their analysis.

[93] With respect, the analysis that is required in the circumstances cannot disregard the interplay between Quebec civil law and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), and must neither weaken the strict formal requirements of corporate law — in this area, *forma dat esse rei* — nor confuse the business corporation with the partnership. Care must be taken not to assume that the registration of a transfer of shares means that there was a contract for the transfer of shares. Like the trial judge's assertion that shares can be issued conditionally without the corporation approving the issuance and that of the majority of the Court of Appeal that a share issuance may be cancelled retroactively without any formalities, the solution proposed by the majority cannot, in my view, be reconciled with the basic principles of corporate law and the civil law.

[94] I therefore cannot agree with the majority's opinion.

[95] The appellant, Johnny Mennillo, objects to a resolution passed by the respondent corporation, Intramodal Inc., and to its registration in its registers of a transfer of his shares to its majority shareholder, Mario Rosati. Although Intramodal initially argued, with a supporting affidavit, that the appellant had never been one of its shareholders, it now acknowledges that he was indeed a shareholder, but it refuses, contrary to the law and to its own articles and by-laws, to recognize that he now has that

[91] Deux grands principes sont profondément enracinés en droit canadien des sociétés par actions et ne peuvent simplement être écartés ou ignorés : il s'agit du principe de la personnalité juridique distincte de la société par rapport à celle de son ou ses actionnaires, et du principe ou de la règle du maintien du capital.

[92] À mon avis, tant le juge de première instance que les juges majoritaires de la Cour d'appel ont totalement fait abstraction de ces deux principes dans leurs analyses respectives.

[93] Avec égards, l'analyse qui s'impose dans les circonstances ne peut ignorer l'interaction du droit civil québécois avec la *Loi canadienne sur les sociétés par actions*, L.R.C. 1985, c. C-44 (« *LCSA* »), et ne doit pas fragiliser les exigences strictes du droit des sociétés sur le plan du formalisme — en ce domaine « *forma dat esse rei* » — et ne doit pas non plus confondre la société par actions avec la société de personnes. Il faut se garder de tenir pour acquis que l'inscription d'un transfert d'actions signifie qu'il y a eu contrat de transfert d'actions. Au même titre que l'affirmation du juge de première instance selon laquelle il peut y avoir émission conditionnelle d'actions sans que celle-ci ne soit entérinée par la société, et celle des juges majoritaires de la Cour d'appel selon laquelle une émission d'actions peut être annulée rétroactivement sans aucune formalité, la solution préconisée par la majorité est, à mon avis, irréconciliable avec les principes élémentaires du droit des sociétés et du droit civil.

[94] Je ne puis donc me résoudre à souscrire à l'opinion de la majorité.

[95] L'appelant, Johnny Mennillo, reproche à la société intimée, Intramodal inc., l'adoption d'une résolution et l'inscription dans ses registres d'un transfert de ses actions au bénéfice de son actionnaire majoritaire, Mario Rosati. Bien qu'Intramodal ait d'abord prétendu, déclaration sous serment à l'appui, que l'appelant n'avait jamais été actionnaire d'Intramodal, elle reconnaît aujourd'hui qu'il a effectivement été actionnaire, mais refuse de lui reconnaître ce statut et les avantages qui s'y rattachent, et

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status and is entitled to the advantages associated therewith.

[96] It is also important to be clear that this is a proceeding brought by the appellant against Intramodal under s. 241 *CBCA*. Contrary to what my colleague seems to be suggesting, this is not a case in which one shareholder sues another over the ownership of his or her shares in a company. Mr. Rosati is not a party to this litigation.

[97] In his claim, the appellant asked that the resolution passed by the respondent company be revoked and that its registers be rectified. This means that, although he brought this claim under s. 241 *CBCA*, he could also have done so under s. 243 *CBCA* (rectification of registers) or s. 247 *CBCA* (failure by a corporation to comply with the legislation or with its articles or by-laws). The appellant submitted that Intramodal had breached its legal duties by passing the resolution in question and registering the transfer of his shares although none of the formalities required by law had been observed. He argued that the respondent company's conduct in refusing to recognize his status as a shareholder was oppressive and that a remedy was appropriate under s. 241 *CBCA*. In addition to a declaration that he had always remained a shareholder of the company, the appellant asked, as a consequence, that the resolution approving the transfer of his shares be revoked and that the company's registers be rectified accordingly.

[98] The trial judge and the majority of the Court of Appeal found that the appellant's claim was without merit on the ground that he had, in their view, expressed an intention in May 2005 to withdraw from the respondent company both as a director and officer and as a shareholder. It was therefore open to Intramodal to register the transfer of the appellant's shares to Mr. Rosati despite the fact that there had been no exchange of wills with regard to the terms of the appellant's withdrawal and even though the principal formalities required by law for the transfer of shares had not been observed. The dissenting judge found that his colleagues were disregarding the formal requirements of corporate law.

ce, en contravention à la loi et à ses propres statuts et règlements.

[96] Il importe de plus de préciser qu'il s'agit d'un recours entrepris par l'appelant à l'encontre d'Intramodal en vertu de l'art. 241 *LCSA*. Contrairement à ce que semble laisser entendre mon collègue, il ne s'agit pas d'un litige où un coactionnaire en poursuit un autre relativement à la propriété de ses actions dans la société. M. Rosati n'est pas partie au présent litige.

[97] Dans le cadre de son recours, l'appelant demande l'annulation de la résolution adoptée par la société intimée et la rectification de ses registres. En ce sens, son recours, bien que tombant sous le coup de l'art. 241 *LCSA*, aurait également pu être entrepris en vertu des art. 243 *LCSA* (rectification des registres) ou 247 *LCSA* (inobservation par la société de la loi ou de ses statuts ou règlements). L'appelant soutient qu'Intramodal a manqué à ses obligations légales en adoptant ladite résolution et en procédant à l'inscription du transfert de ses actions, alors qu'aucune des formalités requises par la loi n'avait été accomplie. La conduite de la société intimée, par son refus de reconnaître son statut d'actionnaire, est selon lui abusive et un redressement s'impose en vertu de l'art. 241 *LCSA*. En sus d'une déclaration selon laquelle il est toujours demeuré actionnaire de la société, l'appelant demande donc l'annulation de la résolution avalisant le transfert de ses actions de même que la rectification des registres de la société en conséquence.

[98] Le juge de première instance et les juges majoritaires de la Cour d'appel ont estimé que le recours de l'appelant n'était pas fondé au motif qu'il avait, selon eux, en mai 2005, exprimé son intention de se retirer de la société intimée, tant à titre d'administrateur et de dirigeant que d'actionnaire. Intramodal pouvait donc procéder à l'inscription du transfert des actions de l'appelant à M. Rosati, et ce, malgré l'absence d'échange de volontés quant aux modalités du retrait de l'appelant et même si les principales formalités prescrites par la loi en matière de transfert d'actions n'avaient pas été respectées. Le juge dissident a pour sa part conclu que l'opinion de ses collègues faisait fi du formalisme requis en droit des sociétés.

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[99] According to the trial judge, the majority of the Court of Appeal and my colleagues, the fact that a shareholder expresses an intention to withdraw from a business corporation bars the shareholder from bringing any oppression proceeding for the express purpose of seeking recognition of his or her status as a shareholder. My colleague Cromwell J. finds that, in the civil law of Quebec, the expression of such an intention is equivalent to a transfer of shares. In other words, it is sufficient to cause a person to lose his or her status as a shareholder.

[100] With respect, I am of the view that the fact that one shareholder claims he and his fellow shareholder entered into an agreement for the transfer of shares does not relieve the corporation of its legal duty to make the necessary inquiries before passing a resolution approving that transfer of shares and registering the transfer in its registers. It is clear from the evidence that Intramodal did not discharge any of its legal duties in this regard. If the respondent company had made the proper inquiries, it would have discovered that the appellant's share certificate (Intramodal share certificate No. 2) had not been endorsed, contrary to the requirements of the *CBCA* and to the transfer restrictions set out on the share certificate itself and in the company's articles. It should then have refrained from registering the transfer in its registers. As well, the impugned resolution should not have been passed.

[101] In my opinion, Intramodal instead confused its interests with those of its majority shareholder, took a disturbingly lax approach in preparing its corporate documents and displayed wilful blindness as regards its legal duties. That confusion was particularly obvious — to say the least — in each of the courts below, and in this Court, where Intramodal vigorously defended the interests of its majority shareholder, who did not even see fit to intervene in the case but instead used Intramodal as his puppet. Intramodal could of course have defended itself on the allegations made against it, but it chose instead to expend its energy on defending an alleged agreement to which it was not even a party without even

[99] Suivant le raisonnement du juge de première instance, de la majorité de la Cour d'appel et de mes collègues, l'intention manifestée par un actionnaire de se retirer d'une société par actions constitue une fin de non-recevoir à tout recours pour abus visant précisément à faire reconnaître ce statut d'actionnaire. Selon mon collègue le juge Cromwell, l'expression d'une telle volonté équivaut en droit civil québécois à un transfert d'actions. En d'autres mots, elle suffit pour faire perdre à une personne son statut d'actionnaire.

[100] Avec égards, je suis d'avis que la prétention d'un actionnaire suivant laquelle une entente de transfert d'actions est intervenue entre lui et son coactionnaire ne libère pas la société en cause de son devoir légal de faire les vérifications requises avant d'entériner par résolution ce transfert d'actions et de l'inscrire dans ses registres. Or, il est manifeste, à la lumière de la preuve, qu'Intramodal n'a respecté aucune de ses obligations légales à cet égard. Si la société intimée avait procédé aux vérifications qui s'imposaient, elle aurait alors constaté que le certificat d'actions de l'appelant (certificat d'actions n° 2 d'Intramodal) n'avait pas été endossé, contrairement aux exigences de la *LCSA* et aux restrictions de transfert figurant sur le certificat d'actions lui-même ainsi que dans les statuts d'Intramodal. Cette dernière aurait dès lors dû s'abstenir d'inscrire le transfert dans ses registres. Également, la résolution contestée n'aurait pas dû être adoptée.

[101] À mon avis, Intramodal a plutôt confondu ses intérêts avec ceux de son actionnaire majoritaire et fait preuve d'un laxisme troublant dans la préparation de sa documentation corporative, ainsi que d'aveuglement volontaire quant au respect de ses obligations légales. Cette confusion a été plus qu'apparente — pour dire le moins — devant chacune des juridictions inférieures, et devant notre Cour, où Intramodal s'est employée à défendre vigoureusement les intérêts de son actionnaire majoritaire, lequel n'a même pas jugé bon d'intervenir au litige, utilisant plutôt Intramodal comme sa marionnette. Intramodal pouvait certainement se défendre des reproches formulés à son endroit,

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bothering to determine its scope or verify that it was genuine.

[102] By focusing solely on the scope of the alleged agreement between the appellant and Mr. Rosati without considering the respondent company's conduct, its failure to discharge its legal duties and the consequences of that failure, the trial judge and the majority of the Court of Appeal disregarded the company's distinct legal personality as well as the basic requirements of corporate law. Rather than punishing the respondent company's unlawful conduct, they chose to endorse its actions.

[103] In addition, the trial judge made palpable and overriding errors and disregarded key evidence in arriving at the conclusion that Mr. Mennillo had transferred his shares to Mr. Rosati in May 2005.

[104] Finally, I find that the trial judge and the majority of the Court of Appeal also erred in concluding that the appellant's claim was prescribed. In this Court, the parties agreed that the appellant was, at least at some point, a shareholder of Intramodal. By challenging the respondent company's decision for unlawfully depriving him of his status, the appellant is exercising a remedy that, by its very nature, relates to his right of ownership in his shares. Neither the *CBCA* nor the *Civil Code of Québec* ("*C.C.Q.*") provides that extinctive prescription applies in such a case. As I will explain below, the ownership of shares, as opposed to the rights conferred by them, is not subject to extinctive prescription in Quebec. As a result, the three-year prescription period provided for in art. 2925 *C.C.Q.* cannot be set up against the appellant's claim for oppression.

[105] For these reasons, I am of the opinion that the appeal should be allowed.

mais elle a plutôt choisi de consacrer ses énergies à la défense d'une prétendue entente à laquelle elle n'était même pas partie et dont elle ne s'était même pas donné la peine de déterminer l'étendue et de vérifier l'authenticité.

[102] Le juge de première instance et les juges majoritaires de la Cour d'appel, en s'attachant uniquement à la portée de la prétendue entente conclue entre l'appelant et M. Rosati, sans égard à la conduite de la société intimée, au non-respect de ses obligations légales et aux conséquences de ce non-respect, ont fait fi de la personnalité juridique distincte de celle-ci ainsi que des prescriptions élémentaires du droit des sociétés. Plutôt que de sanctionner la conduite illégale de la société intimée, ils ont choisi de cautionner ses agissements.

[103] De plus, le juge de première instance a commis des erreurs manifestes et dominantes et a fait abstraction d'éléments clés de la preuve en arrivant à la conclusion que M. Mennillo aurait transféré ses actions à M. Rosati en mai 2005.

[104] Enfin, le juge de première instance et les juges majoritaires de la Cour d'appel ont également, à mon avis, eu tort de conclure que le recours de l'appelant était prescrit. Les parties s'entendent devant notre Cour pour dire que l'appelant était, à un certain moment du moins, actionnaire d'Intramodal. L'appelant, en attaquant la décision de la société intimée de le priver illégalement de son statut, exerce un recours qui, de par sa nature, se rattache à son droit de propriété sur ses actions. Ni la *LCSA* ni le *Code civil du Québec* (« *C.c.Q.* ») ne prévoient de prescription extinctive dans un tel cas. Tel que nous le verrons, la propriété des actions, par opposition aux droits qu'elles confèrent, ne fait pas l'objet d'une prescription extinctive au Québec. Partant, l'appelant ne peut se voir opposer, à l'encontre de son recours pour abus, le délai de prescription de trois ans de l'art. 2925 *C.c.Q.*

[105] Pour ces motifs, je suis d'avis qu'il y a lieu d'accueillir le pourvoi.

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II. Facts

[106] In 2004, the appellant and his long-time friend, Mr. Rosati — who worked for Canvec Logistics at the time — discussed the possibility of forming a road transportation company. They agreed that the appellant would provide the start-up financing and that Mr. Rosati would contribute his skills and contacts.

[107] In April 2004, the name "Intramodal" was reserved with Quebec's Enterprise Registrar ("REQ"). The respondent company was incorporated on July 13, 2004. Its certificate of incorporation and its registers confirm that Mr. Rosati and Mr. Mennillo were appointed directors and officers and that Mr. Rosati held 51 and Mr. Mennillo 49 (share certificates No. 1 and No. 2) of the 100 Class "A" common shares that were issued for $1 each.

[108] On May 25, 2005, Mr. Mennillo resigned as a director and officer of Intramodal. A notice of resignation prepared by Daniel Ovadia, acting as Intramodal's lawyer, was sent to Mr. Mennillo, who signed it and faxed it back to Mr. Ovadia. The notice in question did not mention Mr. Mennillo's status as a shareholder but referred only to his removal as a director and officer. The reasons for the resignation were in dispute at trial, as Mr. Mennillo and Mr. Rosati offered conflicting interpretations of the events.

[109] Intramodal remained inactive for several months. The evidence shows that on July 18, 2005, Mr. Ovadia filed an amending declaration with the REQ that specified that the appellant had been removed as a director and officer, and as a shareholder. The declaration in question was signed by Mr. Ovadia, but not by the appellant.

[110] On August 5, 2005, Mr. Rosati ceased working for Canvec Logistics. He then dedicated himself full time to getting Intramodal off the ground. In the

II. Les faits

[106] Au cours de l'année 2004, l'appelant et son ami de longue date, M. Rosati — qui travaille alors chez Canvec Logistique —, discutent de la possibilité de créer une société œuvrant dans le domaine du transport routier. Ils conviennent que l'appelant en financera le démarrage et que M. Rosati y contribuera par le biais de ses compétences et de ses contacts.

[107] En avril 2004, le nom d'Intramodal est réservé auprès du Registraire des entreprises du Québec (« REQ »). La société intimée est constituée le 13 juillet 2004. Le certificat de constitution et les registres de la société confirment que MM. Rosati et Mennillo en sont nommés administrateurs et dirigeants et qu'ils détiennent respectivement 51 pour M. Rosati et 49 pour M. Mennillo (certificats d'actions nº 1 et nº 2) des 100 actions ordinaires de catégorie « A » émises au prix d'un dollar chacune.

[108] Le 25 mai 2005, M. Mennillo démissionne à titre d'administrateur et de dirigeant d'Intramodal. Un avis de démission, rédigé par Me Daniel Ovadia, agissant comme avocat d'Intramodal, lui est transmis, avis que M. Mennillo signe avant de le retourner à Me Ovadia par télécopieur. L'avis en question ne fait aucunement mention du statut d'actionnaire de M. Mennillo, mais seulement de son retrait à titre d'administrateur et de dirigeant. Les raisons expliquant cette démission ont fait l'objet d'un débat en première instance, MM. Mennillo et Rosati proposant des interprétations divergentes des événements.

[109] Intramodal demeurera inactive pendant plusieurs mois. La preuve révèle que le 18 juillet 2005, Me Ovadia a déposé auprès du REQ une déclaration modificative prévoyant le retrait de l'appelant à titre d'administrateur et de dirigeant, ainsi que d'actionnaire. La déclaration en question porte la signature de Me Ovadia. Nulle part toutefois n'y apparaît celle de l'appelant.

[110] Le 5 août 2005, M. Rosati cesse de travailler pour Canvec Logistique. Il s'investit alors à temps plein dans le démarrage d'Intramodal. À

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fall of 2005, money was advanced by Mr. Mennillo. Intramodal officially began operating in December. Mr. Mennillo continued advancing money, which was used to finance the company's operations. As advances were made by Mr. Mennillo, the loaned amounts were recorded on cards of a Rolodex initialled by Mr. Rosati. A total of $440,000 was advanced in that way between June 2004 and October 2006.

[111] That amount was repaid in full by Intramodal between July 3, 2006 and December 7, 2009 by means of cheques marked "consultation fees" or "management fees". During that period, Mr. Mennillo was thus paid $690,000, which included interest and a premium, plus the applicable taxes.

[112] By 2006, the company founded by Mr. Mennillo and Mr. Rosati had become very successful.

[113] On March 24, 2006, Mr. Rosati filed with the REQ an annual declaration dated February 8, 2006 in which Mr. Mennillo was still listed as a shareholder of the company.

[114] In July 2007, at a dinner among friends, an argument broke out when Mr. Mennillo learned of the company's success. That same year (the exact date is not in evidence), Intramodal passed a retroactive resolution acknowledging Mr. Mennillo's resignation as a director and officer and approving the transfer of his shares to Mr. Rosati. That resolution, which is at the heart of this litigation and which shows that Mr. Mennillo was a shareholder of the company, at least before the transfer, was not signed by Mr. Mennillo. Nor did he ever endorse his share certificate, which remained in Intramodal's possession at all times and was never delivered to the purported transferee.

[115] In the fall of 2007, there were discussions involving the following persons: Antoine

l'automne 2005, des sommes d'argent sont avancées par M. Mennillo. En décembre, les activités d'Intramodal débutent officiellement. M. Mennillo continue d'avancer des sommes d'argent qui sont utilisées pour financer les activités de la société. Au fur et à mesure que M. Mennillo fait ces avances, les sommes prêtées sont consignées sur les fiches d'un *Rolodex* avec les initiales de M. Rosati. Au total, 440 000 $ seront ainsi avancés entre juin 2004 et octobre 2006.

[111] Ce montant sera remboursé en totalité par Intramodal au cours de la période du 3 juillet 2006 au 7 décembre 2009, et ce, au moyen de chèques portant la mention [TRADUCTION] « frais de consultation » ou « frais de gestion » (« *consultation fees* » ou « *management fees* »). Une somme de 690 000 $, incluant les intérêts et une prime à laquelle s'ajoutent les taxes applicables, est donc versée à M. Mennillo durant cette période.

[112] Dès 2006, l'entreprise fondée par MM. Mennillo et Rosati connaît un vif succès.

[113] Le 24 mars 2006, M. Rosati dépose au REQ une déclaration annuelle portant la date du 8 février 2006 dans laquelle M. Mennillo apparaît toujours comme actionnaire de la société.

[114] En juillet 2007, lors d'un souper entre amis, la discorde éclate alors que M. Mennillo prend conscience du succès de l'entreprise. En 2007 (la date exacte n'est pas établie par la preuve), Intramodal adopte une résolution avec effet rétroactif qui reconnaît la démission de M. Mennillo à titre d'administrateur et de dirigeant et qui entérine le transfert de ses actions à M. Rosati. Cette résolution, qui est au cœur du présent litige et qui atteste que, à tout le moins avant le transfert, M. Mennillo était actionnaire de la société, n'est pas signée par lui. Par ailleurs, le certificat d'actions de M. Mennillo ne sera jamais endossé par lui non plus. Il demeurera en tout temps entre les mains d'Intramodal et ne sera jamais délivré à son prétendu cessionnaire.

[115] Dès l'automne 2007, sont entreprises des discussions auxquelles prennent part les personnes

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Papadimitriou, an accountant who was retained by several of the appellant's businesses, Paolo Carzoli, a tax lawyer who had been consulted by Mr. Papadimitriou for the occasion, and Israel Kaufman, a commercial lawyer consulted by the appellant to structure the proposed transaction. The appellant and Mr. Rosati also gave different accounts of the purpose of those discussions: according to the appellant, the purpose of the discussions was to determine a price for the redemption of his shares, while Mr. Rosati claimed that their purpose was to increase the amount of the repayment to be made to the appellant. The appellant's version was corroborated in this regard by Mr. Papadimitriou, Mr. Carzoli and Mr. Kaufman.

suivantes : Antoine Papadimitriou, comptable dont les services sont retenus par plusieurs entreprises de l'appelant, Me Paolo Carzoli, avocat fiscaliste consulté par M. Papadimitriou pour l'occasion et Me Israel Kaufman, avocat commercialiste consulté par l'appelant pour le montage de l'opération projetée. L'appelant et M. Rosati offrent également des versions différentes quant à l'objet de ces discussions : selon l'appelant, ces discussions ont pour but de fixer le prix pour le rachat de ses actions, alors que selon M. Rosati, elles visent à augmenter le montant du remboursement à verser à l'appelant. La version de l'appelant est toutefois corroborée sous ce rapport par M. Papadimitriou, Me Carzoli et Me Kaufman.

[116] On December 22, 2008, Intramodal amended its articles by removing any rights and privileges associated with the Class "A" to "G" shares of its capital stock and replacing them with new rights and privileges associated with Class "A" to "I" shares. New shares were issued to Fiducie Intra 4 (a trust created by Mr. Rosati) and to Mr. Rosati himself.

[116] Le 22 décembre 2008, Intramodal modifie ses statuts en supprimant tous les droits et privilèges afférents aux actions de catégories « A » à « G » de son capital pour les remplacer par de nouveaux droits et privilèges afférents aux actions de catégories « A » à « I ». De nouvelles actions sont émises à Fiducie Intra 4 (une fiducie créée par M. Rosati) et à M. Rosati lui-même.

[117] On December 7, 2009, the appellant met Mr. Rosati at a restaurant and Mr. Rosati gave him a $40,000 cheque from Intramodal marked "Full and Final Payment". A few days after that payment, the appellant consulted his lawyer, who then checked the "CIDREQ" reports available online and obtained copies of the declarations filed with the REQ by Intramodal. Noting that the appellant was no longer listed as a shareholder, the lawyer told him about this discovery.

[117] Le 7 décembre 2009, l'appelant rencontre M. Rosati dans un restaurant et ce dernier lui remet un chèque de 40 000 $ tiré par Intramodal, sur lequel apparaît la mention [TRADUCTION] « règlement total et définitif » (« *Full and Final Payment* »). Quelques jours après ce paiement, l'appelant consulte son avocat, qui examine alors les rapports « CIDREQ » disponibles en ligne et obtient copie des déclarations déposées par Intramodal auprès du REQ. Il constate que l'appelant n'apparaît plus comme actionnaire et l'informe de sa découverte.

[118] On February 25, 2010, Mr. Kaufman sent Intramodal a formal notice. The appellant filed a claim for oppression against the respondent company on September 7, 2010.

[118] Le 25 février 2010, Me Kaufman envoie une mise en demeure à Intramodal. L'appelant intente un recours pour abus contre la société intimée le 7 septembre 2010.

[119] The appellant's version of the events that led to the dispute differs from Mr. Rosati's.

[119] La version de l'appelant et celle de M. Rosati diffèrent quant aux événements ayant mené au différend en cause.

[120] Mr. Rosati maintains that in the initial agreement, the appellant undertook to finance the

[120] M. Rosati soutient que dans le cadre de l'entente initiale, l'appelant s'est engagé à assumer

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respondent company and guarantee its debts. At trial, he testified that his relationship with the appellant had begun to deteriorate in July 2004. According to Mr. Rosati, the appellant expressed serious doubts at that time about his ability to successfully implement their plan. Mr. Mennillo discussed this with Mr. Rosati and told him that he intended to withdraw from the company. Mr. Rosati acknowledges that he and Mr. Mennillo at no time formally established the terms of such a withdrawal. According to Mr. Rosati, the company had not yet started operating at the time of their discussion on this subject. Mr. Rosati insisted that the appellant continue financing him, and the appellant agreed to provide him with $300,000.

[121] The appellant categorically denies that he ever expressed an intention to withdraw from the company as a shareholder. He also denies that there was an agreement on his withdrawal as a shareholder. He admits withdrawing solely as a director and an officer, as is confirmed by his notice of resignation, and says that he did so at his friend's request. According to the appellant, a few weeks before May 25, 2005, Mr. Rosati told him that people from the Labatt Brewing Company Ltd. — a potential client — wanted to look at Intramodal's registers. Mr. Mennillo testified that Mr. Rosati told him at that time that it would be better that he withdraw while the necessary verifications were being carried out. According to Mr. Mennillo's own testimony, he resigned as a director and officer only after being promised that he would be reinstated. It was Mr. Rosati, through his lawyer, who sent the appellant a letter of resignation, which the appellant signed immediately.

[122] More specifically, the appellant's and Mr. Rosati's versions of the following events are diametrically opposed:

– With regard to a meeting at a restaurant on July 14, 2007, Mr. Rosati maintains that the appellant told him he was dissatisfied with the return on his loan. The two of them then decided to schedule a meeting to determine the amount to which the appellant was entitled in order to settle their dispute. According to Mr. Rosati,

le financement de la société intimée et à garantir son passif. Au procès, il a témoigné que sa relation avec l'appelant avait commencé à se détériorer à partir de juillet 2004. Toujours selon M. Rosati, l'appelant aurait alors exprimé de sérieux doutes quant à sa capacité à mener à bien leur projet. M. Mennillo en a discuté avec M. Rosati et lui a fait part de son intention de se retirer de la société. M. Rosati reconnaît que lui et M. Mennillo n'ont jamais formellement établi les modalités d'un tel retrait. Leur discussion à cet égard survient, toujours selon M. Rosati, alors que les activités de la société n'ont pas encore débuté. M. Rosati insiste pour que l'appelant continue de le financer, ce qu'il convient de faire à hauteur de 300 000 $.

[121] L'appelant, pour sa part, nie catégoriquement avoir manifesté, à quelque moment que ce soit, son intention de se retirer de la société comme actionnaire. Il nie de plus qu'il y ait eu entente visant son retrait comme actionnaire. Il admet s'être retiré uniquement à titre d'administrateur et de dirigeant, comme le confirme son avis de démission, et ce, à la demande de son ami. L'appelant affirme que quelques semaines avant le 25 mai 2005, ce dernier lui aurait indiqué que des gens de La Brasserie Labatt Ltée — un client potentiel — souhaitaient consulter les registres d'Intramodal. M. Mennillo témoigne que M. Rosati lui a alors indiqué qu'il valait mieux qu'il se retire le temps que les vérifications nécessaires soient faites. Selon son propre témoignage, M. Mennillo n'aurait démissionné comme administrateur et dirigeant que sous promesse d'être rétabli dans ses fonctions. C'est M. Rosati qui, par l'entremise de son avocat, lui fait parvenir une lettre de démission que l'appelant signe immédiatement.

[122] Plus particulièrement, l'appelant et M. Rosati offrent des versions diamétralement opposées des événements suivants :

– Concernant une rencontre au restaurant le 14 juillet 2007, M. Rosati soutient que l'appelant lui a indiqué qu'il était insatisfait du rendement de son prêt. Tous les deux ont alors décidé de fixer une rencontre afin de déterminer le montant auquel l'appelant a droit et mettre fin à leur différend. Les rencontres subséquentes

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the purpose of the subsequent meetings in 2007 was to increase the amount on which they had already agreed.

– The appellant maintains that it was on July 14, 2007 that he realized Intramodal was doing very well. A meeting was scheduled not only to agree on the repayment of the loans, but also to determine a price for the redemption of his shares. Discussions on this subject took place on several occasions in 2007, but they were unsuccessful. It was not until December 2009, as a result of Mr. Kaufman's inquiries, that the appellant learned he was no longer a shareholder of Intramodal.

[123] However, Mr. Rosati and Mr. Mennillo agree on one point. There was no mention whatsoever on May 25, 2005 of the sale, exchange or gift of shares. At most, according to Mr. Rosati, because the appellant expressed an intention to withdraw from Intramodal whereas his shares had been issued to him on condition that he finance the company and guarantee its debts, he lost his status as a shareholder at that time. This is the version of the facts that was accepted by the trial judge.

III. Decisions of the Courts Below

A. *Quebec Superior Court, 2012 QCCS 1640 (Poirier J.)*

[124] The trial judge was of the view that the outcome of this case depended entirely on the credibility of the witnesses. He stated that the appellant's testimony and that of Mr. Rosati were contradictory with respect to three events in particular, namely:

– the appellant's resignation as a director and an officer of Intramodal on May 25, 2005;

– the meeting of July 14, 2007 at the restaurant and the meeting between the appellant and Mr. Rosati on July 21, 2007; and

ayant eu lieu en 2007 visaient, toujours selon M. Rosati, à augmenter le montant déjà convenu.

– L'appelant soutient que c'est le 14 juillet 2007 qu'il a réalisé qu'Intramodal avait le vent dans les voiles. Une rencontre est fixée, non seulement pour convenir du remboursement des prêts, mais également pour déterminer le prix de rachat de ses actions. Des discussions à ce sujet auront lieu à plusieurs reprises en 2007, mais avorteront. Ce n'est qu'en décembre 2009, suite aux vérifications de Me Kaufman, qu'il apprendra qu'il n'est plus actionnaire d'Intramodal.

[123] MM. Rosati et Mennillo s'entendent toutefois sur un point. Le 25 mai 2005, il n'a jamais été question de vente, d'échange ou de donation d'actions. Tout au plus, selon M. Rosati, l'appelant ayant manifesté son intention de se retirer d'Intramodal alors que ses actions lui avaient été émises conditionnellement à ce qu'il finance la société et en garantisse le passif, il a alors perdu son statut d'actionnaire. C'est cette version des faits qui a été retenue par le juge de première instance.

III. Décisions antérieures

A. *Cour supérieure du Québec, 2012 QCCS 1640 (le juge Poirier)*

[124] Le juge de première instance estime que l'issue de la présente affaire repose entièrement sur la crédibilité des témoins. Il indique que le témoignage de l'appelant et celui de M. Rosati sont contradictoires quant à trois événements en particulier, à savoir :

– la démission de l'appelant à titre d'administrateur et de dirigeant d'Intramodal en date du 25 mai 2005;

– la rencontre du 14 juillet 2007 au restaurant ainsi que celle entre l'appelant et M. Rosati le 21 juillet 2007;

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– the series of meetings with the appellant's accountant between October and December 2007.

[125] On the first of those events, the trial judge found that the reason for the appellant's withdrawal as a director and an officer [TRANSLATION] "cannot be linked to the visit to Intramodal's premises and the examination of the company's books by representatives of Labatt", thus rejecting the appellant's claim that Mr. Rosati had asked him to resign to reassure that potential client (para. 29 (CanLII)). The trial judge rejected the appellant's version with respect to the other events as well.

[126] The trial judge also analyzed the exhibits filed by the parties in detail. In his opinion, several of them directly contradicted the appellant's version.

[127] He concluded from the evidence as a whole that the appellant had held 49 common shares *on condition that he finance Intramodal's operations and guarantee all of its debts once it began operating as a business.* He also found that the shares had been distributed as follows when the respondent company was incorporated: 51 percent to Mr. Rosati and 49 percent to the appellant.

[128] More importantly, the trial judge found that it was the appellant who had asked to be removed from the company (both as a director and officer and as a shareholder) effective May 25, 2005. As of that date, in the trial judge's view, the appellant became merely a lender of $440,000 to Intramodal's sole shareholder, namely Mr. Rosati. In other words, because the appellant's shares had been issued on condition that he finance Intramodal's operations and guarantee its debts, those shares were transferred to Mr. Rosati when the appellant expressed a wish to be relieved of his obligations to Intramodal. The appellant nevertheless continued financing Intramodal's operations after May 25, 2005. The trial judge added that [TRANSLATION] "[t]he failure to complete the transfer of [the appellant's] shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer" (para. 74).

– la série de rencontres avec le comptable de l'appelant, d'octobre à décembre 2007.

[125] En ce qui concerne le premier de ces événements, le juge de première instance estime que le motif du retrait de l'appelant à titre d'administrateur et de dirigeant « ne peut être lié à la visite du local de Intramodal et l'examen des livres de la compagnie par les représentants de Labatt », rejetant ainsi la prétention de l'appelant suivant laquelle M. Rosati lui aurait demandé de démissionner afin de rassurer ce client potentiel (par. 29 (CanLII)). Quant aux autres événements, il rejette également la version de l'appelant.

[126] Le juge de première instance procède en outre à une analyse détaillée des pièces produites par les parties. Il est d'avis que plusieurs d'entre elles contredisent directement la version de l'appelant.

[127] Il retient de l'ensemble de la preuve que l'appelant a détenu 49 actions ordinaires *conditionnellement à ce qu'il finance les activités d'Intramodal et garantisse l'ensemble de son passif dès que débuteraient les activités de l'entreprise*. Il retient également que, lors de la constitution de la société intimée, les actions ont été réparties de la façon suivante : 51 p. 100 pour M. Rosati et 49 p. 100 pour l'appelant.

[128] Plus important encore, le juge de première instance retient que c'est l'appelant qui a demandé son retrait de la société (tant à titre d'administrateur et de dirigeant que d'actionnaire) à compter du 25 mai 2005. Selon lui, à partir de ce jour, l'appelant devenait simple prêteur d'une somme de 440 000 $ au seul actionnaire d'Intramodal, à savoir M. Rosati. En d'autres termes, dans la mesure où l'émission des actions de l'appelant était conditionnelle à ce que celui-ci finance les activités d'Intramodal et garantisse son passif, les actions ont été cédées à M. Rosati lorsque l'appelant a exprimé le souhait d'être libéré de ses obligations à l'égard d'Intramodal. L'appelant a pourtant continué à financer les activités d'Intramodal après le 25 mai 2005. Le juge de première instance ajoute que « [l]e fait que la cession des actions de [l'appelant] à Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de

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In short, in his opinion, the appellant was no longer a shareholder, director or officer of Intramodal, which meant that his claim had to be dismissed.

B. *Quebec Court of Appeal, 2014 QCCA 1515*

(1) Reasons of the Majority (Vézina and St-Pierre JJ.A.)

[129] The majority of the Court of Appeal, per Vézina J.A., agreed with the trial judge that the outcome of this case depended on the credibility of the witnesses. In the majority's view, the trial judge had not made any palpable and overriding error that warranted the intervention of the Court of Appeal. Moreover, his assessment of the facts, including the finding that the appellant had been excluded from Intramodal as a shareholder at his own request, necessarily led to the conclusion that the claim had to be dismissed.

[130] Furthermore, the majority found that little weight should be given to the business records in this case, because the relevant documents had been prepared in a sloppy manner. They gave some examples of this, noting that, [TRANSLATION] "[c]learly, neither the parties nor their professional advisers were concerned about paperwork and formalities" and that it was therefore not surprising that the appellant's removal as a shareholder had not been properly registered (para. 216 (CanLII)). The majority added that [TRANSLATION] "[t]his lack of duly completed and reliable documents means that it will be necessary to look to the evidence as a whole, including the depositions, in order to determine what really happened in this case and what the parties actually agreed to" (para. 219).

[131] After considering the evidence relating to the three events analyzed by the trial judge, the majority of the Court of Appeal concluded as follows:

[TRANSLATION] Counsel for Mennillo argues that Mennillo cannot have both been a shareholder and not been a shareholder. Rosati admits that he was one, so it is up to him to prove that he ceased to be one. Hence the issue of the $49 discussed above.

l'avocat de Rosati » (par. 74). Bref, selon lui, l'appelant n'est plus détenteur d'aucune action ni administrateur ou dirigeant d'Intramodal. Son recours doit par conséquent être rejeté.

B. *Cour d'appel du Québec, 2014 QCCA 1515*

(1) Motifs des juges majoritaires (les juges Vézina et St-Pierre)

[129] La majorité de la Cour d'appel, sous la plume du juge Vézina, partage l'avis du juge de première instance selon lequel l'issue de la présente affaire repose sur la crédibilité des témoins. Selon elle, le juge de première instance n'a commis aucune erreur manifeste et dominante justifiant l'intervention de la Cour d'appel. Qui plus est, son appréciation des faits, notamment la conclusion selon laquelle c'est à sa propre demande que l'appelant a été exclu d'Intramodal comme actionnaire, menait nécessairement à la conclusion que le recours devait être rejeté.

[130] Par ailleurs, les juges majoritaires estiment que peu de poids doit être accordé aux documents de l'entreprise dans la présente affaire dans la mesure où les documents pertinents ont été rédigés sans aucune rigueur. Ils donnent quelques exemples qui les amènent à affirmer que, « [m]anifestement, ni les parties ni leurs professionnels ne se souciaient des papiers et des formalités », et qu'il n'est alors pas surprenant que le retrait de l'appelant comme actionnaire n'ait pas été dûment inscrit (par. 216 (CanLII)). Ils ajoutent que « [c]ette absence de documents dûment complétés et fiables oblige à chercher dans l'ensemble de la preuve, dont les dépositions, ce qui s'est réellement passé dans cette affaire, ce dont les parties ont vraiment convenu » (par. 219).

[131] Après avoir examiné la preuve relative aux trois événements analysés par le juge de première instance, les juges majoritaires de la Cour d'appel concluent ce qui suit :

Selon son avocat, Mennillo ne peut avoir été actionnaire et ne pas l'avoir été. Or, Rosati admet qu'il l'a été, donc c'est à lui de prouver qu'il a cessé de l'être. D'où la question des 49 $, ci-dessus traitée.

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In my opinion, and this is the only point on which I have any doubt with respect to the judgment: Can it be concluded that there was a genuine transfer of the shares from Mennillo to Rosati? It seems to me, rather, that they quite simply agreed on May 25, 2005 to retroactively cancel their agreement to associate with one another that they had originally entered into in 2004. The agreement had been reached informally, as was the cancellation thereof.

In this sense, it can be said that Mennillo was a shareholder of Intramodal and that he never was one. This is the case for any contract that is annulled *ab initio* (from the start). The owner of an immovable who applies for annulment remains the owner until the judgment, but the next day is deemed never to have been the owner. If a marriage contract is annulled, the marriage is nonetheless a putative marriage. The spouse in good faith was never married, but it is as if he or she were, as that spouse benefits from the effects of marriage.

Ultimately, it does not matter how Mennillo's removal from the company on May 25, 2005 occurred, since the parties themselves did not see fit to clarify this and observe the formalities. Whether their initial agreement was cancelled or the shares were redeemed, the fact is that only Rosati remained in the company, and he subsequently developed his business for himself and his family. [Emphasis added; paras. 224-27.]

[132] In short, although the majority did not intervene with respect to the trial judge's findings of fact, they did express doubts about his conclusion that the appellant's shares had been transferred to Mr. Rosati. There was no evidence that the terms of the appellant's removal as a shareholder had been discussed. In the majority's view, even though the two men had in fact agreed on the appellant's removal, they had not seen fit to specify how this was to occur. Vézina and St-Pierre JJ.A. held that insofar as the initial agreement had been entered into without any formalities, it could be cancelled in the same way.

(2) Reasons of the Dissenting Judge (Gagnon J.A.)

[133] Gagnon J.A. would have allowed the appeal on the basis that the trial judge's reasons contained

À mon avis, et c'est le seul point où j'ai un doute par rapport au jugement : peut-on conclure qu'il y a eu véritablement cession des actions de Mennillo à Rosati? Il me semble plutôt que, tout simplement, ils conviennent le 25 mai 2005 d'annuler rétroactivement leur entente d'association convenue au départ en 2004. L'entente avait été conclue sans aucun formalisme, de même son annulation.

Et en ce sens, on peut affirmer que Mennillo a été actionnaire d'Intramodal et qu'il ne l'a jamais été. C'est le cas dans tout contrat annulé *ab initio* (depuis le début). Le propriétaire d'un immeuble qui en demande l'annulation demeure propriétaire jusqu'au jugement, le lendemain il est réputé ne jamais l'avoir été. Si un contrat de mariage est annulé, ce n'en est pas moins un mariage putatif, et l'époux de bonne foi n'a jamais été marié, mais c'est tout comme, il (ou elle) bénéficie des effets du mariage.

Enfin, peu importe comment s'est effectué le retrait de Mennillo de l'entreprise le 25 mai 2005 puisque les intéressés n'ont pas jugé bon eux-mêmes de le préciser et d'y mettre les formes. Que ce soit par annulation de leur entente initiale ou par rachat d'actions, le fait est que seul Rosati est demeuré dans la société et, par la suite, il a développé son entreprise pour lui et les siens. [Je souligne; par. 224-227.]

[132] Bref, bien qu'ils n'interviennent pas quant aux conclusions factuelles du juge de première instance, les juges majoritaires expriment des doutes quant à sa conclusion selon laquelle il y a eu cession d'actions de l'appelant à M. Rosati. En effet, la preuve est muette sur l'existence de quelque discussion concernant les modalités du retrait de l'appelant à titre d'actionnaire. Selon les juges majoritaires, même si tous deux se sont effectivement entendus sur le retrait de l'appelant, ils n'ont toutefois pas cru bon de prévoir comment ce retrait s'effectuerait. De l'avis des juges Vézina et St-Pierre, dans la mesure où l'entente initiale avait été conclue sans aucun formalisme, elle pouvait être annulée de la même façon.

(2) Motifs du juge dissident (le juge Gagnon)

[133] Le juge Gagnon aurait pour sa part accueilli l'appel au motif que le jugement de première

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errors of law and palpable and overriding errors of fact. Among other things, he faulted the trial judge, and the majority, for disregarding the law and the respondent company's articles and by-laws by reducing the case to no more than one of credibility.

[134] In Gagnon J.A.'s view, the trial judge was wrong to find that the appellant's ownership of 49 common shares of Intramodal was [TRANSLATION] "conditional" (para. 32). The legislation does not provide for conditional shareholder status, he said. Moreover, there was nothing in the respondent company's registers to support such a position.

[135] Gagnon J.A. added that [TRANSLATION] "status as a shareholder cannot depend on an informal agreement between individuals and on whether one of them chooses to resiliate it or not to resiliate it" (para. 32). He expressed the opinion that the evidence adduced at trial concerning the appellant's status as a shareholder for the period from July 13, 2004 to May 25, 2005 was indisputable. In his view, there was no doubt that the appellant was one of Intramodal's two founding shareholders. The only issue was therefore whether he ceased to be a shareholder at some point and, if so, how.

[136] On the question of a possible transfer of the appellant's shares to Mr. Rosati, Gagnon J.A. found that the onus was on Mr. Rosati to show that he was the duly registered transferee of the appellant's shares pursuant to s. 53(d) *CBCA*.

[137] In response to the respondent company's argument that the appellant's failure to make good on his undertaking to guarantee the company's debts amounted to the price paid by Mr. Rosati to acquire his shares, Gagnon J.A. observed that this confused the company's interests with those of its majority shareholder and also disregarded their distinct legal personalities.

[138] Gagnon J.A. also rejected the respondent company's alternative theory that the appellant had "given" his shares to Mr. Rosati. He relied on art. 1824 *C.C.Q.*, which provides that a gift of

instance est entaché d'erreurs de droit ainsi que d'erreurs de fait manifestes et dominantes. Il reproche entre autres au juge de première instance et aux juges majoritaires de faire abstraction de la loi ainsi que des statuts et des règlements de la société intimée lorsqu'ils réduisent le litige à une simple affaire de crédibilité.

[134] Selon le juge Gagnon, le juge de première instance ne pouvait conclure que la détention par l'appelant de 49 actions ordinaires d'Intramodal était « conditionnelle » (par. 32). Le caractère conditionnel du statut d'actionnaire, dit-il, n'est pas prévu par la loi. D'ailleurs, rien dans les registres de la société intimée n'appuie cette thèse.

[135] Le juge Gagnon ajoute que « la qualité d'actionnaire ne peut dépendre d'une entente informelle intervenue entre des individus, selon que l'un d'eux choisit ou pas de la résilier » (par. 32). Il estime que la preuve présentée en première instance relativement à la qualité d'actionnaire de l'appelant pour la période du 13 juillet 2004 au 25 mai 2005 est incontestable. Il ne fait selon lui aucun doute que l'appelant était l'un des deux actionnaires fondateurs d'Intramodal. La seule question qui se pose est donc de savoir si, à un moment ou à un autre, il a cessé de l'être et, si oui, comment.

[136] Sur la question d'un possible transfert des actions de l'appelant à M. Rosati, le juge Gagnon considère qu'il appartenait à M. Rosati de démontrer qu'il était le cessionnaire dûment inscrit des actions de l'appelant en vertu de l'al. 53d) *LCSA*.

[137] À l'argument de la société intimée selon lequel le défaut de l'appelant de respecter son engagement de garantir le passif de la société équivaudrait au prix payé par M. Rosati pour l'acquisition de ses actions, le juge Gagnon rétorque que c'est confondre l'intérêt de la société avec celui de son actionnaire majoritaire, en plus de ne pas tenir compte de leurs personnalités juridiques distinctes.

[138] Le juge Gagnon rejette également l'hypothèse avancée subsidiairement par la société intimée et selon laquelle l'appelant aurait « donné » ses actions à M. Rosati. Il s'appuie sur l'art. 1824 *C.c.Q.*,

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movable property must be made by notarial act *en minute*, with one exception: where consent to a gift of such property is accompanied by delivery and immediate possession of the property. Gagnon J.A. noted that, in the instant case, Intramodal had not received any notarial contract in which Mr. Mennillo transferred his shares to Mr. Rosati. He added that the evidence did not show a manual gift from the appellant to Mr. Rosati accompanied by delivery of the instrument.

[139] Gagnon J.A. ended his reasons on this point by noting that, to have the claim dismissed, the respondent company had to show that Mr. Rosati was the actual transferee of the shares in question, which required that his share certificate be endorsed in accordance with s. 64 *CBCA*. Moreover, Intramodal's articles provided that no share could be transferred unless the board of directors passed a resolution consenting to the transfer. In the circumstances, it was quite simply not open to Intramodal to disregard these requirements and approve a transfer of shares to Mr. Rosati.

[140] Gagnon J.A. was also of the view that the trial judge should not have rejected the appellant's version of the facts and that there were palpable and overriding errors in his analysis in this regard.

[141] Finally, Gagnon J.A. also rejected the argument that the claim was prescribed.

IV. Issues

[142] The main issues are as follows:

– Did the respondent company, by passing the resolution approving the transfer of the appellant's shares to its majority shareholder and registering that transfer in its registers, contrary to the applicable legislation and to its own articles and by-laws, create an oppressive situation that satisfies the conditions for making a claim for oppression under s. 241 *CBCA*?

qui prévoit que la donation d'un bien meuble s'effectue par acte notarié en minute, sauf dans le seul cas où le consentement à la donation d'un tel bien s'accompagne de la délivrance et de la possession immédiate du bien. Le juge Gagnon souligne que, en l'espèce, Intramodal ne s'est vu remettre aucun contrat notarié dans lequel M. Mennillo transférait ses actions à M. Rosati. Il ajoute que la preuve ne révèle pas un don manuel de l'appelant à M. Rosati accompagné de la délivrance du titre.

[139] Le juge Gagnon termine ses motifs sur ce point en soulignant que, pour obtenir le rejet du recours, la société intimée devait démontrer que M. Rosati était le véritable cessionnaire des actions en cause, ce qui nécessitait l'endossement de son certificat d'actions, le tout conformément à l'art. 64 *LCSA*. De plus, les statuts d'Intramodal prévoient qu'aucune action ne peut être transférée sans le consentement du conseil d'administration exprimé par voie de résolution. Dans ces circonstances, Intramodal ne pouvait tout simplement pas faire fi de ces exigences et ratifier un transfert d'actions à M. Rosati.

[140] Le juge Gagnon est par ailleurs d'avis que le juge de première instance n'aurait pas dû écarter la version des faits de l'appelant et que son analyse, sur ce point, est entachée d'erreurs manifestes et dominantes.

[141] Enfin, le juge Gagnon rejette également l'argument selon lequel le recours est prescrit.

IV. Questions en litige

[142] Les principales questions en litige sont les suivantes :

– La société intimée, en adoptant la résolution entérinant le transfert des actions de l'appelant au bénéfice de son actionnaire majoritaire et en inscrivant ce transfert dans ses registres, en contravention de la législation applicable et de ses propres statuts et règlements, a-t-elle provoqué une situation d'abus qui satisfait aux conditions d'ouverture du recours pour abus prévu à l'art. 241 *LCSA*?

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– Can the fact that the appellant expressed an intention to withdraw from the respondent company be raised against him as a bar to such a claim?

– Did the trial judge make palpable and overriding errors in assessing the evidence?

– Is the appellant's claim prescribed?

V. Analysis

A. *Importance of Formalism in Corporate Law*

[143] As I mentioned above, the analysis of the issues requires a review of some basic principles. While it is true that the appellant and Mr. Rosati did not make the effort to prepare complete documents setting out the exact terms of their business relationship and that they took a rather lax approach in preparing their corporate documents, there is no question that a corporation was indeed formed under the *CBCA* on July 13, 2004 and that the appellant was a shareholder from that date until at least May 25, 2005.

[144] A number of arguments have been advanced in this case with respect to the appellant's shares and, more specifically, to his status as a shareholder, including that the appellant was never a shareholder of the respondent company, that he agreed to transfer the shares to Mr. Rosati, that his ownership of the shares was conditional, and that the shares in question were cancelled retroactively.

[145] With regard to the cancellation of the shares, counsel for the appellant correctly noted at the hearing, in response to the reasons of the majority of the Court of Appeal, that such a cancellation can be effected only in accordance with the law, that is, by amending the corporation's articles or, if the shares have already been paid for, by redeeming them.

[146] The *CBCA* regulates the cancellation of a corporation's shares in order to ensure the integrity of the corporation's share capital and to preserve the common pledge of its creditors. It does so in

– L'appelant peut-il se voir opposer l'expression de son intention de se retirer de la société intimée comme fin de non-recevoir à un tel recours?

– Le juge de première instance a-t-il commis des erreurs manifestes et dominantes dans son appréciation de la preuve?

– Le recours de l'appelant est-il prescrit?

V. Analyse

A. *Importance du formalisme en droit des sociétés*

[143] Tel que mentionné plus avant, l'analyse des questions en litige exige un rappel de certains principes de base. S'il est vrai que l'appelant et M. Rosati se sont peu souciés de transposer dans des écrits complets les modalités exactes de leurs relations d'affaires et qu'ils ont fait preuve d'un certain laxisme dans la préparation des documents relatifs à la société, il est incontestable qu'une société a bel et bien été formée en vertu de la *LCSA* le 13 juillet 2004 et que l'appelant a été actionnaire du 13 juillet 2004 jusqu'au moins le 25 mai 2005.

[144] Le sort réservé aux actions de l'appelant en l'espèce et, en l'occurrence, à sa qualité d'actionnaire, a donné lieu à plusieurs thèses, entre autres celles suivant lesquelles l'appelant n'aurait jamais été actionnaire de la société intimée, il aurait convenu de les transférer à M. Rosati, il aurait été un actionnaire conditionnel, ou encore les actions en cause auraient été annulées rétroactivement.

[145] En ce qui concerne l'annulation des actions, l'avocat de l'appelant, à l'audience, et en réponse au jugement majoritaire de la Cour d'appel, a souligné à juste titre qu'une telle annulation ne pouvait se faire que conformément à la loi, soit par voie de modification des statuts, soit, si les actions ont déjà été payées, par voie d'achat ou de rachat.

[146] La *LCSA* encadre l'annulation des actions de la société dans le but de garantir l'intégrité du capital-actions et de préserver le gage commun des créanciers, le tout conformément à la règle du

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accordance with the maintenance of capital rule, which is of particular importance in corporate law:

> Although the trust fund doctrine does not completely apply to our corporate law, it nonetheless constitutes the basis of a rule which appears in the law today: the maintenance of capital rule.
>
> This rule is inferred from statutory provisions prohibiting or submitting to solvency (federally) or accounting tests various transactions directly or indirectly having an effect on the paid-up capital of a corporation, such as the reduction of issued capital, declaration of dividends, acquisition by a corporation of its shares, issue of shares at a discount, transfer of shares not fully paid, etc. In the Quebec *Business Corporations Act*, it is telling that most of these provisions are found in a section entitled "Maintenance of share capital".
>
> The paid-up capital of a corporation must be maintained and safeguarded in the interest of the creditors: to this extent we can say that the trust fund doctrine is present, especially when we consider that all the above-mentioned transactions can lead to the personal liability of the directors.
>
> The principle, which essentially comes from doctrine and case law respecting paid-up capital, is the following: a corporation is not allowed to "traffic in" its capital. The statutory provisions we have referred to merely define the limits of this principle by creating certain exceptions to the prohibition against a corporation drawing on its paid-up capital. Any action which does not fall within the scope of these exceptions infringes the maintenance of capital rule and is therefore unlawful. [Emphasis added; footnotes omitted.]

(P. Martel, *Business Corporations in Canada: Legal and Practical Aspects* (loose-leaf), at pp. 12-17 and 12-18)

[147] It should be borne in mind that, although a business corporation is similar to a partnership in some respects, as is true, for example, of relationships between the shareholders of a closely held corporation, it differs from a partnership in several ways, including the fact that it requires a stricter adherence to formalities to ensure its independent existence.

maintien du capital, laquelle est au cœur du droit des sociétés :

> Même si la doctrine du *Trust fund* ne s'applique pas intégralement dans notre droit des sociétés, elle n'en constitue pas moins un fondement d'une règle qui, elle, se manifeste dans les lois actuelles : la règle du maintien du capital.
>
> Cette règle se déduit des dispositions statutaires interdisant ou soumettant à des tests de solvabilité, au fédéral, ou comptables, diverses opérations ayant pour conséquence directe ou indirecte d'affecter le capital souscrit de la société, comme par exemple la réduction du capital émis, la déclaration de dividendes, l'acquisition de ses propres actions par la société, l'émission d'actions à escompte, le transfert d'actions impayées, etc. Dans la *Loi sur les sociétés par actions*, il est significatif que la plupart de ces dispositions soient regroupées dans une section, intitulée « Maintien du capital ».
>
> Le capital souscrit de la société doit être maintenu, sauvegardé, et ce dans l'intérêt des créanciers : dans cette mesure, on peut parler d'une manifestation de la doctrine du *Trust fund*, surtout quand on constate que toutes les opérations mentionnées plus haut engagent la responsabilité personnelle des administrateurs.
>
> À la base, le principe dégagé par la doctrine et la jurisprudence en matière de capital souscrit est le suivant : la société n'a pas le droit de « trafiquer » dans son capital. Les dispositions statutaires auxquelles nous avons fait allusion ne viennent que préciser les limites de ce principe, en créant certaines exceptions à cette défense pour la société de toucher à son capital souscrit. Tout geste qui n'entre pas dans le cadre de ces exceptions contrevient à la règle du maintien du capital et est de ce fait illégal. [Je souligne; notes en bas de page omises.]

(P. Martel, *La société par actions au Québec*, vol. I, *Les aspects juridiques* (feuilles mobiles), par. 12-79 à 12-82)

[147] Rappelons que la société par actions, malgré qu'elle comporte certaines similitudes avec la société de personnes, notamment en ce qui concerne les rapports entre les actionnaires dans le cas d'une société par actions à capital fermé, s'en distingue à plusieurs égards, notamment par le fait qu'elle requiert un formalisme plus grand visant à assurer son existence autonome.

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[148] A business corporation is not merely the product of an agreement between associates. As Martel notes, "[a] corporation is a 'joint stock corporation' incorporated through the intervention of the State, not by contract, and as such it is not subject to the partnership rules in the *Civil Code*" (p. 27-32 (footnote omitted)).

[149] By choosing a business corporation as their legal vehicle for carrying on business, a company's founders and shareholders voluntarily decide to be subject to a scheme that, although it does involve numerous formalities, also has a number of advantages, including the limited liability of directors for the corporation's debts, which is an advantage that flows directly from the corporation's distinct legal personality.

[150] In the case at bar, if Mr. Mennillo and Mr. Rosati had wanted consensualism to take precedence over formalism in the conduct of their affairs, they could easily have opted for a partnership, but they did not do so. Since they instead chose to create a business corporation, they cannot enjoy the advantages of such a corporation without complying with the stricter rules that apply to it.

[151] A business corporation is a legal person established for a private interest that has a distinct legal personality and patrimony: R. Crête and S. Rousseau, *Droit des sociétés par actions* (3rd ed. 2011), at para. 51. In principle, it expresses itself through the resolutions of its board of directors. Decisions of the board of directors must be made at meetings that are lawfully called, although it is also possible for all the directors to sign a given resolution in writing, in which case the resolution is as valid as if it had been passed at a meeting: s. 117(1) *CBCA*.

[152] The shareholders may exercise the management powers of the board of directors only if they enter into a unanimous shareholder agreement pursuant to s. 146 *CBCA*. Moreover, several of the many powers conferred on the board of directors may not be delegated and require authorization from the board itself: ss. 121(a) and 115(3) *CBCA*. In the

[148] Une société par actions n'est pas que le produit d'une entente entre les associés. Comme le souligne Martel : « La société est une "société par actions", constituée par l'intervention de l'État et non pas par contrat et comme telle elle n'est pas assujettie au régime général des sociétés du Code civil » (par. 27-122 (note en bas de page omise)).

[149] En choisissant le véhicule juridique qu'est la société par actions pour exercer leurs activités, les fondateurs et actionnaires d'une telle société décident volontairement de s'assujettir à un régime qui est certes soumis à de nombreuses formalités, mais qui comporte aussi plusieurs avantages, notamment la responsabilité limitée des administrateurs quant au passif de la société, soit un avantage qui découle directement de sa personnalité juridique distincte.

[150] Dans le cas qui nous occupe, si MM. Mennillo et Rosati avaient voulu que le consensualisme prime le formalisme dans la conduite de leurs affaires, ils auraient facilement pu opter pour une société de personnes, mais ils ne l'ont pas fait. Dans la mesure où ils ont plutôt choisi de créer une société par actions, ils ne peuvent bénéficier des avantages de ce type de société sans se soumettre aux règles plus strictes qui s'y rattachent.

[151] La société par actions est une personne morale de droit privé dotée d'une personnalité juridique et d'un patrimoine distincts : R. Crête et S. Rousseau, *Droit des sociétés par actions* (3e éd. 2011), par. 51. Elle s'exprime en principe au moyen des résolutions adoptées par son conseil d'administration. Les décisions du conseil d'administration doivent se prendre lors de réunions régulièrement convoquées, à moins que tous les administrateurs ne signent une résolution écrite, auquel cas cette dernière a la même valeur qui si elle avait été adoptée au cours d'une réunion : par. 117(1) *LCSA*.

[152] Les pouvoirs de gestion du conseil d'administration ne peuvent être exercés par les actionnaires que lorsque ceux-ci adoptent une convention unanime des actionnaires en vertu de l'art. 146 *LCSA*. De plus, parmi les nombreux pouvoirs conférés au conseil d'administration, plusieurs ne peuvent être délégués et doivent faire l'objet d'une

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instant case, no unanimous shareholder agreement was entered into.

[153] Once the shareholders have in fact subscribed for shares, the invested amounts belong to the corporation. That capital is locked in in such a way that shareholders cannot recover their investments unilaterally or liquidate some or all of the corporation's assets at the expense of its creditors. This is the maintenance of capital principle.

[154] This principle also implies that the shareholders cannot agree among themselves to authorize one of them to require the corporation to redeem his or her shares and thus to withdraw from the corporation without its intervening.

[155] Various statutes place considerable value on corporate documents as a way to protect third parties (including creditors) that rely on them to assess the corporation's situation. One such statute is Quebec's *Act respecting the legal publicity of enterprises*, CQLR, c. P-44.1.

[156] The formalities provided for in corporate legislation are not merely a matter of "form" as suggested by the trial judge, the majority of the Court of Appeal and my colleague Cromwell J. Rather, the observance of such formalities must be viewed as conditions for the validity of the acts of the corporation, its directors and its shareholders. They are imposed to give effect to the principle that a corporation has a distinct legal personality and to the maintenance of capital principle, and they are necessary to protect the corporation's patrimony, the common pledge of its creditors.

[157] Furthermore, these principles cannot be variable. The principle that a corporation has a distinct legal personality and the maintenance of capital principle are just as important in the case of a small company as in that of a large one, if not more so. Although expectations may vary from one shareholder to another in the case of a closely held

autorisation du conseil lui-même : al. 121a) et par. 115(3) *LCSA*. On notera que, en l'espèce, aucune convention unanime des actionnaires n'a été signée.

[153] Dès que les actionnaires ont bel et bien procédé à la souscription des actions, les montants investis appartiennent à la société. Ce capital est immobilisé de manière que les actionnaires ne puissent récupérer unilatéralement leur investissement et liquider partiellement ou totalement les actifs de la société au détriment des créanciers de cette dernière. Il s'agit du principe du maintien du capital.

[154] Ce principe implique en outre que l'accord des actionnaires entre eux ne peut permettre à l'un d'eux de forcer le rachat par la société des actions qu'il détient et d'ainsi se retirer de la société sans l'intervention de cette dernière.

[155] Différentes lois accordent une valeur considérable à la documentation corporative d'une société, et ce, afin de protéger les tiers (dont les créanciers) qui s'y fient pour connaître la situation de la société, dont, au Québec, la *Loi sur la publicité légale des entreprises*, RLRQ, c. P-44.1.

[156] Les formalités prévues par les lois relatives aux sociétés par actions ne relèvent pas que de la « forme » comme le laissent entendre le juge de première instance, les juges majoritaires de la Cour d'appel, de même que mon collègue le juge Cromwell. Il faut plutôt voir dans leur respect la condition de la validité des actes de la société, de ses administrateurs et de ses actionnaires. Elles sont imposées en raison du principe de la personnalité juridique distincte de la société et du principe du maintien du capital et elles sont nécessaires à la protection du patrimoine de la société, gage commun de ses créanciers.

[157] Ces principes ne peuvent d'ailleurs être à géométrie variable. Le principe de la personnalité juridique distincte de la société et celui du maintien du capital sont tout aussi importants — sinon plus — dans le cas d'une petite société que dans celui d'une grande. Bien que les attentes des actionnaires puissent varier de l'un à l'autre dans le

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corporation, this does not diminish the importance of these principles. The same is true of the formalities provided for by law to ensure that they are adhered to.

[158] In light of the above, the conclusion of the majority of the Court of Appeal that the agreement between the two shareholders regarding the appellant's shares was cancelled retroactively, simply by their consenting to its being cancelled, and that this cancellation had some effect on the company even though the necessary formalities were not observed, jeopardizes important pillars of Canadian corporate law.

[159] Assuming that Mr. Mennillo and Mr. Rosati did in fact enter into an agreement concerning a specific juridical operation in order to terminate or change the terms of their business association — which the evidence in no way shows — that agreement could not be set up against the respondent company in respect of the shares in question unless the necessary formalities were performed.

[160] The appellant argues, as did the dissenting Court of Appeal judge, that the majority of the Court of Appeal erred in completely disregarding the *CBCA*'s mandatory formalities for redeeming and transferring shares. In my view, the appellant is right. The reasoning of the majority of the Court of Appeal amounts to equating a business corporation with a partnership and seriously undermines the principle that a corporation has a distinct legal personality and the maintenance of capital principle, thereby creating uncertainty with respect to transactions involving the share capital of corporations.

[161] With respect, the fact that the appellant and Mr. Rosati themselves disregarded the necessary formalities in the way they conducted their affairs did not authorize the Superior Court and the majority of the Court of Appeal to do the same.

[162] As Idington J. of this Court noted in *Smith v. Gow-Ganda Mines, Ltd.* (1911), 44 S.C.R. 621, at p. 624, it is true that shareholders can enter into

cas d'une société par actions à capital fermé, l'importance de ces principes n'est pas pour autant diminuée. Il en va de même des formalités prévues par la loi pour faire respecter ces principes.

[158] À la lumière de ce qui précède, la conclusion des juges majoritaires de la Cour d'appel selon laquelle il y a eu annulation rétroactive de l'entente entre les deux actionnaires quant aux actions de l'appelant sur simple consentement de ceux-ci et que cette annulation a eu quelque effet que ce soit sur la société, en dépit de l'absence du formalisme requis, met en péril des piliers importants du droit canadien des sociétés.

[159] À supposer qu'une entente sur une opération juridique précise soit effectivement intervenue entre MM. Mennillo et Rosati afin de mettre fin à leur association d'affaires ou d'en changer les modalités — ce que la preuve ne révèle d'aucune façon —, pour que cette entente puisse être opposable à la société intimée eu égard aux actions en cause, les formalités requises devaient être accomplies.

[160] À l'instar du juge dissident de la Cour d'appel, l'appelant reproche aux juges majoritaires de la Cour d'appel d'avoir complètement fait abstraction des formalités impératives de la *LCSA* en matière de rachat et de transfert d'actions. À mon avis, l'appelant a raison. Le raisonnement des juges majoritaires de la Cour d'appel revient à assimiler la société par actions à une société de personnes et porte sérieusement atteinte au principe de la personnalité juridique distincte de la société par actions et à celui du maintien du capital et, ce faisant, il sème l'incertitude quant à la sécurité des opérations relatives au capital-actions des sociétés.

[161] Avec égards, le fait que l'appelant et M. Rosati eux-mêmes ont fait abstraction du formalisme requis dans leur façon de mener leurs affaires n'autorisait pas la Cour supérieure et les juges majoritaires de la Cour d'appel à faire de même.

[162] Comme le souligne le juge Idington de notre Cour dans l'arrêt *Smith c. Gow-Ganda Mines, Ltd.* (1911), 44 R.C.S. 621, p. 624, les actionnaires

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various agreements as part of their business relationship, but for such agreements to be binding on the corporation, it is imperative that the statutory formalities be observed.

B. *Significance of Formalism in Corporate Law*

[163] In their respective reasons, the trial judge and the majority of the Court of Appeal relied heavily, to justify dismissing the appellant's claim for oppression, on his having expressed an intention to withdraw from the respondent company as a director, officer and shareholder. They were of the view that the only issue in this case was one of credibility.

[164] With respect, this conclusion completely disregards the formalism that is required in corporate law. It also completely disregards the respondent company's distinct legal personality. By focusing solely on whether the appellant had expressed an intention to withdraw from the respondent company, the trial judge and the majority of the Court of Appeal sidestepped the main issue: whether the respondent company's conduct was oppressive.

[165] Section 76 *CBCA* could not be any clearer. A corporation may not register a transfer of shares in its registers without first making certain inquiries. The legislation imposes some very strict requirements to be met before a transfer of shares is registered, including that the security be endorsed and that the transfer be rightful:

76 (1) Where a security in registered form is presented for transfer, the issuer shall register the transfer if

(a) the security is endorsed by an appropriate person as defined in section 65;

(b) reasonable assurance is given that that endorsement is genuine and effective;

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty;

peuvent certes, dans le cadre de leur relation d'affaires, conclure différentes ententes, mais pour que ces ententes engagent la société, les formalités prévues par la loi doivent impérativement être respectées.

B. *Portée du formalisme en droit des sociétés*

[163] Dans leurs motifs respectifs, le juge de première instance et les juges majoritaires de la Cour d'appel insistent abondamment sur l'intention exprimée par l'appelant de se retirer de la société intimée à titre d'administrateur, de dirigeant et d'actionnaire pour justifier le rejet de son recours pour abus. Ils sont d'avis que la présente affaire ne soulève qu'une simple question de crédibilité.

[164] Avec égards, une telle conclusion ne tient aucunement compte de la portée du formalisme qui s'impose en droit des sociétés. De plus, cette conclusion fait totalement abstraction de la personnalité juridique distincte de la société intimée. Le juge de première instance et les juges majoritaires de la Cour d'appel, en ne se préoccupant que de la question de savoir si l'appelant avait exprimé son intention de se retirer de la société intimée, ont esquivé la principale question en litige, à savoir celle du caractère abusif ou non de la conduite de la société intimée.

[165] L'article 76 *LCSA* est on ne peut plus clair. Une société ne peut inscrire un transfert d'actions dans ses registres sans d'abord procéder à certaines vérifications. La loi soumet l'inscription d'un transfert d'actions à des conditions préalables très strictes, dont l'endossement du titre et le caractère régulier du transfert :

76 (1) L'émetteur doit procéder à l'inscription du transfert d'une valeur mobilière nominative lorsque les conditions suivantes sont réunies :

a) la valeur mobilière est endossée par une personne compétente au sens de l'article 65;

b) des assurances suffisantes sur l'authenticité et la validité de cet endossement sont données;

c) il n'est pas tenu de s'enquérir de l'existence d'oppositions ou il s'est acquitté de cette obligation;

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(d) any applicable law relating to the collection of taxes has been complied with;

(e) the transfer is rightful or is to a *bona fide* purchaser; and

(f) any fee referred to in subsection 49(2) has been paid.

(2) Where an issuer has a duty to register a transfer of a security, the issuer is liable to the person presenting it for registration for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

[166] The *CBCA* and the respondent company's articles and by-laws required the company to make certain minimal inquiries before registering the transfer, one of which involved ensuring that the appellant's share certificate had been endorsed. The respondent company's failure to make such inquiries in this case was in itself a form of oppression. This conclusion is even more valid where, as here, this requirement is set out in black and white on the share certificate.

[167] It is contrary to basic principles of Quebec civil law to argue, as the respondent company does, that the intention expressed by the appellant in this case resulted in an agreement of wills even though there was no agreement on the juridical operation being contemplated. If the appellant and Mr. Rosati did not actually agree, on May 25, 2005, on the terms of the appellant's withdrawal from the respondent company as a shareholder, the intention the appellant expressed in this regard was at most an offer to contract. To conclude that the expression of such an intention bars the appellant's claim for oppression — thereby approving after the fact the transfer registered by the respondent company in its registers — is contrary to the law, to fairness and to common sense.

C. *Oppression Remedy*

[168] For the purposes of my analysis on the oppression remedy, I will deal in turn with: (1) the conditions for making a claim for oppression, (2) the duties owed by the respondent company

d) les lois relatives à la perception de droits ont été respectées;

e) le transfert est régulier ou est effectué au profit d'un acheteur de bonne foi;

f) les droits prévus au paragraphe 49(2) ont été acquittés.

(2) L'émetteur tenu de procéder à l'inscription du transfert d'une valeur mobilière est responsable, envers la personne qui la présente à cet effet, du préjudice causé par tout retard indu ou par tout défaut ou refus.

[166] La *LCSA* de même que les statuts et les règlements de la société intimée exigeaient que cette dernière fasse un minimum de vérifications, notamment s'assurer que le certificat d'actions de l'appelant avait été endossé, avant de procéder à l'inscription du transfert. L'omission de telles vérifications par la société intimée en l'espèce constituait en soi une forme d'abus. Pareille conclusion est d'autant plus justifiée lorsque, comme dans la présente affaire, cette exigence figure en toutes lettres dans le certificat d'actions.

[167] Soutenir, comme le fait la société intimée, que l'intention exprimée par l'appelant en l'espèce donnait lieu à un accord de volontés, et ce, malgré l'absence d'entente quant à l'opération juridique projetée, va à l'encontre de principes élémentaires du droit civil québécois. Si l'appelant et M. Rosati ne se sont effectivement pas entendus le 25 mai 2005 sur les modalités du retrait de l'appelant à titre d'actionnaire de la société intimée, l'intention exprimée par l'appelant à cet égard constituait tout au plus une offre de contracter. Conclure que l'expression d'une telle intention constitue une fin de non-recevoir au recours pour abus de l'appelant — avalisant ainsi a posteriori le transfert inscrit par la société intimée dans ses registres — heurte la loi, l'équité et le sens commun.

C. *Recours pour abus*

[168] Pour les fins de mon analyse au sujet du recours pour abus, j'aborderai tour à tour : (1) les conditions d'ouverture de ce recours, (2) les obligations de la société intimée quant à l'inscription d'un

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in registering a transfer of shares and the oppression that resulted from its failure to discharge them, (3) the alleged agreement between the appellant and Mr. Rosati regarding the shares in question and, finally, (4) the question whether the claim is prescribed.

(1) Conditions for Making a Claim for Oppression

[169] Section 241(2) *CBCA* provides that a complainant may apply to a court to rectify matters resulting from a corporation's conduct where

> **(a)** any act or omission of the corporation . . . effects a result,
>
> **(b)** the business or affairs of the corporation . . . are or have been carried on or conducted in a manner, or
>
> **(c)** the powers of the directors of the corporation . . . are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer . . . .

[170] In *Budd v. Gentra Inc.* (1998), 111 O.A.C. 288, the Ontario Court of Appeal described the purpose of the oppression remedy and the nature of the relevant conduct as follows:

> Section 241 provides a statutory means whereby corporate stakeholders may gain redress for corporate conduct which has one of the effects described in s. 241(2). The section serves as a judicial brake against abuse of corporate powers, particularly, but not exclusively, by those in control of a corporation and in a position to force the will of the majority on the minority. Section 241 enables the court to intercede in the affairs and operation of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance. [para. 32]

[171] The oppression remedy introduced by the reform of corporate law that began in the 1970s

transfert d'actions et la situation d'abus provoquée par son omission de s'en acquitter, (3) la prétendue entente entre l'appelant et M. Rosati quant aux actions en cause et, enfin, (4) la question de la prescription du recours.

(1) Les conditions d'ouverture du recours pour abus

[169] Le paragraphe 241(2) *LCSA* prévoit qu'un plaignant peut demander au tribunal de redresser toute situation provoquée par la société lorsqu'elle

> abuse des droits des détenteurs de valeurs mobilières, créanciers, administrateurs ou dirigeants, ou, se montre injuste à leur égard en leur portant préjudice ou en ne tenant pas compte de leurs intérêts :
>
> **a)** soit en raison de son comportement;
>
> **b)** soit par la façon dont elle conduit ses activités commerciales ou ses affaires internes;
>
> **c)** soit par la façon dont ses administrateurs exercent ou ont exercé leurs pouvoirs.

[170] La Cour d'appel de l'Ontario, dans l'affaire *Budd c. Gentra Inc.* (1998), 111 O.A.C. 288, décrit ainsi l'objet du recours pour abus et la nature de la conduite visée :

> [TRADUCTION] L'article 241 [de la *LCSA*] permet à un intéressé dans la société d'obtenir une ordonnance pour remédier au comportement de la société qui a l'un des effets mentionnés au par. 241(2). Il constitue un frein judiciaire à l'abus des pouvoirs de la société, en particulier, mais pas seulement, par les actionnaires majoritaires susceptibles d'infléchir la volonté des actionnaires minoritaires. L'article 241 permet au tribunal de s'immiscer dans les affaires et dans l'exploitation d'une société et d'annuler les décisions des personnes auxquelles incombe la régie de l'entreprise. [par. 32]

[171] Le recours pour abus introduit par la réforme du droit des sociétés amorcée dans les années

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gives the courts significant powers in respect of the internal affairs of the corporation in question. It is an equitable remedy that, *inter alia*, allows a corporation's directors, officers and shareholders to resolve their disputes in a case involving oppression.

[172] Shareholders of a closely held corporation sometimes find it unnecessary to enter into a detailed agreement to govern their internal relationships. However, a shareholder may have legitimate expectations that go beyond what is specifically provided for in the corporation's articles and by-laws; an oppression remedy such as the one provided for in s. 241 *CBCA* is therefore all the more justified.

[173] As this Court noted in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, s. 241 *CBCA* is extremely broad in scope. The broad powers this section confers on a court enable the court, *inter alia*, to prevent a corporation from arguing that, because its actions were lawful, the oppression remedy is not available to a complainant: Crête and Rousseau, at paras. 1576-77.

[174] In some circumstances, where an alleged illegality is also oppressive or unfairly prejudicial, the oppression remedy will also make it possible to sanction a corporation for failure to discharge its legal duties, although proof of such a failure is not a prerequisite under s. 241 *CBCA*:

> . . . the oppression remedy does not turn on legal rights as much as on concepts of fairness and equity. Conduct may be oppressive even if it is "legal" in the sense that it is based on the exercise of a legal right. The remedy gives the court broad, equitable jurisdiction to enforce not just what is legal but what is fair. Although some courts have tied oppression relief to the establishment of some type of common legal claim, the oppression remedy is not simply a codification of the common law. The weight of jurisprudence holds that, although a breach of a legal duty will constitute oppression, it is not a prerequisite to a finding of oppression. As a result, a finding of oppression does not require the applicant to

70 confère aux tribunaux d'importants pouvoirs à l'égard des affaires internes de la société visée. Il s'agit d'un recours en equity qui permet notamment aux administrateurs, aux dirigeants et aux actionnaires d'une société de résoudre leurs conflits en cas d'abus.

[172] Dans une société par actions à capital fermé, les actionnaires jugent parfois inutile de conclure une entente détaillée pour régir leurs rapports internes. Or, un actionnaire peut avoir des attentes légitimes qui dépassent le cadre de ce qui est spécifiquement prévu dans les statuts et règlements de la société; un recours pour abus comme celui que prévoit l'art. 241 *LCSA* est donc d'autant plus justifié.

[173] Comme le rappelle notre Cour dans l'arrêt *BCE Inc. c. Détenteurs de débentures de 1976*, 2008 CSC 69, [2008] 3 R.C.S. 560, la portée de l'art. 241 *LCSA* est extrêmement large. Les vastes pouvoirs conférés au tribunal par cette disposition lui permettent notamment d'empêcher la société d'opposer la légalité de ses actes comme fin de non-recevoir au recours pour abus d'un plaignant : Crête et Rousseau, par. 1576-1577.

[174] Le recours pour abus permettra également, dans certaines circonstances, lorsque l'illégalité alléguée constitue par ailleurs un abus ou un acte injustement préjudiciable, de sanctionner la société qui omet de se conformer à ses obligations légales, même si la démonstration d'une telle omission ne constitue pas une condition préalable aux fins de l'art. 241 *LCSA* :

> [TRADUCTION] . . . le recours pour abus repose moins sur des droits reconnus par la loi que sur des notions d'équité et de justice. Une conduite peut être abusive même si elle est "légale" au sens où elle résulte de l'exercice d'un droit reconnu par la loi. L'exercice du recours confère au tribunal le pouvoir général, fondé sur l'equity, de faire respecter non seulement ce qui est légal, mais aussi ce qui est juste. Certains tribunaux ont subordonné leur intervention à l'établissement d'une quelconque réclamation en common law, mais le recours pour abus n'est pas seulement le résultat de la codification de la common law. Il appert de la jurisprudence que même si le manquement à une obligation légale constitue un abus,

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establish conduct that is subject to redress at law. When determining whether conduct is oppressive, courts have been admonished to look at business realities and not narrow legalities. [Emphasis added; footnotes omitted.]

(M. Koehnen, *Oppression and Related Remedies* (2004), at pp. 78-79)

[175] According to the analytical approach set out in *BCE*, a court must proceed in two stages in considering a claim under s. 241 *CBCA*. First, the court must determine whether the evidence shows that the complainant had a reasonable expectation having regard to the facts of the case before it. Then, it must determine whether the conduct contrary to that expectation was oppressive or unfairly prejudicial within the meaning of s. 241 *CBCA*: *BCE*, at para. 68.

[176] If the court concludes that there was oppressive conduct on the corporation's part, it then has a broad discretion to decide what remedial order to make. Section 241 *CBCA* contains a non-exhaustive list of orders that can be made; the contemplated order must take the parties' mutual interests into account.

[177] At the first stage, that of the reasonable expectation, the court can consider various factors, as this Court noted in *BCE* (at para. 72):

Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[178] I cannot subscribe to the view that, by expressing an intention to withdraw from the respondent company as a shareholder, Mr. Mennillo extinguished any reasonable expectations he may

il n'est pas requis pour que l'on puisse conclure à l'abus. Partant, pour prouver l'abus, le demandeur n'a pas à établir l'existence d'une conduite qui justifie un redressement en droit. On a exhorté les tribunaux appelés à se prononcer sur le caractère abusif d'une conduite à tenir compte de la réalité commerciale et non des considérations strictement juridiques. [Je souligne; notes en bas de page omises.]

(M. Koehnen, *Oppression and Related Remedies* (2004), p. 78-79)

[175] Dans le cadre d'un recours fondé sur l'art. 241 *LCSA*, le tribunal doit, suivant la méthode d'analyse mise de l'avant dans l'arrêt *BCE*, procéder en deux étapes. Il doit d'abord déterminer si la preuve démontre une attente raisonnable du plaignant compte tenu des faits propres à l'espèce. Il doit ensuite déterminer si la violation de cette attente constitue un abus ou un acte injustement préjudiciable au sens de l'art. 241 *LCSA* : *BCE*, par. 68.

[176] Lorsque le tribunal conclut qu'il y a eu conduite abusive de la part de la société, il dispose alors d'un large pouvoir discrétionnaire pour choisir l'ordonnance réparatrice à rendre. L'article 241 *LCSA* prévoit une liste non exhaustive d'ordonnances qu'il peut imposer, l'ordonnance envisagée devant prendre en compte les intérêts mutuels des parties.

[177] À la première étape axée sur l'attente raisonnable, le tribunal peut prendre en compte différents facteurs, comme l'a rappelé notre Cour dans *BCE* (par. 72) :

Des facteurs utiles pour l'appréciation d'une attente raisonnable ressortent de la jurisprudence. Ce sont notamment les pratiques commerciales courantes, la nature de la société, les rapports entre les parties, les pratiques antérieures, les mesures préventives qui auraient pu être prises, les déclarations et conventions, ainsi que la conciliation équitable des intérêts opposés de parties intéressées.

[178] Je ne puis souscrire à l'opinion selon laquelle en exprimant l'intention de se retirer de la société intimée à titre d'actionnaire, M. Mennillo mettait fin à toutes attentes raisonnables qu'il pouvait

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have had as regards his remaining on the company's books as a shareholder, or that the expression of that intention barred his claim for oppression. By that logic, the mere expression of an intention to withdraw from a corporation as a shareholder would also extinguish the reasonable expectation that the corporation in question will act in accordance with the law and with its articles and by-laws and will make the necessary inquiries before depriving a person of his or her shareholder status, thereby defeating the oppression remedy. I cannot accept this reasoning for the reasons that follow.

[179] First, the *CBCA* itself does not limit access to the oppression remedy in such a manner. Section 238 provides that a complainant (including one who makes a claim for oppression) may be a registered holder of a security but may also be a former registered holder of a security of a corporation. The s. 241 remedy is therefore available to a former shareholder, not only one who has allegedly expressed an intention to cease to be a shareholder, but also one who has allegedly completed a specific juridical operation by which he or she effectively transferred his or her shares.

[180] Next, where the complainant's expectations are based on strict legal rules and the corporation's impugned conduct is alleged to have been unlawful, it is my view that the question of reasonable expectations plays an extremely limited role, or even no role at all. This is readily understandable, since shareholders are entitled to expect a corporation to act in accordance with its articles and by-laws and, more generally, with the law. These are, so to speak, presumed expectations:

> It is submitted that the shareholders' reasonable expectations analysis is the most appropriate theory to determine whether the interests of a shareholder have been unfairly prejudiced or unfairly disregarded in the context of a closely-held corporation. The analysis goes to the heart of the unfairness on an intuitive level. It also defines the standard of unfairness in a manner that is conducive to a principled application at law.
>
> Of course other circumstances can attract the remedial scope of the oppression remedy. Corporate action which

avoir de demeurer dans les registres de la société en tant qu'actionnaire, ni que l'expression de cette intention constituait une fin de non-recevoir à son recours pour abus. Selon cette logique, la simple expression de l'intention de se retirer d'une société en tant qu'actionnaire mettrait également fin à l'attente raisonnable que la société en question agisse en conformité avec la loi et ses statuts et règlements et qu'elle procède aux vérifications requises avant de priver une personne de son statut d'actionnaire, faisant ainsi échec au recours pour abus. Je ne peux souscrire à ce raisonnement pour les raisons qui suivent.

[179] Tout d'abord, la *LCSA* elle-même ne limite pas ainsi l'accès au recours pour abus. En effet, l'art. 238 prévoit qu'un plaignant (notamment en cas de recours pour abus) peut être le détenteur inscrit de valeurs mobilières, mais également un ancien détenteur de valeurs mobilières d'une société. Donc, le recours prévu à l'art. 241 est ouvert à un ancien actionnaire, non seulement celui qui aurait exprimé une intention de ne plus l'être, mais aussi celui qui aurait conclu une opération juridique précise en vertu de laquelle il a effectivement cédé ses actions.

[180] Ensuite, lorsque les attentes du plaignant se fondent sur le droit strict, et qu'il allègue l'illégalité de la conduite reprochée à la société, je suis d'avis que la question des attentes raisonnables joue un rôle extrêmement limité et n'en joue peut-être même aucun. Cela se comprend aisément puisque les actionnaires sont en droit de s'attendre à ce que la société agisse en conformité avec ses statuts et règlements et, plus généralement, avec la loi. Il s'agit pour ainsi dire d'attentes présumées :

> [TRADUCTION] Les attentes raisonnables de l'actionnaire constitueraient le meilleur cadre d'analyse pour décider si une société fermée s'est montrée injuste à l'égard d'un actionnaire en lui portant préjudice ou en ne tenant pas compte de ses intérêts. L'analyse s'attache alors intrinsèquement à la notion d'injustice et se veut intuitive. Elle définit aussi l'injustice d'une manière propice à l'application d'un principe de droit.
>
> D'autres situations peuvent évidemment justifier le prononcé d'une ordonnance pour remédier à un abus.

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is contrary to the constitution of the corporation, or which constitutes a breach by the directors of their duties to the corporation, may be considered to be oppressive, or to unfairly prejudice or unfairly disregard the interests of the shareholders. In these situations, an analysis of shareholders' reasonable expectations is arguably of little substantive importance. To say that shareholders have a reasonable expectation that corporate action will be taken lawfully, or that directors will act in accordance with their duties, is a rather banal statement. The conclusion that unlawful conduct should give rise to relief under the oppression remedy could be reached on the basis of an alternative theory. [Emphasis added.]

(J. A. Campion, S. A. Brown and A. M. Crawley, "The Oppression Remedy: Reasonable Expectations of Shareholders", in *Law of Remedies: Principles and Proofs* (1995), 229, at p. 249)

[181] In my view, the question of reasonable expectations is of greater relevance to the determination of a shareholder's rights that are not specifically provided for in the legislation and in the corporation's articles and by-laws. Indeed, this Court observed in *BCE* that "[the] oppression [remedy] gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (para. 58).

[182] As a result, where, as in the instant case, a corporation is alleged to have acted unlawfully, the focus of the analysis is not so much on the question of reasonable expectations as on that of whether the corporation's conduct was in fact unlawful and, therefore, oppressive: Martel, at p. 31-80.

[183] While it is true, as the Court noted in *BCE*, that "[t]he size, nature and structure of the corporation are relevant factors in assessing reasonable expectations" and that "[c]ourts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company" (para. 74), that latitude depends, of course, on the nature of the alleged violation.

L'acte de la société qui va à l'encontre de ses statuts constitutifs ou qui constitue un défaut, par les administrateurs, de respecter leurs obligations envers la société peut être considéré comme un abus des droits de l'actionnaire ou comme une mesure injuste lui causant préjudice ou ne tenant pas compte de ses intérêts. Dans de telles situations, on pourrait soutenir que l'analyse fondée sur les attentes raisonnables de l'actionnaire a peu de pertinence. Que l'actionnaire s'attende raisonnablement à ce que la société agisse en toute légalité ou à ce que les administrateurs agissent conformément à leurs obligations est plutôt évident. La conclusion selon laquelle une conduite illégale devrait permettre un redressement dans le cadre d'un recours pour abus pourrait être tirée par application d'une autre théorie. [Je souligne.]

(J. A. Campion, S. A. Brown et A. M. Crawley, « The Oppression Remedy : Reasonable Expectations of Shareholders », dans *Law of Remedies : Principles and Proofs* (1995), 229, p. 249)

[181] À mon avis, la question des attentes raisonnables a une plus grande pertinence lorsqu'il s'agit de déterminer les droits d'un actionnaire au-delà de ce qui est spécifiquement prévu dans la loi et les statuts et règlements de la société. D'ailleurs, notre Cour, dans *BCE*, rappelait que « la demande de redressement pour abus [. . .] confère au tribunal un vaste pouvoir, en equity, d'imposer le respect non seulement du droit, mais de l'équité » (par. 58).

[182] En conséquence, lorsque l'illégalité de la conduite de la société est alléguée, comme c'est le cas en l'espèce, l'analyse ne porte pas tant sur la question des attentes raisonnables que sur celle visant à déterminer si la conduite de la société est effectivement illégale et, partant, abusive : Martel, par. 31-213.

[183] S'il est vrai, comme le souligne notre Cour dans *BCE*, que « [l]a taille, la nature et la structure de la société constituent [. . .] des facteurs pertinents dans l'appréciation d'une attente raisonnable » et qu'« [i]l est possible que les tribunaux accordent une plus grande latitude pour déroger à des formalités strictes aux administrateurs d'une petite société fermée qu'à ceux d'une société ouverte de plus grande taille » (par. 74), cette latitude dépend bien sûr de la nature de la violation alléguée.

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[184] In sum, mere irregularities that are not oppressive or unfairly prejudicial will not be sufficient to justify granting the remedy to the complainant. On the other hand, a failure to comply with a mandatory legislative provision or with the requirements set out in the corporation's articles and by-laws that relate to the very recognition of shareholder status may justify granting the oppression remedy. In my view, this is particularly important for the protection of a minority shareholder in a closely held corporation like Intramodal. Otherwise, what remedy would be available to a shareholder who claims to have been unlawfully dispossessed?

(2) Oppressive Conduct on the Respondent Company's Part

[185] In this case, several aspects of the respondent company's conduct are problematic.

[186] First of all, there is the impugned resolution, which was passed in 2007, retroactive to 2005. There is nothing more specific in the evidence as regards the date it was passed. The resolution, of which the appellant learned only after he had brought his claim, reads as follows:

IT WAS RESOLVED THAT:

. . .

5. The Corporation also hereby approves and accepts the transfer by **Johnny MENNILLO** of the Forty-Nine (49) Class "A" Shares registered in his name, represented by Certificate number 2 unto **Mario ROSATI**.

6. In view of said transfer of Shares, it is hereby confirmed that effective this day **Mario ROSATI** is the Sole Shareholder of the Corporation, having One Hundred (100) Class "A" Shares registered in his name.

Each and every of the foregoing six (6) Resolutions is hereby consented to by the Sole Director and Sole Shareholder of the Corporation entitled to vote on such Resolutions pursuant to the Canada Business Corporations

[184] En somme, de simples irrégularités, qui ne constituent pas pour autant un abus ou un acte injustement préjudiciable, ne seront pas suffisantes pour donner ouverture au recours du plaignant. À l'inverse, l'omission de se conformer à une disposition impérative de la loi ainsi qu'aux exigences prévues par les statuts et règlements de la société en ce qui concerne la reconnaissance même du statut d'actionnaire pourra donner ouverture au recours pour abus. Je suis d'avis que cela est particulièrement important pour la protection de l'actionnaire minoritaire dans une société fermée telle qu'Intramodal. Sinon, quel recours serait à la disposition de l'actionnaire qui se prétend illégalement évincé?

(2) La situation d'abus provoquée par la société intimée

[185] En l'espèce, plusieurs aspects de la conduite de la société intimée posent problème.

[186] Il y a d'abord la résolution attaquée, qui a été adoptée en 2007, avec effet rétroactif en 2005. La preuve n'est pas plus précise quant à la date de son adoption. Cette résolution, dont l'appelant n'a eu connaissance qu'une fois son recours entrepris, est libellée comme suit :

[TRADUCTION]

IL A ÉTÉ RÉSOLU QUE :

. . .

5. Par la présente, la Société approuve et accepte la cession par **Johnny MENNILLO** à **Mario ROSATI** de quarante-neuf (49) actions de catégorie « A » immatriculées à son nom, tel qu'attesté par le certificat numéro 2.

6. En raison de cession d'actions, il est confirmé par la présente, avec effet immédiatement, que **Mario ROSATI** est l'unique actionnaire de la Société, cent (100) actions de catégorie « A » étant immatriculées à son nom.

Chacune des six (6) résolutions qui précèdent est par la présente approuvée par l'unique administrateur et actionnaire de la Société ayant droit de vote à l'égard de telles résolutions suivant la Loi canadienne sur les sociétés

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Act as evidenced by his signature hereto this 25th day of May, 2005 10.00 a.m. [Underlining added; bold in original.]

(A.R., vol. VIII ("Minutes Book of Intramodal"), at p. 118)

[187] Next, the evidence shows that the respondent company registered the transfer referred to in the resolution in its registers. Under the *CBCA*, the company could not register such a transfer unless the security was endorsed, which was not the case here.

[188] Section 60(1) *CBCA* provides that it is only on "delivery" of a security, that is, at the time of the voluntary transfer of possession, that the purchaser acquires the rights in the security that the transferor had or had authority to convey:

(1) On delivery of a security the purchaser acquires the rights in the security that the transferor had or had authority to convey, except that a purchaser who has been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim does not improve their position by taking from a later *bona fide* purchaser.

[189] Furthermore, the purchaser of a security may become a *bona fide* purchaser only as of the time of its endorsement: s. 64 *CBCA*. It is worth nothing that s. 65(3) *CBCA* says the following about an endorsement for the purposes of the assignment or transfer of a security:

(3) An endorsement of a security in registered form is made when an appropriate person signs, either on the security or on a separate document, an assignment or transfer of the security or a power to assign or transfer it, or when the signature of an appropriate person is written without more on the back of the security.

[190] Endorsement is a condition that must be met for a contract entered into by two shareholders with respect to the purchase of a security to have any legal effect on the corporation. Moreover, if the necessary endorsements are not on or with the security and the corporation registers the transfer of the security anyway, it is liable for any loss incurred as a result of the registration: s. 79(1)(a) *CBCA*. And as

par actions, ce qui est attesté par sa signature apposée en ce 25e jour de mai 2005, à 10 heures. [Je souligne; en caractères gras dans l'original.]

(d.a., vol. VIII (les « registres d'Intramodal »), p. 118)

[187] Ensuite, la preuve révèle que la société intimée a inscrit dans ses registres le transfert auquel la résolution réfère. Or, en vertu de la *LCSA*, la société ne pouvait procéder à l'inscription d'un tel transfert que si la valeur mobilière était endossée, ce qui n'est pas le cas en l'espèce.

[188] En effet, le par. 60(1) *LCSA* prévoit que les droits transmissibles de celui qui cède la valeur mobilière ne passent à l'acquéreur qu'à la « livraison » de la valeur mobilière, c'est-à-dire au moment du transfert volontaire de possession :

(1) Dès livraison de la valeur mobilière, les droits transmissibles du cédant passent à l'acquéreur, mais le fait de détenir une valeur d'un acheteur de bonne foi ne saurait modifier la situation du cessionnaire qui a participé à une fraude ou à un acte illégal mettant en cause la validité de cette valeur ou qui, en tant qu'ancien détenteur, connaissait l'existence d'une opposition.

[189] Qui plus est, l'acquéreur d'une valeur mobilière ne devient acquéreur de bonne foi qu'après son endossement : art. 64 *LCSA*. Il est à noter que le par. 65(3) *LCSA* précise ce qui suit au sujet de l'endossement aux fins de cession ou de transfert d'une valeur mobilière :

(3) L'endossement d'une valeur mobilière nominative aux fins de cession ou de transfert se fait par l'apposition, soit à l'endos de cette valeur sans autre formalité, soit sur un document distinct ou sur une procuration à cet effet, de la signature d'une personne compétente.

[190] L'endossement constitue une condition *sine qua non* pour qu'un contrat intervenu entre deux coactionnaires quant à l'acquisition d'une valeur mobilière puisse avoir quelque effet juridique sur la société. D'ailleurs, si la valeur mobilière n'est pas assortie des endossements requis, et que la société procède tout de même à l'inscription de son transfert, elle est responsable du préjudice causé par une

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I mentioned above, s. 76 *CBCA* expressly provides that a corporation may not register a transfer in its records and registers without first making certain inquiries, one of which relates to the required endorsements.

[191] In the instant case, the company's articles expressly imposed other restrictions, including that the company *could not* register a transfer of shares in its registers unless the share certificate had been duly endorsed and all requirements with respect to transfers had been met:

C. TRANSFER OF SECURITIES

. . .

133. Registration of transfers. Subject to the Act and to the provisions of paragraph 135 below, no transfer of securities or of warrants shall be registered in the securities' register of the Corporation unless:

(a) the security certificate has been duly endorsed by the proper person;

(b) a reasonable assurance has been given to the effect that the endorsement is genuine;

(c) every act or statute in Canada or in a province or territory of Canada with respect to the collection of income tax, sales taxes or charges, duties or fees has been complied with;

(d) any restriction on its issue, on its transfer or on the holding thereof as authorized by the articles has been complied with; and

(e) any lien on the securities as provided for in paragraph 131 above has been reimbursed. [Bold in original.]

(Minutes Book of Intramodal, at pp. 94-95)

[192] Clearly, endorsement of the share certificate, as a precondition to the registration of a transfer

telle inscription : al. 79(1)a) *LCSA*. De plus, tel que mentionné précédemment, l'art. 76 *LCSA* prévoit expressément qu'une société ne peut inscrire un transfert d'actions dans ses livres et registres sans d'abord procéder à certaines vérifications, y compris quant aux endossements requis.

[191] En l'espèce, d'autres restrictions s'appliquaient expressément en vertu des statuts de la société, notamment celle voulant que cette dernière *ne puisse* inscrire un transfert d'actions dans ses registres que si le certificat d'actions a été régulièrement endossé et que toutes les exigences relatives au transfert ont été respectées :

[TRADUCTION]

C. CESSION DE VALEURS MOBILIÈRES

. . .

133. Inscription d'une cession. Sous réserve de la Loi et du paragraphe 135, la cession d'une valeur mobilière ou d'un bon de souscription ne peut être inscrite au registre des valeurs mobilières de la Société que si :

(a) le certificat d'action est dûment endossé par la personne habilitée à le faire;

(b) des assurances raisonnables sont données que la signature ainsi apposée est authentique;

(c) les exigences de toute loi canadienne, y compris d'une province ou d'un territoire du Canada, relative à la perception de l'impôt sur le revenu, de la taxe de vente ou de frais ou de droits ont été respectées;

(d) toute restriction applicable à son émission, à sa cession ou à sa détention autorisées par les statuts a été respectée;

(e) toute sûreté réelle grevant la valeur mobilière comme le prévoit le paragraphe 131 a été levée. [En caractères gras dans l'original.]

(registres d'Intramodal, p. 94-95)

[192] De toute évidence, l'endossement du certificat d'actions, à titre de condition préalable à

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of shares, was important enough for the respondent company's founders to consider it appropriate to include an express provision to this effect in their articles, in addition to mentioning it on the share certificates.

[193] The following note appears on the appellant's certificate: "Only the person whose name appears on the front of this certificate or his duly authorized agent or representative may validly transfer the shares represented by this certificate" (Minutes Book of Intramodal, at p. 170).

[194] The very existence of a legal duty that the respondent company make the necessary inquiries before registering a transfer of shares created a reasonable expectation for the company's shareholders. It is clear that the respondent company failed to discharge this duty and that its failure to do so was more than a mere irregularity.

[195] The appellant had a reasonable expectation that the respondent company would act in accordance with the law and with its articles and by-laws. He had a reasonable expectation that the respondent company would make the necessary inquiries before depriving him of his status as a shareholder. The failure to do so was unfairly prejudicial to the appellant insofar as it deprived him of that status.

[196] The evidence shows that the share certificate in question was not endorsed. It also shows that the respondent company made no inquiries before passing the resolution to transfer the appellant's shares, and that the resolution was passed retroactively and was signed by a single shareholder (namely Mr. Rosati). The respondent company's lawyer admitted on cross-examination that his job was to do what Intramodal's majority shareholder, Mr. Rosati, asked and nothing more:

Q. So, if you're told by a client to remove a shareholder without a signed document, will you do it?

l'inscription d'un transfert d'actions, était suffisamment important pour que les fondateurs de la société intimée jugent pertinent d'inclure une disposition expresse à cet effet dans leurs statuts, en plus d'en faire mention sur les certificats d'actions.

[193] Sur le certificat de l'appelant, on peut en effet lire la mention suivante : [TRADUCTION] « Seule la personne dont le nom figure au recto du présent certificat ou son mandataire ou son représentant dûment autorisé peut valablement céder les actions dont la détention est attestée par le présent certificat » (registres d'Intramodal, p. 170).

[194] L'obligation légale de la société intimée de procéder aux vérifications requises avant d'inscrire le transfert d'actions créait *ipso facto* une attente raisonnable chez ses actionnaires. Il est manifeste que la société intimée n'a pas respecté cette obligation et que son défaut dépasse le cadre d'une simple irrégularité.

[195] L'appelant avait l'attente raisonnable que la société intimée agisse en conformité avec la loi et ses statuts et règlements. Il avait l'attente raisonnable que la société intimée, avant de le priver de son statut d'actionnaire, procède aux vérifications requises. L'omission de ce faire constitue un acte injustement préjudiciable à l'appelant dans la mesure où elle le prive de son statut d'actionnaire.

[196] La preuve révèle que le certificat d'actions en cause n'a pas été endossé. Elle révèle également que la société intimée n'a fait aucune vérification avant d'adopter la résolution de transfert des actions de l'appelant, et que c'est rétroactivement et avec la signature d'un seul actionnaire (c'est-à-dire M. Rosati) que la résolution a été adoptée. L'avocat de la société intimée a reconnu en contre-interrogatoire que sa tâche consistait à obtempérer aux demandes de l'actionnaire majoritaire d'Intramodal, M. Rosati, sans plus :

[TRADUCTION]

Q. Donc, si un client vous dit de supprimer le nom d'un actionnaire sans vous remettre un document signé à l'appui, le faites-vous?

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A. If I have instructions, I will do what the instructions are.

[197] Despite all the emphasis placed on the appellant's expressed intention to withdraw from Intramodal, the fact is that Intramodal had no way of knowing that such an intention had actually been expressed, since, by its own admission, it did not make the required inquiries in this regard, which it considered unnecessary.

[198] To conclude that there was oppression in the circumstances is not to allow Mr. Mennillo to use the oppression remedy provided for in s. 241 *CBCA* as an instrument of oppression, but simply to recognize the obvious: Mr. Rosati used his position as majority shareholder to strip Mr. Mennillo of his status as a shareholder. To paraphrase the Ontario Court of Appeal in *Budd*, it was to put a brake on this very type of conduct that Parliament thought it necessary to introduce the oppression remedy provided for in s. 241 *CBCA*.

[199] If the respondent company had made the necessary inquiries, it would not have registered the transfer of shares. Assuming that there was in fact an agreement between the appellant and Mr. Rosati in this regard, the parties to the agreement would therefore have had to meet again to take the necessary steps to record the agreement and ensure that the legislated conditions were met. If Mr. Mennillo had in fact agreed to transfer his shares, it would have been a simple matter to ask him to sign Intramodal's resolution in 2007. In the event of a disagreement, Intramodal's majority shareholder could then have taken the necessary action to require the appellant to endorse his share certificate and sign the relevant corporate documents:

> The law requires that the transferor provide the purchaser with any "requisite necessary to obtain registration" of the transfer, and states that if he does not comply with the demand within a reasonable time, the purchaser may reject the transfer or consider the transfer contract to be rescinded. [Footnote omitted.]
>
> (Martel, at p. 16-30)

R. Si on me donne des instructions, j'agis conformément à ces instructions.

[197] Malgré toute l'insistance mise sur l'intention manifestée par l'appelant de se retirer d'Intramodal, le fait est qu'Intramodal n'avait aucun moyen de savoir qu'une telle intention avait effectivement été exprimée car, de son propre aveu, elle n'a pas fait les vérifications requises à cet égard, estimant que de telles vérifications n'étaient pas nécessaires.

[198] Conclure à l'abus dans les circonstances ne revient pas à permettre à M. Mennillo d'instrumentaliser le recours pour abus prévu par l'art. 241 *LCSA*, mais tout simplement à reconnaître l'évidence : M. Rosati a utilisé sa position d'actionnaire majoritaire pour dépouiller M. Mennillo de son statut d'actionnaire. Pour paraphraser la Cour d'appel de l'Ontario dans l'affaire *Budd*, c'est précisément afin de mettre un frein à ce genre de conduite que le législateur a cru nécessaire d'introduire le recours pour abus prévu à l'art. 241 *LCSA*.

[199] Si la société intimée avait fait les vérifications requises, elle n'aurait pas inscrit le transfert d'actions. À supposer qu'il y ait effectivement eu entente entre l'appelant et M. Rosati à cet égard, les parties à l'entente auraient alors dû se rencontrer à nouveau afin de prendre les moyens nécessaires pour consigner cette entente et s'assurer que les conditions établies par la loi étaient satisfaites. Si M. Mennillo avait effectivement consenti au transfert de ses actions, il aurait été très simple de lui demander de signer la résolution d'Intramodal en 2007. En cas de mésentente, l'actionnaire majoritaire d'Intramodal aurait alors pu intenter les recours nécessaires afin de forcer l'appelant à endosser son certificat d'actions et à signer les documents corporatifs pertinents :

> La loi impose au cédant l'obligation de fournir à l'acquéreur les pièces nécessaires à l'inscription du transfert, et précise que s'il ne se conforme pas à toute demande à cet effet dans un délai raisonnable, l'acquéreur peut refuser le transfert ou en demander la rescision. [Note en bas de page omise.]
>
> (Martel, par. 16-106)

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[200] A conclusion that Intramodal's conduct in this regard was prejudicial to the appellant does not require a lengthy explanation: that conduct unlawfully stripped him of his status as a shareholder. It is difficult to imagine how a business corporation could act more oppressively toward a shareholder than by depriving him or her of that status.

[201] The conduct of a corporation that approves a transfer of shares without making any inquiries and that confuses its interests with those of its majority shareholder, as if it were a mere puppet, is not less oppressive simply because another shareholder at some point expressed an intention to withdraw from the corporation without there being any agreement on the terms of such a withdrawal. To suggest otherwise would amount to encouraging a corporation's shareholders to refrain from participating in any kind of discussions or negotiations about a possible transfer of shares.

[202] The instant case concerns a complainant who was originally recognized as a shareholder, who alleges that the corporation has committed clear violations of the law and of its articles and by-laws, and who has applied for an oppression remedy under s. 241 *CBCA*. The oppressive situation created by the corporation can indeed be remedied by means of a claim for oppression, or of an application to rectify registers under s. 243 *CBCA* or an application under s. 247 *CBCA* to compel the corporation to discharge its duties, provided that the conditions for the chosen remedy are met, which is the case here. It should be noted that, independently of ss. 243 and 247 *CBCA*, s. 241(3)(k) gives the courts the power to order the rectification of registers and to sanction unlawful conduct on the corporation's part.

[203] The classic example of this situation can be found in *Journet v. Superchef Food Industries Ltd.*, [1984] C.S. 916, at p. 925, in which the Superior Court found the conduct of the corporation in question to be oppressive on the basis of several unlawful and fraudulent acts it had committed. The evidence that the acts were unlawful was considered sufficient

[200] Nul besoin d'une grande démonstration pour conclure que cette conduite d'Intramodal a été préjudiciable à l'appelant : elle l'a dépouillé illégalement de son statut d'actionnaire. Et il est difficile d'imaginer conduite plus abusive d'une société par actions à l'endroit d'un actionnaire que celle de le priver de ce statut.

[201] La conduite d'une société qui avalise un transfert d'actions sans vérification aucune, et qui confond ses intérêts avec ceux de son actionnaire majoritaire comme si elle n'était qu'une simple marionnette, n'est pas moins abusive seulement parce que, à un certain moment donné, un coactionnaire a exprimé son intention de se retirer de la société, sans qu'il y ait eu entente quant aux modalités d'un tel retrait. Soutenir le contraire revient à inciter les actionnaires d'une société à s'abstenir de toute forme de discussions ou de pourparlers relativement à un possible transfert d'actions.

[202] En l'espèce, il est question d'un plaignant dont le statut d'actionnaire a été initialement reconnu, qui reproche à la société des violations claires de la loi et de ses statuts et règlements, et qui intente un recours pour abus en vertu de l'art. 241 *LSCA*. La situation abusive provoquée par la société peut effectivement être corrigée par le truchement d'un tel recours, ou d'un recours en rectification des registres fondé sur l'art. 243 *LCSA*, ou encore d'un recours fondé sur l'art. 247 *LCSA* visant à contraindre la société à se conformer à ses obligations, pour autant que les conditions du recours choisi soient satisfaites, ce qui est le cas en l'espèce. Rappelons que l'al. 241(3)k), indépendamment des art. 243 et 247 *LCSA*, octroie au tribunal le pouvoir d'ordonner la rectification des registres et permet de sanctionner la société pour l'illégalité de sa conduite.

[203] L'exemple classique en la matière correspond à l'affaire *Journet c. Superchef Food Industries Ltd.*, [1984] C.S. 916, p. 925, où la Cour supérieure a conclu à une conduite abusive sur la base de plusieurs actes illégaux et frauduleux commis par la société en cause. La preuve de l'illégalité des actes a été jugée suffisante pour satisfaire les conditions

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to meet the conditions for the oppression remedy, and no additional evidence was required.

[204] In my view, the same reasoning applies in the case at bar. With respect for those who disagree, I find that the appellant has discharged his burden of proving the validity of his claim for oppression. The evidence shows that the company's actions, namely passing the resolution to transfer the appellant's shares, registering that transfer in its registers and subsequently filing declarations to the same effect, constituted violations of express provisions of the legislation and the company's articles and by-laws. This evidence was sufficient to justify a finding that the company's conduct was oppressive and prejudicial and that it warranted revocation of the company's resolution and the rectification of its registers.

[205] The purpose of the appellant's application is to obtain a conclusion that the company failed to discharge its legal duties and an order that its registers be rectified accordingly. As I mentioned above, the appellant could very well have brought an application under s. 243 or 247 *CBCA*. Had he done so, he would have been successful. In view of the liberal interpretation that has been given to s. 241 *CBCA* and the nature of the remedy being sought, it would not be very pragmatic to dismiss his claim simply because it was made under s. 241 rather than s. 243 or 247 *CBCA*. Raymonde Crête and Stéphane Rousseau comment as follows in this regard:

[TRANSLATION] A review of the case law shows that, in some cases, claimants apply for the oppression remedy even where the alleged acts are in fact clear violations of the rules that could easily give rise to alternative recourses under the legislation. Despite those alternatives, judges take a pragmatic approach in this regard and agree to intervene on the basis of the oppression remedy even though, in this context, proof of the unlawful acts limits the usefulness of interventions based on fairness involving the oppression remedy. We note, however, that there is nothing to prevent a claimant from joining to his or her claim other recourses provided for in the legislation with respect to business corporations or flowing from general law principles, such as a derivative action or an application for an investigation, a mandatory or

d'ouverture du recours pour abus et aucune preuve additionnelle n'a été exigée.

[204] À mon avis, le même raisonnement s'applique en l'espèce. J'estime, avec égards pour l'opinion contraire, que l'appelant s'est déchargé de son fardeau de preuve quant au bien-fondé de son recours pour abus. La preuve démontre que les actes commis par la société, soit l'adoption de la résolution de transfert des actions de l'appelant, l'inscription de ce transfert dans les registres et les déclarations subséquentes au même effet, constituent des violations des dispositions expresses de la loi, de ses statuts et de ses règlements. Il s'agit d'une preuve suffisante pour conclure à une conduite abusive et préjudiciable justifiant l'annulation de la résolution adoptée par la société et la rectification de ses registres.

[205] Le redressement demandé vise à faire reconnaître l'inobservation par la société de ses obligations légales et à faire rectifier ses registres en conséquence. Tel que mentionné ci-dessus, l'appelant aurait certes pu entreprendre un recours sur le fondement des art. 243 ou 247 *LCSA*. Il aurait alors eu gain de cause. Vu l'interprétation libérale de l'art. 241 *LCSA* et la nature du redressement demandé, ce serait faire preuve de bien peu de pragmatisme que de rejeter son recours pour le seul motif qu'il a été entrepris en vertu de l'art. 241 plutôt que des art. 243 ou 247 *LCSA*. À cet égard, les auteurs Raymonde Crête et Stéphane Rousseau écrivent ce qui suit :

L'examen de la jurisprudence montre que, dans certains cas, les demandeurs font appel au recours en cas d'abus même si les actes reprochés constituent en fait des violations claires de la réglementation qui peuvent aisément donner lieu à des recours alternatifs conformément à la loi. Malgré la présence de ces mesures alternatives, les juges adoptent en cette matière une approche pragmatique et acceptent d'intervenir sur la base du recours pour abus bien que, dans ce contexte, la preuve des actes illégaux réduise l'utilité des interventions fondées sur l'équité en vertu du recours en cas d'abus. Notons, par ailleurs, que rien n'empêche un demandeur de joindre à sa demande d'autres recours prévus dans la loi sur les sociétés par actions ou dans les principes de droit commun, notamment en y joignant un recours de nature oblique

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negatory order, the rectification of registers or even liquidation of the corporation. [Emphasis added; footnote omitted; para. 1629.]

[206] Section 241 *CBCA* is extremely broad in scope and gives a court broad powers: *BCE*, at para. 58. This extremely broad scope of the oppression remedy means that it is appropriate in the instant case to consider the recourse relating to rectification of registers (s. 243 *CBCA*) or the one relating to failure by the corporation to comply with the legislation or with its articles or by-laws (s. 247 *CBCA*).

[207] In any event, the conclusion that the respondent company unlawfully deprived the appellant of his status as a shareholder leads inescapably to the conclusion that its conduct in this case was oppressive. Indeed, what could be more oppressive than being unlawfully stripped of one's status as a shareholder?

[208] In my view, this conclusion is sufficient to dispose of the merits of the case. Nonetheless, in light of the importance attached by the parties to the agreement that is alleged to have been entered into by Mr. Mennillo and Mr. Rosati on May 25, 2005, and of my colleague's remarks in this regard, which could have serious consequences going beyond the scope of this case, I think it is important to discuss that issue.

(3) Alleged Agreement Between the Appellant and Mr. Rosati

(a) *Nature of the Alleged Agreement*

[209] My reading of the trial judge's reasons differs from that of the majority. In my view, the trial judge did not find that the appellant and Mr. Rosati had agreed on a transfer of shares. That interpretation, advanced by the respondent company, denotes a fragmented reading of the trial judge's reasons and distorts his conclusions. The trial judge instead concluded that, *given that the appellant's shares had been issued on condition that he guarantee the respondent company's debts*, the intention he

ou une demande en vue d'obtenir une enquête, une ordonnance mandatoire ou négatoire, la rectification des registres ou même la liquidation de la société. [Je souligne; note en bas de page omise; par. 1629.]

[206] La portée de l'art. 241 *LCSA* est extrêmement large et confère de vastes pouvoirs au tribunal : *BCE*, par. 58. Cette portée extrêmement large du recours pour abus permet de considérer dans la présente instance le recours en rectification des registres (art. 243 *LCSA*) ou celui pour inobservation par la société de la loi ou de ses statuts ou règlements (art. 247 *LCSA*).

[207] À tout événement, la conclusion selon laquelle la société intimée a illégalement privé l'appelant de son statut d'actionnaire mène irrémédiablement à la conclusion qu'il y a eu abus en l'espèce. En effet, quelle forme plus grave d'abus y a-t-il que celle de se faire dépouiller illégalement de son statut d'actionnaire?

[208] Cette conclusion suffit à mon avis pour statuer sur le fond de l'affaire. Néanmoins, vu l'importance accordée par les parties à la question et vu les propos de mon collègue sur celle-ci, lesquels pourraient avoir de lourdes conséquences dépassant le cadre du présent litige, j'estime important d'aborder la prétendue entente qui serait intervenue entre MM. Mennillo et Rosati le 25 mai 2005.

(3) La prétendue entente entre l'appelant et M. Rosati

a) *Nature de la prétendue entente*

[209] Ma lecture du jugement de première instance diffère de celle de la majorité. Je suis d'avis que le premier juge n'a pas conclu que l'appelant et M. Rosati s'étaient entendus afin de procéder à un transfert d'actions. Cette interprétation, mise de l'avant par la société intimée, dénote une lecture parcellaire du jugement de première instance et en dénature les conclusions. Le juge de première instance a plutôt conclu que l'intention exprimée par l'appelant de se retirer de la société, *dans la mesure*

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expressed of withdrawing from the company was sufficient for him to be stripped of his status as a shareholder:

[TRANSLATION] The Court concludes that Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of Intramodal's debts once it began operating. Mennillo refused to participate in this venture and asked to be removed from the company as a shareholder and a director effective May 25, 2005. As of that date, Mennillo agreed only to be a lender of $440,000 to his friend Rosati. The failure to complete the transfer of Mennillo's shares to Rosati resulted from an error or oversight on the part of Rosati's lawyer.

Since May 25, 2005, Mennillo has no longer been a shareholder or director of Intramodal. [Emphasis added; paras. 74-75.]

[210] These remarks are not open to differing interpretations. There is no doubt that deference is owed to the trial judge's findings of fact in the absence of a palpable and overriding error, and an appellate court does not have *carte blanche* to take isolated passages from the trial judge's reasons and give them a meaning they do not have. The trial judge's findings of fact must be considered as they are, and as a whole. In short, it is, in my respectful opinion, inaccurate to say that the trial judge's finding that the shares had been transferred was independent of their having been issued conditionally.

[211] My colleague's reasoning strikes me as contradictory. He is of the view that the trial judge accepted as a finding of fact that "Mr. Mennillo agreed that he would remain a shareholder only so long as he was willing to guarantee the corporation's debts" (reasons of Cromwell J., at paras. 4 and 61 (emphasis added)) and that "Mr. Mennillo agreed that he would remain a shareholder of the corporation on the condition that he guarantee its debts" (para. 10 (emphasis added)). Yet the rest of the trial judge's statement to the effect that the occurrence of the suspensive condition *resulted in a transfer of*

où ses actions avaient été émises conditionnellement à ce qu'il garantisse le passif de la société intimée, était suffisante pour le dépouiller de son statut d'actionnaire :

Le Tribunal arrive à la conclusion que Mennillo a détenu 49 actions ordinaires émises par Intramodal, le tout conditionnellement à ce que ce dernier garantisse l'ensemble des créances de Intramodal dès que cette dernière débute ses activités. Mennillo a refusé cette aventure et a demandé son retrait de la compagnie à titre d'actionnaire et d'administrateur à compter du 25 mai 2005. À compter de cette date, Mennillo a accepté de n'être que le prêteur d'une somme de 440 000 $ à son ami Rosati. Le fait que la cession des actions de Mennillo à Rosati n'ait pas été complétée résulte de l'erreur ou l'oubli de la part de l'avocat de Rosati.

Depuis le 25 mai 2005, Mennillo n'est plus détenteur d'aucune action ni administrateur de Intramodal. [Je souligne; par. 74-75.]

[210] Ces propos ne peuvent donner lieu à des interprétations divergentes. Certes, les conclusions factuelles du juge de première instance doivent être traitées avec déférence, sauf erreur manifeste et dominante, mais les tribunaux d'appel n'ont pas carte blanche pour retenir isolément certains passages du jugement de première instance et leur donner un sens qu'ils n'ont pas. Les conclusions factuelles du juge de première instance doivent être considérées telles quelles, dans leur ensemble. Bref, avec égards, je suis d'avis qu'il n'est pas exact en l'espèce d'affirmer que le juge de première instance a conclu à la cession des actions, indépendamment du caractère conditionnel de leur émission.

[211] Le raisonnement de mon collègue me paraît contradictoire. Il est d'avis que le juge de première instance a accepté comme conclusion de fait que « M. Mennillo a convenu qu'il ne demeurait actionnaire que tant qu'il serait disposé à garantir le passif de la société » (motifs du juge Cromwell, par. 4 et 61 (je souligne)) et que « M. Mennillo [a] convenu qu'il demeurerait actionnaire de la société à condition d'en garantir le passif » (par. 10 (je souligne)). Or, le reste de l'affirmation du juge de première instance selon laquelle la réalisation de la condition suspensive *aurait donné lieu à une cession*

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shares cannot be considered in isolation. Moreover, my colleague Cromwell J. finds that the evidence supports the trial judge's conclusion even though, in his view, that evidence is "confused and confusing" (para. 34), and "conflicting and inconsistent" (para. 68). I will return to the trial judge's assessment of the evidence below. For now, I note that my colleague acknowledges that there was no condition attached to the issuance of the shares in the case at bar and that it is wrong in law to say the opposite (para. 76), but he nevertheless finds that "the condition to which the trial judge referred was a result of an agreement between Messrs. Mennillo and Rosati that the former would be a shareholder only if he guaranteed Intramodal's debts" (para. 77). With respect, I do not see how it is possible both to accept the trial judge's conclusion that Mr. Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of its debts and to postulate that, in law, Mr. Mennillo could not be a conditional shareholder in this case.

d'actions ne peut être considéré en vase clos. De plus, mon collègue le juge Cromwell est d'avis que la preuve appuie la conclusion du juge de première instance, malgré que cette preuve soit, selon lui, « confuse et source de confusion » (par. 34) et « contradictoire et incohérente » (par. 68). Je reviendrai plus loin sur la question de l'appréciation de la preuve par le juge de première instance. Je note pour l'instant que mon collègue reconnaît qu'aucune condition n'était rattachée à l'émission des actions en l'espèce et qu'il est erroné en droit de prétendre le contraire (par. 76), mais qu'il conclut néanmoins que « la condition dont [le juge de première instance] fait mention résulte d'un accord entre MM. Mennillo et Rosati selon lequel le premier ne serait actionnaire que s'il se portait garant du passif d'Intramodal » (par. 77). Avec égards, je vois mal comment on peut à la fois accepter la conclusion du juge de première instance voulant que M. Mennillo ait détenu 49 actions ordinaires émises par Intramodal conditionnellement à ce qu'il garantisse l'ensemble des créances de celle-ci et postuler que M. Mennillo ne pouvait pas, en droit, être actionnaire conditionnel en l'espèce.

[212] The majority of the Court of Appeal also concluded that the appellant no longer had the status of a shareholder, but for another reason, namely that the intention he had expressed of withdrawing from the respondent company had resulted in the retroactive cancellation of his shares.

[212] Pour leur part, les juges majoritaires de la Cour d'appel ont également conclu que l'appelant n'avait plus le statut d'actionnaire, mais pour une autre raison, à savoir que l'intention manifestée de se retirer de la société intimée avait entraîné l'annulation rétroactive de ses actions.

[213] The parties characterized the agreement that was alleged to have been entered into by Mr. Mennillo and Mr. Rosati in several different ways, at times as a conditional issuance of shares, at times as a retroactive cancellation and at times as a contract of sale or a contract of gift. This reflects a more fundamental problem, namely that, without some speculation, no intention in this regard can be found in the evidence. Indeed, the difficulty the courts below had in characterizing the alleged agreement resulted from the fact that there was no evidence of the juridical operation contemplated by Mr. Rosati and Mr. Mennillo on May 25, 2005 that allegedly resulted in the transfer of Mr. Mennillo's shares. The same is true in this Court.

[213] Les parties ont qualifié l'entente qui serait intervenue entre MM. Mennillo et Rosati de maintes façons, y voyant tantôt une émission conditionnelle, tantôt une annulation rétroactive, tantôt un contrat de vente ou de donation. Cela traduit un problème plus fondamental : le fait que, sauf conjecture, aucune intention à cet effet ne ressort de la preuve. En fait, la difficulté éprouvée par les juridictions inférieures à qualifier la prétendue entente résulte du fait que la preuve est muette sur l'opération juridique qui aurait été envisagée par MM. Rosati et Mennillo le 25 mai 2005 et qui aurait eu comme résultat le transfert de ses actions. Il en est de même pour notre Cour.

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[214] The *CBCA* provides, as a general rule, that the cancellation of shares held by a shareholder can happen in only two ways: by an amendment to the corporation's articles or by redemption of the shares by the corporation. In the case of redemption, two types are possible: unilateral redemption by the corporation and redemption by mutual agreement.

[215] In the instant case, the respondent company did not amend its articles at any time before May 25, 2005. Regarding the possibility that it redeemed the appellant's shares unilaterally, such a redemption would have had to be provided for in the company's articles, which was not the case for the Class "A" shares held by the appellant. The company's articles did give it a right of unilateral redemption, but only for Class "G" shares.

[216] As for a redemption by mutual agreement, it is subject to a number of formalities, including the passage of a directors' resolution to that effect and, under s. 34 *CBCA*, tests of solvency and liquidity.

[217] Even more importantly, the *CBCA* provides that such a redemption, whether unilateral or by mutual agreement, results in cancellation of the acquired shares:

39 . . .

. . .

(6) Shares or fractions thereof of any class or series of shares issued by a corporation and purchased, redeemed or otherwise acquired by it shall be cancelled or, if the articles limit the number of authorized shares, may be restored to the status of authorized but unissued shares of the class.

[218] In the case at bar, even assuming that the appellant did in fact consent to the redemption of his shares — which he disputes — it must be acknowledged that none of the formalities applicable to such a redemption were performed, which means that it cannot be said that the appellant's shares were cancelled by way of redemption.

[214] La *LCSA* prévoit, en règle générale, que l'annulation des actions d'un actionnaire n'est possible que selon deux modalités, soit la modification des statuts de la société, soit le rachat des actions par la société. En cas de rachat, deux formes peuvent être envisagées : le rachat unilatéral par la société ou le rachat de gré à gré.

[215] En l'espèce, à aucun moment avant le 25 mai 2005, la société intimée n'a procédé à une modification de ses statuts. Quant à la possibilité qu'elle ait procédé unilatéralement au rachat des actions de l'appelant, un tel rachat devait être prévu par les statuts de la société, ce qui n'est pas le cas des actions de catégorie « A » détenues par l'appelant. Les statuts de la société prévoient certes un droit de rachat unilatéral par la société, mais pour les actions de catégorie « G » seulement.

[216] Le rachat de gré à gré est pour sa part soumis à plusieurs formalités, y compris l'adoption d'une résolution des administrateurs à cet effet et, en vertu de l'art. 34 *LCSA*, des tests de solvabilité et de liquidité.

[217] Plus important encore, la *LCSA* prévoit qu'un tel rachat, unilatéral ou de gré à gré, entraîne l'annulation des actions acquises :

39 . . .

. . .

(6) Les actions ou fractions d'actions de toute catégorie ou série de la société émettrice acquises par elle, notamment par achat ou rachat, sont annulées; elles peuvent reprendre le statut d'actions autorisées non émises de la catégorie dont elles relèvent, au cas où les statuts limitent le nombre d'actions autorisées.

[218] Or, en l'espèce, même en tenant pour acquis qu'il y a effectivement eu consentement du principal intéressé du rachat de ses actions — ce que ce dernier conteste —, force est d'admettre qu'aucune des formalités applicables à un tel rachat n'a été accomplie, si bien que l'on ne peut prétendre que les actions de l'appelant ont été annulées par rachat.

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[219] Indeed, the respondent company indicates in its factum that the stated capital was never reduced. Nor was any resolution passed to approve the company's redemption of the shares. As I will explain below, the only resolution at issue apparently concerned a transfer of shares between the appellant and Intramodal's majority shareholder, Mr. Rosati.

[220] What is more, it is difficult to see how the tests of liquidity and solvency could have been met given that, by the respondent company's own admission, it had no assets at the time.

[221] In short, the argument that the appellant's shares were cancelled retroactively by way of redemption fails not because of mere technical irregularities in the corporate documents, but on the basis of the legal requirements applicable to the redemption of shares and, hence, to their cancellation.

[222] The trial judge's conclusion — which the majority of the Court of Appeal rejected — that the appellant's shares were issued on condition that he would guarantee the respondent company's debts, and that the desire he expressed to cease guaranteeing those debts had the effect of depriving him of his status as a shareholder, is also contrary to the provisions of the *CBCA*.

[223] As I mentioned above, the trial judge referred to this possibility at para. 74 in writing that [TRANSLATION] "Mennillo held 49 common shares issued by Intramodal on condition that he guarantee all of Intramodal's debts once it began operating" (emphasis added).

[224] Finally, it can be seen from the respondent company's registers that no suspensive condition related to the issuance of the appellant's shares was set out in the resolution of the board of directors that authorized their issuance. For such a suspensive condition to have any effect, it would also have had to appear in the respondent company's registers. Otherwise, there would be no way for creditors to

[219] La société intimée, dans son mémoire, affirme d'ailleurs que le capital déclaré n'a en aucun temps été réduit. De plus, aucune résolution n'a été adoptée pour approuver le rachat de ses actions par la société. En fait, la seule résolution en cause vise, comme nous le verrons plus loin, un transfert d'actions qui serait intervenu entre l'appelant et l'actionnaire majoritaire d'Intramodal, M. Rosati.

[220] Qui plus est, on voit mal comment les critères de liquidité et de solvabilité auraient pu être satisfaits étant donné que la société intimée ne comptait alors, de son propre aveu, aucun actif.

[221] Bref, la thèse selon laquelle les actions de l'appelant auraient été annulées rétroactivement par voie de rachat se bute non pas à de simples irrégularités techniques dans la documentation corporative, mais bien aux exigences légales applicables à un rachat d'actions et, partant, à leur annulation.

[222] La conclusion du juge de première instance — écartée par les juges majoritaires de la Cour d'appel — selon laquelle les actions de l'appelant auraient été émises conditionnellement à ce qu'il garantisse le passif de la société intimée, le souhait exprimé par l'appelant de ne plus garantir celui-ci ayant eu pour effet de le priver du statut d'actionnaire, va également à l'encontre des dispositions de la *LCSA*.

[223] Comme mentionné précédemment, le juge de première instance réfère à cette possibilité au par. 74 lorsqu'il écrit que « Mennillo a détenu 49 actions ordinaires émises par Intramodal, le tout conditionnellement à ce que ce dernier garantisse l'ensemble des créances de Intramodal dès que cette dernière débute ses activités » (je souligne).

[224] Enfin, à la lecture des registres de la société intimée, on constate qu'aucune condition suspensive liée à l'émission des actions de l'appelant n'est prévue dans la résolution du conseil d'administration autorisant l'émission de celles-ci. Pour qu'une telle condition suspensive puisse produire quelque effet, encore aurait-il fallu qu'elle apparaisse dans les registres de la société intimée, sans quoi il n'y

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know that the company's share capital could be affected at any time.

(b) *Effect of the Alleged Agreement*

[225] I also agree with the appellant and the dissenting judge of the Court of Appeal that it is impossible to find, as a matter of law, that the appellant transferred his shares to Mr. Rosati on May 25, 2005. Whatever conclusion might be reached about the credibility of the witnesses in this regard, the intention expressed by the appellant of withdrawing from the respondent company had no effect on his rights as a shareholder.

[226] Though governed by the *CBCA*, a transfer of shares remains subject to the conditions of formation of a contract.

[227] My colleague Cromwell J. states that the appellant transferred his shares to Mr. Rosati by means of an onerous contract, but he does not specify the nature of that contract, its essential elements and what prestation Mr. Mennillo received in return from Mr. Rosati. However, [TRANSLATION] "[t]he fact that a contract is innominate does not mean that it is subject to no legislative scheme": D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at para. 136.

[228] The *Civil Code of Québec* defines a contract as "an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation" (art. 1378). Where there is no meeting of the minds between the parties — unlike where the conditions of formation of a contract are not met, which results in the nullity of the contract — it cannot be found that a contract even exists: V. Karim, *Les obligations* (4th ed. 2015), at para. 507; see also para. 642. The proposal must be firmly directed toward the completion of a specific juridical operation: Lluelles and Moore, at para. 275.

[229] The respondent company submits that the appellant transferred his shares to Mr. Rosati and that, in return, he was relieved of his obligation to

avait aucun moyen pour les créanciers de savoir que son capital-actions pouvait à tout moment être affecté.

b) *Effet de la prétendue entente*

[225] Je partage par ailleurs l'avis de l'appelant et du juge dissident en Cour d'appel qu'il est impossible de conclure en droit que l'appelant a transféré ses actions à M. Rosati le 25 mai 2005. En effet, peu importe la conclusion à laquelle nous pouvons arriver sur la crédibilité des témoins à cet égard, l'intention manifestée par l'appelant de se retirer de la société intimée était sans effet sur ses droits en tant qu'actionnaire.

[226] Bien qu'il soit régi par la *LCSA*, le transfert d'actions demeure assujetti aux conditions de formation d'un contrat.

[227] Mon collègue le juge Cromwell dit que l'appelant a transféré ses actions à M. Rosati par le biais d'un contrat à titre onéreux, mais il omet de préciser quelle serait la nature du contrat, quels sont ses éléments essentiels et quelle prestation M. Mennillo aurait reçue en retour de la part de M. Rosati. Or, « [l]e caractère innommé d'un contrat ne signifie pas pour autant qu'il échappe à tout régime législatif » : D. Lluelles et B. Moore, *Droit des obligations* (2e éd. 2012), par. 136.

[228] Le *Code civil du Québec* définit le contrat comme « un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation » (art. 1378). L'absence de rencontre des volontés des parties, contrairement au non-respect des conditions de formation du contrat qui, lui, entraîne la nullité, empêche de conclure à l'existence même du contrat : V. Karim, *Les obligations* (4e éd. 2015), par. 507; voir aussi par. 642. La proposition doit tendre de manière ferme à la conclusion d'une opération juridique précise : Lluelles et Moore, par. 275.

[229] La société intimée soutient que l'appelant a transféré ses actions à M. Rosati et qu'il était libéré, en contrepartie, de son obligation de financer

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finance Intramodal's operations and guarantee its debts. In my view, this is not a valid prestation. This submission by the respondent company, once again, confuses the company's distinct legal personality with that of its shareholder or shareholders.

[230] The intention expressed by the appellant in this case was at most an invitation to contract. The fact that a transfer of shares was registered by the respondent company where Mr. Rosati had spent no money to acquire the appellant's shares certainly does not prove that the appellant transferred his shares. To conclude from the respondent company's registration of a transfer of shares that a contract was formed is to engage in circular reasoning: because a transfer was registered, a contract was formed, and because the contract was formed, the transfer is necessarily valid.

[231] The parties also referred to the possibility that the alleged agreement of May 2005 was a contract of gift, but it is clear that there was no gift in the case at bar. There is a presumption in the civil law that acts are normally by onerous title. Two things must thus be proved before a gift can be found to exist: an absence of consideration and [TRANSLATION] "a deliberate intent to impoverish oneself" (*Martin v. Dupont*, 2016 QCCA 475, at paras. 26-31 (CanLII)). In its factum, the respondent company states that [TRANSLATION] "[the appellant] wants just one thing: to receive '. . . *money for the rest of [his] life, till [he dies]*'" (para. 30). On the face of it, this seems to me to be the exact opposite of an intent to impoverish oneself. Moreover, and this is not insignificant, neither the respondent company nor the appellant is arguing that the shares were given to Mr. Rosati on May 25, 2005. The former states in its factum that the alleged contract between the parties was [TRANSLATION] "anything but a gratuitous contract" (para. 77), while the latter denies the very existence of an exchange of wills but, in an alternative argument, responds to the fact that no valid consideration was received by reiterating the requirements for a gift under the *Civil Code of Québec* and the legal consequences of a failure to satisfy those requirements.

les opérations d'Intramodal et de garantir le passif de la société. À mon avis, cela ne constitue pas une prestation valide. Cette prétention de la société intimée confond, encore une fois, la personnalité juridique distincte de la société avec celle de son ou ses actionnaires.

[230] Tout au plus, l'intention exprimée par l'appelant en l'espèce constituait une invitation à contracter. Le fait qu'un transfert d'actions a été inscrit par la société intimée alors que M. Rosati n'a déboursé aucune somme pour acquérir les actions de l'appelant ne prouve certainement pas que l'appelant a cédé ses actions. Conclure de l'inscription d'un transfert d'actions par la société intimée qu'un contrat a été formé relève du raisonnement circulaire : parce qu'un transfert a été inscrit, un contrat a été formé et parce que le contrat a été formé, le transfert est nécessairement valide.

[231] Les parties ont également évoqué la possibilité que la prétendue entente du mois de mai 2005 constitue un contrat de donation. Or, il est clair qu'il n'y a pas eu de donation en l'espèce. En effet, il existe en droit civil une présomption selon laquelle un acte est normalement à titre onéreux. Deux éléments doivent alors être établis pour conclure à la donation : l'absence de contrepartie et « la volonté réfléchie de s'appauvrir » (*Martin c. Dupont*, 2016 QCCA 475, par. 26-31 (CanLII)). Dans son mémoire, la société intimée écrit qu'« [u]ne seule volonté [. . .] anime [l'appelant] : de recevoir [TRADUCTION] "(…) *de l'argent [s]a vie durant, jusqu'à [s]on décès*" » (par. 30). Cela me semble, a priori, l'antithèse d'une volonté de s'appauvrir. Par ailleurs, et ce n'est pas anodin, ni la société intimée ni l'appelant ne prétendent que les actions ont été données à M. Rosati le 25 mai 2005. La première indique dans son mémoire que le prétendu contrat intervenu entre les parties est « tout sauf un contrat à titre gratuit » (par. 77). Le second nie l'existence même d'un échange de volontés, mais répond subsidiairement à l'absence de contrepartie valide en rappelant les exigences du *Code civil du Québec* en matière de donation et les conséquences du non-respect de telles exigences en droit.

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[232] Article 1824 *C.C.Q.* reads as follows:

1824. The gift of movable or immovable property is made, on pain of absolute nullity, by notarial act *en minute*, and shall be published.

These rules do not apply where, in the case of the gift of movable property, the consent of the parties is accompanied by delivery and immediate possession of the property.

[233] In the absence of a published notarial act *en minute*, a gratuitous contract must be consistent with the definition of a manual gift, according to which either the donee must be put in immediate possession of the property or all hindrances must be removed so that the donee can take possession of the property (art. 1825 *C.C.Q.*). If the contract does not meet the conditions for a manual gift, it is absolutely null: *Paré v. Paré (Succession de)*, 2014 QCCA 1138.

[234] Furthermore, s. 65(3) of the *CBCA* imposes a second requirement for possession in the case of a manual gift: the share certificate for the transferred shares must, at a minimum, be endorsed by the transferor (*Grusk v. Sparling* (1992), 44 C.A.Q. 219).

[235] In the instant case, not only did the appellant never express an intention to make a gift of his shares, but it is clear that these conditions were not met.

[236] In short, I cannot accept the proposition that the onus was on the appellant to seek a conclusion that the alleged agreement of May 25, 2005 was null after inferring that a contract existed from the fact that a transfer had been registered even though there had been no exchange of wills on that date concerning a specific juridical operation and even though the appellant did not know that the transfer had been registered in the respondent company's registers until he had instituted this proceeding.

(4) Trial Judge's Assessment of the Evidence

[237] In his claim, the appellant alleges wrongful conduct on the respondent company's part, that is,

[232] L'article 1824 *C.c.Q.* se lit ainsi :

1824. La donation d'un bien meuble ou immeuble s'effectue, à peine de nullité absolue, par acte notarié en minute; elle doit être publiée.

Il est fait exception à ces règles lorsque, s'agissant de la donation d'un bien meuble, le consentement des parties s'accompagne de la délivrance et de la possession immédiate du bien.

[233] En l'absence d'un acte notarié en minute et publié, le contrat à titre gratuit doit correspondre à la définition d'un don manuel, ce qui implique que le donataire soit mis en possession immédiate du bien ou, sinon, que tous les obstacles soient écartés afin qu'il puisse en prendre possession (art. 1825 *C.c.Q.*). S'il ne respecte pas les conditions du don manuel, le contrat est nul de nullité absolue : *Paré c. Paré (Succession de)*, 2014 QCCA 1138.

[234] Dans la même veine, pour qu'il y ait possession aux fins d'un don manuel, la *LCSA*, à son par. 65(3), prévoit une seconde exigence : le certificat d'actions constatant les actions cédées doit au minimum être endossé par le cédant (*Grusk c. Sparling* (1992), 44 C.A.Q. 219).

[235] En l'espèce, non seulement l'appelant n'a jamais exprimé l'intention de donner ses actions, mais il est évident que ces conditions n'ont pas été satisfaites.

[236] En somme, je ne puis souscrire à la thèse qu'il appartenait à l'appelant de soulever la nullité de la prétendue entente du 25 mai 2005, après avoir inféré qu'il y avait eu contrat parce qu'un transfert avait été inscrit, alors qu'il n'y avait pas eu, à ce jour-là, d'échange de volontés sur une opération juridique précise et que l'appelant n'a eu connaissance de l'inscription du transfert dans les registres de la société intimée qu'à une fois le présent recours intenté.

(4) Appréciation de la preuve par le juge de première instance

[237] Dans le cadre de son recours, l'appelant reproche à la société intimée sa conduite fautive, à

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that it failed to discharge its legal duties and that it registered a transfer of shares without having observed the necessary formalities.

[238] However, insofar as my colleague Cromwell J. accepts the trial judge's finding of fact that the appellant had expressed his intention of withdrawing from Intramodal as a shareholder and had transferred his shares to Mr. Rosati in May 2005, and given that my colleague bases his analysis on that finding, I believe it is important to point out the errors the trial judge made in assessing the evidence. In addition to having no basis in law, that finding by the trial judge is not supported by the evidence and is thus based on palpable and overriding errors. I therefore agree with the dissenting judge of the Court of Appeal that the trial judge's analysis on this point contained errors warranting appellate intervention: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[239] The finding that the appellant told Mr. Rosati he wanted to withdraw from Intramodal as a shareholder on May 25, 2005 is based solely on Mr. Rosati's testimony. The trial judge erred in rejecting the appellant's testimony, since, as the dissenting judge of the Court of Appeal rightly noted, he did so on the basis of an unreasonable interpretation of several pieces of evidence in the record.

[240] First, there is the letter of resignation signed by the appellant on May 25, 2005, which speaks for itself. The appellant withdrew from the company as a director and officer at that time. That letter prepared by the respondent company's lawyer — who, according to the evidence, was following the majority shareholder's instructions — could easily have provided for more if that had been the parties' intention. But it did not.

[241] Next, there are various documents relating to life insurance taken out on the appellant and Mr. Rosati, of which the respondent was the beneficiary. One of those documents stated that

savoir l'omission de se conformer à ses obligations légales et l'inscription d'un transfert d'actions sans le respect des formalités requises.

[238] Toutefois, dans la mesure où mon collègue le juge Cromwell accepte la conclusion de fait du juge de première instance selon laquelle l'appelant aurait exprimé son intention de se retirer d'Intramodal en tant qu'actionnaire et aurait transféré ses actions à M. Rosati en mai 2005, et puisqu'il en fait le fondement de son analyse, j'estime qu'il est important de souligner les erreurs commises par le juge de première instance dans son appréciation de la preuve. En effet, en plus de n'avoir aucun fondement en droit, cette conclusion du juge de première instance ne trouve aucune assise dans la preuve et repose donc sur des erreurs manifestes et dominantes. Je partage ainsi l'avis du juge dissident de la Cour d'appel selon lequel l'analyse du juge de première instance sur ce point comporte des erreurs justifiant l'intervention en appel : *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235.

[239] La conclusion selon laquelle l'appelant aurait indiqué à M. Rosati qu'il voulait se retirer en tant qu'actionnaire d'Intramodal le 25 mai 2005 s'appuie exclusivement sur le témoignage de ce dernier. Lorsque le juge de première instance rejette le témoignage de l'appelant, il commet une erreur puisque, comme le souligne à juste titre le juge dissident de la Cour d'appel, il le fait en s'appuyant sur une interprétation déraisonnable de plusieurs pièces versées au dossier.

[240] Il y a d'abord la lettre de démission signée par l'appelant le 25 mai 2005, laquelle lettre parle d'elle-même. L'appelant se retirait alors de la société comme administrateur et dirigeant. Cette lettre, préparée par l'avocat de la société intimée, lequel suivait, selon la preuve, les instructions de l'actionnaire majoritaire, aurait facilement pu prévoir davantage si telle avait été l'intention des parties. Or, ce n'est pas le cas.

[241] Il y a aussi les divers documents relatifs à la souscription d'une assurance-vie sur les personnes de l'appelant et de M. Rosati et dont l'intimée était la bénéficiaire. L'un de ces documents indique que

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Mr. Rosati was the respondent company's sole shareholder. Yet the policy in question was on the lives of both the appellant and Mr. Rosati. What insurable interest did Intramodal have in the appellant's life if he was no longer a shareholder? To ask the question is to answer it.

[242] As for the letter written by Mr. Kaufman on October 31, 2007 that was sent to the appellant, I also agree with the dissenting judge of the Court of Appeal that it could not reasonably lead to an inference that the appellant was, by insisting on being repaid his investment, relinquishing his shares.

[243] Nor could the formal notice of February 25, 2010 prepared by Mr. Kaufman lead to any negative inference. In it, the appellant claimed to be entitled to receive 50 percent of the respondent company's profits and to continue his partnership with Rosati. But by February 25, 2010, it had become clear that the appellant was no longer a shareholder *in the respondent company's registers*. According to his testimony and that of his professional advisers, the purpose of the letter was to have the situation remedied, failing which $1,000,000 would be claimed from Mr. Rosati.

[244] Finally, another ground advanced by the trial judge for rejecting the appellant's version was that, in his opinion, the reason the appellant gave for his withdrawal as a director and officer, namely the visit to Intramodal's premises and the examination of the company's books by representatives of Labatt, was false. Yet the dissenting judge of the Court of Appeal noted that, even though the company had not been active at the time, the appellant's assertion that meetings had taken place with representatives of Labatt had not been contradicted. Moreover, amounts were advanced before December 2005 and continued to be advanced until October 2006.

[245] In short, in my view, the evidence does not support the conclusion that the two shareholders entered into an agreement under which the appellant withdrew from the company as a shareholder. In arriving at that conclusion, the trial judge made

M. Rosati est le seul actionnaire de la société intimée. Pourtant, ladite police couvre tant la vie de l'appelant que celle de M. Rosati. Quel intérêt assurable Intramodal détenait-elle sur la vie de l'appelant si celui-ci n'était plus un actionnaire? Poser la question, c'est y répondre.

[242] Quant à la lettre rédigée par Me Kaufman le 31 octobre 2007 et transmise à l'appelant, je suis également d'accord avec le juge dissident en Cour d'appel pour dire qu'on ne pouvait raisonnablement en inférer que l'appelant, en insistant pour se faire rembourser son investissement, renonçait par le fait même à ses actions.

[243] La mise en demeure du 25 février 2010 rédigée par Me Kaufman ne permettait pas non plus de tirer d'inférence négative. L'appelant y revendique son droit à 50 p. 100 des profits de la société intimée et son partenariat avec M. Rosati. Or, en date du 25 février 2010, il était devenu clair que l'appelant n'était plus actionnaire *dans les registres de la société intimée*. Selon son témoignage et celui de ses représentants professionnels, la lettre visait à faire corriger la situation à défaut de quoi une somme de 1 000 000 $ serait réclamée à M. Rosati.

[244] Enfin, le juge de première instance a également rejeté la version de l'appelant parce que, selon lui, le motif avancé du retrait à titre d'administrateur et de dirigeant, soit la visite du local d'Intramodal et l'examen des livres de la société par les représentants de Labatt, était faux. Le juge dissident en Cour d'appel souligne que même si la société intimée n'était pas alors active, l'affirmation de l'appelant selon laquelle des rencontres avaient eu lieu avec des représentants de Labatt n'a pas été contredite. Des sommes ont d'ailleurs été avancées avant décembre 2005 et ont continué de l'être jusqu'en octobre 2006.

[245] Bref, à mon avis, la conclusion selon laquelle une entente est intervenue entre les deux actionnaires en vertu de laquelle l'appelant s'est retiré de la société intimée en tant qu'actionnaire n'est pas étayée par la preuve. Pour arriver à cette

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palpable and overriding errors and disregarded key aspects of the evidence. At most, the evidence shows that the appellant expressed an intention to divest himself of his shares, but no agreement was reached on how he would dispose of them.

(5) Prescription of the Claim

[246] In the alternative, the respondent company argues that the appellant's claim must be dismissed on the ground that it is prescribed. The trial judge and the majority of the Court of Appeal agreed with that argument.

[247] The *CBCA* does not specify the prescription period that applies to the oppression remedy, although it does provide for a two-year prescription period for other remedies, two examples of which can be found in ss. 118(7) and 119(3) *CBCA*. It can therefore be assumed, at least where this remedy is concerned, that Parliament intended to defer to general civil law principles where a claim for oppression is made in Quebec: Martel, at pp. 31-191 to 31-192.

[248] In this regard, art. 2925 *C.C.Q.* provides as follows:

2925. An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined.

[249] A claim under s. 241 *CBCA* is normally brought to enforce a personal right. This is the case, for example, where the complainant alleges that a corporation's majority shareholder has acted in disregard of minority shareholders' interests (*Bénard v. Gagnon*, 2002 CanLII 23768 (Que. Sup. Ct.), aff'd by 2004 CanLII 73057 (Que. C.A.)) or where what is described as oppression consists of acts committed by the directors, who are alleged to have misled and unfairly treated certain shareholders in the same class (*Regroupement des marchands actionnaires inc. v. Métro Inc.*, 2011 QCCS 2389). An oppression claim can also be made to enforce a real right where, for example, the corporation in question refuses to pay

conclusion, le juge a commis des erreurs manifestes et dominantes et a fait abstraction d'éléments clés de la preuve. Tout au plus, la preuve démontre qu'une intention de se départir de ses actions a été exprimée par l'appelant, sans toutefois qu'il n'y ait eu d'entente quant à la façon dont il disposerait de ses actions.

(5) Prescription du recours

[246] Subsidiairement, la société intimée fait valoir que le recours de l'appelant doit être rejeté au motif qu'il est prescrit. Le juge de première instance et les juges majoritaires de la Cour d'appel ont également conclu en ce sens.

[247] Le délai de prescription applicable au recours pour abus n'est prévu nulle part dans la *LCSA*. Celle-ci prévoit pourtant, pour d'autres recours, un délai de prescription de deux ans. C'est le cas des par. 118(7) et 119(3) *LCSA*. On peut donc supposer, dans le cas de ce recours du moins, que le législateur fédéral entendait s'en remettre aux principes généraux du droit civil lorsqu'un tel recours est intenté au Québec : Martel, par. 31-482.

[248] À cet égard, l'art. 2925 *C.c.Q.* prévoit ce qui suit :

2925. L'action qui tend à faire valoir un droit personnel ou un droit réel mobilier et dont le délai de prescription n'est pas autrement fixé se prescrit par trois ans.

[249] Le recours fondé sur l'art. 241 *LCSA* tend normalement à faire valoir un droit personnel. C'est le cas notamment lorsque le plaignant allègue que l'actionnaire majoritaire d'une société agit sans tenir compte des intérêts des actionnaires minoritaires (*Bénard c. Gagnon*, 2002 CanLII 23768 (C.S. Qc), conf. par 2004 CanLII 73057 (C.A. Qc)), ou lorsque l'abus s'entend d'actes des administrateurs qui auraient induit en erreur et traité inéquitablement certains actionnaires d'une même catégorie (*Regroupement des marchands actionnaires inc. c. Métro Inc.*, 2011 QCCS 2389). Le recours pour abus peut également tendre à faire valoir un droit réel lorsque, par exemple, la société en cause refuse

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dividends owed to the complainant despite acknowledging the complainant's status as a shareholder.

[250] Sometimes, as in the case at bar, the claim is instead premised on the complainant's ownership of shares and on the corporation's refusal to acknowledge the complainant's status as a shareholder. In such cases, a claim under s. 241 *CBCA* is brought not to *enforce* a real right but to have it *acknowledged*.

[251] In the civil law, the right of ownership (in this case the right of ownership of a security) is perpetual, which means that it is not lost either by non-use or by the mere passage of time:

[TRANSLATION] The right of ownership is *perpetual.* This does not mean that the right remains forever attached to the same patrimony or that it can be transmitted perpetually; it means that it is not lost through non-use (*supra*, at No. 18). However, an owner can destroy (corporeal) property, in which case the right will disappear with the property, which explains why the right is identified with the property. The owner can also renounce the right (the abandoned property then becomes a thing without an owner — arts. 934 et seq. C.C.Q.) or transfer the property to a trust patrimony without an owner (art. 1261 C.C.Q.), or the right may be acquired by a third party possessor through acquisitive prescription . . . . [Emphasis in original; footnote omitted.]

(D.-C. Lamontagne, *Biens et propriété* (7th ed. 2013), at para. 207)

[252] Professor Pierre-Claude Lafond states the following on this same subject:

[TRANSLATION] One characteristic of the right of ownership is that it is not lost by way of extinctive prescription (see *supra*, at 3.1.2.4). Since an action in revendication sanctions the right of ownership, it too is therefore *imprescriptible*, unlike other types of actions to enforce a real right, which are prescribed by ten years (art. 2923 C.C.Q.) or by three years (art. 2925 C.C.Q.), depending on whether the right is immovable or movable. In our view, those two provisions cannot apply, given that the purpose of a petitory action is not to *enforce* a right but to *have it acknowledged* (art. 912 C.C.Q.).

de verser au plaignant, à qui elle reconnaît pourtant le statut d'actionnaire, les dividendes qui lui sont dus.

[250] Il arrive, comme c'est le cas en l'espèce, que le recours se fonde plutôt sur la prémisse que le plaignant est propriétaire d'actions et qu'on reproche à la société de refuser de lui reconnaître le statut d'actionnaire. Le recours fondé sur l'art. 241 *LCSA* vise alors non pas à *faire valoir* un droit réel, mais à le faire *reconnaître*.

[251] Or, le droit civil reconnaît le caractère perpétuel du droit de propriété (en l'occurrence un droit de propriété portant sur une valeur mobilière), ce qui signifie que celui-ci ne se perd ni par le non-usage ni par le simple écoulement du temps :

Le droit de propriété est *perpétuel*. Cela signifie non pas que le droit demeure attaché à perpette au même patrimoine ou qu'il est transmissible perpétuellement, mais qu'il ne se perd pas par le non-usage (*supra*, n° 18). Cependant, le propriétaire peut détruire son bien (corporel), le droit disparaissant avec celui-ci, ce qui permet de comprendre l'identification du droit au bien. Il peut encore renoncer à son droit (le bien abandonné devenant un bien sans maître — 934 et s. C.c.Q.), transférer son bien à un patrimoine fiduciaire dépourvu de propriétaire (1261 C.c.Q.), ou le droit peut se prescrire acquisitivement au bénéfice d'un tiers possesseur . . . [En italique dans l'original; note en bas de page omise.]

(D.-C. Lamontagne, *Biens et propriété* (7e éd. 2013), par. 207)

[252] Sur ce même point, le Professeur Pierre-Claude Lafond s'exprime ainsi :

Une des caractéristiques du droit de propriété est qu'il ne se perd pas par l'effet de la prescription extinctive (voir *supra*, 3.1.2.4). Puisque l'action en revendication sanctionne le droit de propriété, elle est donc aussi *imprescriptible*, et ce contrairement aux autres espèces d'actions qui visent à faire valoir un droit réel, lesquelles se prescrivent par dix ans (art. 2923 C.c.Q.) ou trois ans (art. 2925 C.c.Q.), selon qu'il s'agit d'un droit immobilier ou mobilier. À notre avis, ces deux dispositions ne peuvent s'appliquer, car l'action pétitoire ne vise nullement à *faire valoir* un droit, mais plutôt à le *faire reconnaître* (art. 912 C.c.Q.).

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In practice, this imprescriptibility may be defeated where acquisitive prescription is claimed by a possessor (arts. 2917 to 2919 C.C.Q.) (see *infra*, at 6.3.3.3.2), although this does not change the principle that the right of ownership cannot be lost by reason of the passage of time. [Emphasis added; citations omitted.]

(*Précis de droit des biens* (2nd ed. 2007), at para. 1205)

[253] Thus, extinctive prescription cannot be set up against a person seeking to have his or her ownership of property *acknowledged*.

[254] A share of a company is a real right in respect of which a shareholder can seek recognition of a right of ownership: "For a shareholder, ownership of shares is a real right, not a personal right, which can render inadmissible in Quebec an action taken to be declared owner of shares of which the *situs* is outside Quebec" (Martel, at p. 12-11 (emphasis added; footnotes omitted)).

[255] As a result, the prescription period applicable to a claim under s. 241 *CBCA* will depend on the basis for the claim. Where — as in this case — the complainant has been acknowledged to be a shareholder at some point and is claiming to have been unlawfully stripped of shareholder status by the corporation, the claim is therefore imprescriptible.

[256] This was the conclusion reached by the Quebec Court of Appeal in *Greenberg v. Gruber*, 2004 CanLII 14882 (Que. C.A.).

[257] In that case, the complainant submitted that shares in several corporations were being held for him by the respondents as *prête-noms* (nominees). He argued that he actually owned a third of the shares of those corporations, and he requested, *inter alia*, that the registers be rectified and that a share certificate be delivered to him.

[258] The respondents sought to set up extinctive prescription against the claim. The trial judge held that prescription was applicable but that the claim

En pratique, cette imprescriptibilité peut cependant être mise en échec par l'effet d'une prescription acquisitive réclamée d'un possesseur (art. 2917 à 2919 C.c.Q.) (voir *infra*, 6.3.3.3.2), ce qui ne change rien au principe que le droit de propriété ne saurait se perdre par l'écoulement du temps. [Je souligne; références omises.]

(*Précis de droit des biens* (2e éd. 2007), par. 1205)

[253] Ainsi, la personne qui cherche à se voir *reconnaître* la propriété d'un bien ne peut se faire opposer la prescription extinctive.

[254] L'action d'une société constitue un droit réel sur lequel l'actionnaire peut demander que son droit de propriété soit reconnu : « Pour l'actionnaire, la propriété des actions est un droit réel, et non un droit personnel, ce qui peut rendre irrecevable au Québec un recours intenté pour se faire déclarer propriétaire d'actions dont le *situs* est hors du Québec » (Martel, par. 12-42 (je souligne; notes en bas de page omises)).

[255] Suivant ce raisonnement, le délai de prescription applicable au recours exercé en application de l'art. 241 *LCSA* dépendra du fondement du recours. Lorsque le statut d'actionnaire a été à un moment reconnu au plaignant — comme c'est le cas en l'espèce — et que celui-ci prétend que la société l'en a illégalement dépouillé, le recours est alors imprescriptible.

[256] C'est la conclusion à laquelle est arrivée la Cour d'appel du Québec dans *Greenberg c. Gruber*, 2004 CanLII 14882 (C.A. Qc).

[257] Dans cette affaire, le plaignant soutenait que les intimés détenaient pour lui, à titre de prête-noms, des actions dans plusieurs sociétés. Il faisait valoir qu'il était dans les faits propriétaire du tiers des actions de ces sociétés et demandait notamment que les registres soient rectifiés et qu'un certificat d'actions lui soit remis.

[258] En réponse à ce recours, les intimés ont tenté d'opposer la prescription extinctive. Le juge de première instance ayant conclu que la prescription

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was not prescribed, and the respondents appealed that decision. The issue before the Quebec Court of Appeal was whether, in such a case, extinctive prescription can be relied on [TRANSLATION] "in order to argue that a shareholder has lost the right of ownership in his shares because of his failure to act in a timely manner" (*Greenberg*, at para. 6). If the answer was yes, the Court of Appeal also had to determine which prescription period was applicable, that of 10 years under art. 2922 *C.C.Q.* or that of three years under art. 2925 *C.C.Q.*

[259] The Court of Appeal accepted the complainant's argument that extinctive prescription cannot be raised where, in the case of a claim under s. 241 *CBCA*, the complainant seeks to assert a right of ownership or seeks acknowledgment of his or her status as a shareholder in connection with that right.

[260] More specifically, the Court of Appeal reached the conclusion that [TRANSLATION] "the fact that [the complainant] failed to contest the 'denial' of his status as a shareholder within three years (or any other period) does not mean that he can no longer assert his right of ownership in the shares" (*Greenberg*, at para. 43). To terminate the complainant's right of ownership, the respondents would have had to show that they had acquired the shares by way of acquisitive prescription, but they were not making that argument. The Court of Appeal added that, "[a]s an owner, the [complainant] certainly cannot be prevented from asserting his right of ownership by someone who simply refuses to acknowledge that right" (*Greenberg*, at para. 44).

[261] I am in complete agreement with that reasoning.

[262] Like the respondents in *Greenberg*, the respondent company in the case at bar is not arguing that it became the owner of the appellant's shares by way of acquisitive prescription. It is simply refusing to acknowledge the appellant's status as a shareholder, and its argument is that its majority shareholder, Mr. Rosati, now owns his shares as a result of an alleged informal verbal agreement between the appellant and Mr. Rosati. However, I

était applicable mais que le recours n'était pas prescrit, les intimés ont fait appel de la décision. La question dont la Cour d'appel du Québec était saisie était de savoir si, dans un tel cas, la prescription extinctive pouvait être invoquée « pour prétendre qu'un actionnaire a perdu le droit de propriété de ses actions vu son défaut d'agir en temps utile » (*Greenberg*, par. 6). Dans l'affirmative, la Cour d'appel devait également déterminer quel délai de prescription était applicable, celui de 10 ans prévu à l'art. 2922 *C.c.Q.* ou celui de trois ans prévu à l'art. 2925 *C.c.Q.*

[259] La Cour d'appel a fait droit à la prétention du plaignant selon laquelle la prescription extinctive ne pouvait être invoquée lorsque, dans le cadre d'un recours fondé sur l'art. 241 *LCSA*, un plaignant cherche à faire valoir son droit de propriété ou demande que, en lien avec ce droit, le statut d'actionnaire lui soit reconnu.

[260] Plus particulièrement, la Cour d'appel est arrivée à la conclusion que « ce n'est pas parce que [le plaignant] a omis de contester la "négation" de son statut d'actionnaire à l'intérieur d'un délai de trois ans (ou de tout autre délai) qu'il ne peut plus faire valoir son droit de propriété sur les actions » (*Greenberg*, par. 43). Pour mettre fin au droit de propriété du plaignant, les intimés devaient démontrer qu'ils avaient acquis les actions par voie de prescription acquisitive, ce qu'ils ne soutenaient pas. Toujours selon la Cour d'appel, « [e]n tant que propriétaire, [le plaignant] ne peut certainement pas être empêché de faire valoir son droit de propriété par quelqu'un qui refuse simplement de reconnaître ce droit » (*Greenberg*, par. 44).

[261] Je souscris entièrement à ce raisonnement.

[262] En l'espèce, tout comme dans affaire *Greenberg*, la société intimée ne prétend pas être devenue propriétaire des actions de l'appelant par application de la prescription acquisitive. Elle refuse tout simplement de reconnaître à l'appelant son statut d'actionnaire et soutient que c'est son actionnaire majoritaire, M. Rosati, qui est dorénavant propriétaire de ses actions en raison d'une prétendue entente verbale et intervenue informellement entre

would stress once again that the situation in this case differs from the one in *Greenberg*, as Mr. Rosati is not a party to the litigation and therefore cannot claim acquisitive prescription in relation to the shares. Nor can the respondent company do so on his behalf.

VI. Conclusion

[263] For all these reasons, I would allow the appeal, revoke the resolution to transfer the appellant's shares and order that the respondent company's registers be rectified to reflect the appellant's status as a shareholder, with costs throughout.

Appeal dismissed with costs, CÔTÉ J. *dissenting.*

Solicitors for the appellant: Blake, Cassels & Graydon, Montréal.

Solicitors for the respondent: Langlois lawyers, Montréal.

l'appelant et M. Rosati. Or, contrairement à la situation dans l'affaire *Greenberg*, et j'insiste une fois de plus sur ce point, M. Rosati n'est pas partie au litige et ne peut par conséquent revendiquer la prescription acquisitive des actions. La société intimée ne peut non plus le faire pour lui.

VI. Conclusion

[263] Pour tous ces motifs, je suis d'avis d'accueillir le pourvoi, d'annuler la résolution de transfert des actions de l'appelant et d'ordonner la rectification des registres de la société intimée afin de refléter le statut d'actionnaire de l'appelant, le tout avec dépens devant toutes les cours.

Pourvoi rejeté avec dépens, la juge CÔTÉ *est dissidente.*

Procureurs de l'appelant : Blake, Cassels & Graydon, Montréal.

Procureurs de l'intimée : Langlois avocats, Montréal.

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TAB 47

CITATION: Midwest Amusement Park, LLC v. Cameron Motorsports Inc., 2018 ONSC 4549
COURT FILE NO.: CV-08-00361674
COURT FILE NO.: CV-10-00404713
DATE: 20180726

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Midwest Amusement Park, LLC Plaintiff	)	*Ryan MacIsaac*, and *James Holtom* for the Plaintiff
– and –	)	
Cameron Motorsports Inc., Robert Cameron, MMG Financial Corp. Malcolm McMaster and Team Hurricane Inc. Defendants	)	
AND BETWEEN:	)	*Ryan MacIsaac*, and *James Holtom* for the Plaintiff
Dr. R.C. Samanta Roy Institute of Science & Technology, Inc. and Midwest Amusement Park, LLC Plaintiffs	)	
- and –	)	
Robert Cameron Defendant	)	
	)	**HEARD**: July 19, 2018

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In 2008, Midwest Amusement Park, LLC sued Robert Cameron, Cameron Motorsports

Inc., Malcolm McMaster, MMG Financial Corp., and Team Hurricane Inc. for fraud (the 2008-action).

[2] In 2010, Midwest Amusement and Dr. Samanta Roy Institute of Science and Technology (the "Institute") sued Mr. Cameron for another fraud (the 2010-action).

[3] In the 2008-action, Midwest Amusement now moves for summary judgment against Mr. Cameron and Cameron Motorsports for the equivalent in Canadian dollars of $386,281.93 (USD). Midwest Amusement also requests a lift of the stay of proceedings against Cameron Motorsports, which a few days ago made an assignment into bankruptcy under the *Bankruptcy and Insolvency Act*.[1]

[4] In the 2010-action, Midwest Amusement and the Institute now move for summary judgment against Mr. Cameron for $5 million plus the equivalent in Canadian dollars of $175,000 (USD), plus punitive damages of $500,000.

[5] For the reasons that follow:

- I lift the stay of proceedings in the 2008-action brought about by the assignment into bankruptcy of Cameron Motorsports.
- In the 2008-action, I grant Midwest Amusement a judgment against Mr. Cameron and Cameron Motorsports for: (a) the equivalent in Canadian dollars of $386,281.93 (USD), plus post-judgment interest at 2%; and (b) costs of $40,000 on a substantial indemnity basis.
- In the 2010-action, I grant Midwest Amusement and the Institute a judgment against Mr. Cameron for: (a) the equivalent in Canadian dollars of $175,000 (USD) plus pre-judgment and post-judgment interest at 2% per annum from November 1, 2008; (b) damages at large of $500,000 with post-judgment interest at 2% per annum; (c) punitive damages of $500,000 plus post-judgment interest at 2% per annum; and (d) costs of $40,000 on a substantial indemnity basis.

B. Evidentiary Background

[6] In support of the two summary judgment motions, Midwest Amusement and the Institute relied on the affidavit of Naomi Isaacson dated April 3 2018 and on the affidavit of Kathy Stubits dated April 3, 2018. The Plaintiffs also relied on the transcripts from the examinations for discovery and form the cross-examinations on summary judgment motions in the 2008-action and in the 2010-action.

[7] Ms. Isaacson, who is the manager of Midwest Amusement and the Chief Executive Officer of the Institute, was not cross-examined. Ms. Stubits, who is a law clerk at McCarthy Tétrault LLP, lawyers for Midwest Amusement and for the Institute, was not cross-examined.

[8] Mr. Cameron and Cameron Motorsports did not file any evidence on the summary

[1] R.S.C., 1985, c. B-3.

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judgment motions and neither defendant appeared at the hearing of the summary judgment motions.

[9] Late during the course of the argument of the motion, I was advised that Mr. Cameron was in transit from Hamilton to the courthouse in Toronto. He did not arrive before the argument was completed, and I reserved judgment.

[10] Cameron Motorsports' trustee-in-bankruptcy was aware of the summary judgment motion but did not appear, although duly served.

C. Facts

[11] Midwest Amusement is a limited liability corporation incorporated pursuant to the laws of Wisconsin, U.S.A. It operated USA International Raceway, a go-kart race track located in Shawano, Wisconsin on lands owned by a subsidiary of the Institute.

[12] Midwest Amusement is owned by the Institute, which is a not-for-profit corporation pursuant to the laws of Delaware, U.S.A. The Institute owns a group of corporations that operate a variety of business including amusement parks, hotels, land development, and resource development.

[13] Mr. Cameron is an Ontario resident and is the principal of Cameron Motorsports, an Ontario corporation that carried on the business of distributing go-karts and go-kart accessories. Mr. Cameron and, or his wife are the owners of Cameron Motorsports.

[14] Malcolm McMaster is or was an Ontario resident and is the principal of MMG Financial, an Ontario corporation that carried on the business of a financing purchase transactions. It was alleged that MMG Financial was the financial arm of Cameron Motorsports. Mr. Cameron and Mr. McMaster were business associates or partners until there was a falling out between them.

[15] Team Hurricane is an Ontario corporation. Team Hurricane was owned and controlled by some combination of Messrs. Cameron and McMaster, Cameron Motorsports, and MMG Financial. Team Hurricane was a shell company.

[16] In the winter of 2005, Kal Gronval, a representative of Midwest Amusement, met with representatives of Cameron Motorsports at a trade show. Subsequently, representatives of Midwest Amusement met in Wisconsin with Mr. Cameron and Mr. McMaster and with representatives of Cameron Motorsports and Team Hurricane.

[17] As a result of these meetings, Midwest Amusement was induced to enter into an oral agreement pursuant to which it agreed to purchase 24 go-karts, a service and maintenance service, and also rights to the "Arrive and Drive Program," an apparently very successful turnkey racing program to operate go-cart race tracks for amateur competitors. Midwest Amusement was to receive the rights to use the program and a distributorship to licence the program to other race tracks across the U.S.

[18] To induce Midwest Amusement to purchase the go-karts and the Arrive and Drive Program, Messrs. Cameron and McMaster, Cameron Motorsports, MMG Financial, and Team Hurricane misrepresented the quality of the go-karts, the services that would be provided, the

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distributorship program, the forecasts of profits, and their own intention to perform their promises.

[19] Midwest Amusement was also induced to enter into an oral loan agreement with MMG Financial. Under this arrangement, MMG Financial agreed to finance Midwest Amusement's purchase of goods and services from Cameron Motorsports and Team Hurricane. MMG Financial agreed to pay on Midwest Amusement's behalf the cost of the goods and services. The payment was to be a $190,000 (USD) loan to be repaid by Midwest Amusement with interest at 2% per month.

[20] It is unknown whether MMG Financial actually advanced the $190,000 (USD). Mr. McMaster said that it did. However, Cameron Motorsports denies every being paid for the go-karts and the associated goods and services. The breakup of the business relationship between Mr. Cameron and Mr. McMaster may have had something to do with this dispute about what happened to the $190,000 (USD).

[21] In any event, in the late summer of 2005, Team Hurricane, which was a shell company, delivered the go-karts to Midwest Amusement. The delivery was late, and the go-carts were unassembled, defective, and dangerous and inoperable when assembled. The engines of twelve go-carts exploded during a test run, and the remaining twelve go-karts were inoperable. The material for the Arrive and Drive Program was never delivered.

[22] Mr. Cameron and Cameron Motorsports later admitted that they never intended to provide the goods and services that they had represented and promised to Midwest Amusement.

[23] As a result of not receiving the goods and services from Mr. Cameron and Cameron Motorsports, Midwest Amusement reneged on making any payments to MMG Financial.

[24] In August 2006, MMG Financial responded by bringing an action against Midwest Amusement in the District Court for the Eastern District of Wisconsin for repayment of its $190,000 (USD) loan.

[25] In September 2008, MMG Financial's action was successful. A jury of the U.S. District Court granted MMG Financial a judgment for $386,281.93 (USD) for breach of contract.

[26] On August 29, 2008, by notice of action (the 2008-action), Midwest Amusement sued Cameron Motorsports, Mr. Campbell, MMG Financial, Mr. McMaster and Team Hurricane for fraud.

[27] On September 26, 2008, Midwest Amusement delivered its Statement of Claim.

[28] Following the commencement of the 2008-action, Mr. Cameron persuaded Midwest Amusement and the Institute that Mr. McMaster was to blame for all the problems. Mr. Cameron said that he would help Midwest Amusement and the Institute if they discontinued the 2008-action against him and his company. Thus, in October 2008, notwithstanding the delivery of its Statement of Claim, in the 2008-action, Midwest Amusement entered into a Loan Agreement and a Business Agreement with Mr. Cameron. Under these agreements, Mr. Cameron agreed to provide consulting services to ensure that Midwest Amusement would realize weekly revenues of $50-70,000 (USD) during the 2009 racing season, and he agreed to lend or to arrange a loan to Midwest Amusement and the Institute of $10 million (USD) for their ongoing operations.

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[29] In order to induce Midwest Amusement and the Institute to enter into the Business Agreement and the Loan Agreement, Mr. Cameron fabricated documents indicating that international wire transfers of funds had been arranged. On his examination for discovery, Mr. Cameron admitted that he fabricated all of the banking and financial information that he provided to Midwest Amusement and the Institute.

[30] Midwest Amusement and the Institute were fooled. Around November 1, 2008, in performance of the Business Agreement, Midwest Amusement and the Institute agreed to pay Mr. Cameron a consulting fee of $250,000 (USD), and they paid $175,000 (USD) as an advance payment to Mr. Cameron.

[31] After receiving the $175,000 (USD), Mr. Cameron stated that he had never intended to honour the Loan and Business Agreement and that he had tricked Midwest Amusement in order to receive the monies that he alleged were never paid for the go-karts pursuant to the 2005 agreement.

[32] On his examinations in these proceedings, Mr. Cameron admitted that he never intended to fulfill his obligations under the Business and Loan Agreements and that he had fraudulently induced Midwest Amusement and the Institute to transfer $175,000 (USD) as the first instalment of the consulting fee. He confessed that he faked the Swiss bank and the financial records that he sent to Midwest Amusement and the Institute as assurance that $10 million was available for a loan. On his examination for discovery, Mr. Cameron testified as follows:

> Q. 769 Generally one of the things that you were in discussion with my client about doing during this September/October time frame of 2008 was being a consultant for them whereby you would set up an arrive and drive program, lend them go-karts, promote certain events and get their racetrack in the black, if you will, in terms of turning a profit, right?
>
> A. Correct.
>
> Q. 770 And there's a contract that was signed in that regard, wasn't there?
>
> A. Uh-huh.
>
> Q. 771 We'll come to it.
>
> MR. HENDERSON: Is that the business agreement that you're referring to?
>
> BY MR. TAIT:
>
> Q. 772 Yes, and we'll come to it, but I'm right, and I know we've talked about this before, you never had any intention of living up to that?
>
> A. No. I never had intentions living up to any of the things that I agreed to do for them.
>
> Q.773. You just wanted them to pay you some money because you felt they owed you money for the go-karts?
>
> A. Yes, they owed me money for the go-karts.
>
> Q.774 How much did they owe you for the go-karts?
>
> A. I don't know offhand, but when they went to court, I think they lost 190,000, so if I would have asked for 190, I would look too suspicious, so I asked for 350. I think it was or something like that and 175,000 up front, and then the last whatever 100 and something thousand once I got all the stuff done.
>
> Q. 775 Expecting only to ever get the 175?

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A. That's correct.

[….]

Q. 796 And is it your evidence that this contract entitled Loan and Business Agreement Between USA International Raceway Inc. and Robert Cameron of October 23rd, 2008 reflects the terms of the consultancy agreement that was being negotiated and entered into at the time?

A. To be honest with you, I never read this agreement. It didn't matter what it said. I sent them a different agreement, and this is what they sent back.

Q.797 And you were fine with it?

A. Like I said, it didn't matter what it said. It could have said anything. I was signing it. It didn't matter.

Q.798 One of the aspects, the idea, the concept, was that you were going to be a consultant. They were going to pay you I think you said 300 and some odd thousand dollars with 175,000 up front, right?

A. Uh-huh.

Q.799 Then, as part and parcel of that, you were going to lend my clients ten million as a mortgage on the racetrack. Is that correct?

A. It had nothing to do with -- I guess it was ten million, and in return I guess whatever collateral they could put up for that kind of money. Like I said, it's --

Q. 800 What was the ten million for clause No. 3?

A. They needed money. Ten million was to --

Q. 801 You were supposed to wire ten million?

A. Yes.

Q. 802 And of course you never did?

A. I never did. Where would I get ten million? Where would I get half a million dollars?

Q. 803 You don't have ten million?

A. No, I don't have ten million. If -- no.

Q. 804 But you told my clients that you did?

A. Your clients told me a lot of things too.

Q. 805 That's not the question, sir.

A. So, I lied just like they lied, and I did whatever I could do in accordance even to the police when they found out the money that I got and they saw the wire transfers. They lied to me right from day one, and I just did whatever I said to get my money back.

Q.806 Is it fair to call it a setup?

A. I'm sorry?

Q. 807 Can we call it a setup?

A. Yes, I think they set me up.

Q. 808 No, no, what you did to them.

A. No. What I did to them was in retaliation, sir, to their setup.

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[33] Retaliation was not enough for Mr. Cameron. He felt horribly wronged by Midwest Amusement and the Institute. He wanted revenge. In his lust for blood, he concocted and published to the media a story that the Institute had paid him $175,0000 (USD) to arrange a contract killing of 60 residents of Shawano, Wisconsin including its mayor and virtually every other town official. For example, on December 23, 2008, Mr. Cameron was interviewed on a CBS Evening News. During the broadcast, a video of which I viewed, he said that he had received $175,000 (USD) in wire transfers from the Institute along with a list of 60 names of persons marked for assignation. Mr. Cameron said that he had only approached the Institute to recover the money owed him for go-karts, but they hired him to arrange murders.

[34] In November 2008, Mr. Cameron set numerous threatening, racist, sexist, and repulsive text and phone messages to Ms. Isaacson, members of her family, and to others associated with Midwest Amusement and the Institute. Examples are set out below:

> Text: 11/23/2008 - I hope your sister enjoyed the pork she ate while in jail. Does she look or sound like the dirty pig she is?
>
> Text: 11/23/2008 - Tomorrow I will be releasing all our taped conversations to all media and the people you guys have been emailing shit about me.
>
> Text 11/23/2008 - u just signed the end to [the Institute] I will not stop until everyone of you are dead and behind bars and I have more supporters than u have cult members.
>
> Text: 11/23/2008 - Your son Gad is going hunting - I hope he is safe in North Dakota
>
> Text: 11/23/2008 - u r about 2 go to jail 4 along time, bitch
>
> Text: 11/23/2008- U have to be the ugliest bitch I ever seen.
>
> Phone Message: Hey Darlene, I hope all you guys are fucking tape-recording all these messages. Especially you. I am gonna fuck with you and yours. You don't understand you got a big fucking mouth. And you're gonna keep talking about my family, me, my business and your emailing everybody. You know what? Now its time to talk about you, you little bitch. I heard you're an old bitch, but you're an old bitch that wants everybody. You know, what the fuck, I'm talking about you know who the fuck I am. I'm coming after you two fucking pieces of shit.
>
> Phone Message: Hey bitch, website, email and everything else. Shut your fucking hole. I hear everything about you fucking people. Gonna be all over the fucking Internet. I'm gonna email everybody in fucking Wisconsin. You are fucked, bitch. You, and your fucking sister and all your fucking religion. You fucking cock sucking people are all gonna be paying for what you did to me. You cunt. You slimy bitch.
>
> Phone Message: Did the Doc tell you about your sister Naomi? I'll get her number tomorrow from the telephone company. I know where you guys live. I know whom the companies you guys are associated with. I know everything now. I am gonna find a little bit more out each fucking day. You guys are in a lot of fucking trouble. I'm fucking coming. I'm telling you, you think your sister got it bad, you're gonna get it good. You fucking bitch.

[35] Meanwhile, on November 24, 2008, Mr. McMaster and MMG Financial delivered its Statement of Defence in the 2008-action. They also delivered a Crossclaim against Mr. Cameron and Cameron Motorsports.

[36] On February 19, 2009, Mr. Cameron and Cameron Motorsports delivered its Statement of Defence in the 2008-action. They also delivered a Crossclaim against Mr. McMaster and MMG Financial.

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[37] On February 27, 2009, Team Hurricane was noted in default for failure to deliver a Statement of Defence in the 2008-action.

[38] On July 7, 2009, Mr. Cameron and Cameron Motorsports withdrew a motion for security for costs at the hearing of the motion.

[39] In August, 2009, Mr. McMaster and MMG Financial moved for a summary judgment in the 2008-action on the basis that the claim against it was barred by *res judicata* because of the U.S. District Court decision.

[40] On July 29, 2010, Mr. Cameron was cross-examined in respect of Mr. McMaster's and MMG Financial's motion for a summary judgment against Midwest Amusement in the 2008-action.

[41] On January 5, 2010, the United States Court of Appeals for the Seventh Circuit dismissed Midwest Amusement's appeal of the jury verdict.

[42] On June 20, 2010, Midwest Amusement and the Institute sued Mr. Cameron for breach of contract, deceit, injurious falsehood, intentional interference with economic interests, libel and slander and unjust enrichment (the 2010-action). By this time several of the Institute's subsidiaries had gone bankrupt, allegedly as a result of the damage to their reputation caused by Mr. Cameron's retaliatory actions.

[43] On August 3, 2010, Mr. Cameron delivered his Statement of Defence to the 2010-action against him.

[44] On April 1, 2011, Master Hawkins dismissed Mr. McMaster's and MMG Financial's motion for a summary judgment in the 2008-action.

[45] On April 28, 2011, Mr. Cameron was examined for discovery in the 2008-action and in the 2010-action in his own behalf and as the representative of Cameron Motorsports.

[46] In December 2011, Midwest Amusement set the 2008-action down for trial. It is not clear to me precisely when, but the 2010-action was also set down for trial.

[47] Between August 2012 and February 2014, Mr. Cameron and Cameron Motorsports changed counsel several times and the parties were unable to agree about scheduling the trial or trials. Eventually, the trial in the 2010-action was scheduled for March 10, 2014 and the trial in the 2008-action was scheduled for June 23, 2014.

[48] On March 7, 2014, days before the commencement of the trial in the 2010-action, Mr. Cameron advised counsel for the Plaintiffs that he had declared bankruptcy on September 4, 2013. As a result, the actions against him were automatically stayed pursuant to the *Bankruptcy and Insolvency Act*.

[49] On March 10, 2014, Justice Stinson ordered that the automatic stay against Mr. Cameron be lifted for the sole purpose of making an order as to costs against Mr. Cameron for the wasted preparation for the trial in the 2010-action. The stay was then reinstated, including enforcement of the costs award just made, pending further order of the court. The costs award of $8,000 was never paid.

[50] On April 25, 2014, there was a pre-trial conference in the 2008-action. Justice Chiapetta

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ordered that the scheduled trial not proceed as Mr. McMaster and MMG Financial could not be located. The 2008-action was struck off the list, and a pre-trial conference was scheduled for October 29, 2014.

[51] The October 29, 2014 pre-trial was abortive as Mr. Cameron and Cameron Motorsports failed to attend.

[52] On November 13, 2014, Mr. McMaster and MMG Financial were noted in default.

[53] On October 8, 2015, Mr. Cameron was discharged from bankruptcy. Pursuant to s.168.1(1) of the *Bankruptcy and Insolvency Act*, Mr. Cameron was discharged and released from all debts, except those matters referred to in s.178(1) of the Act. Section 178 (1) of the Act states:

> *Debts not released by order of discharge*
>
> 178 (1) 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 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;
>
> [...]
>
> (h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

[54] The result of Mr. Cameron's discharge from bankruptcy was that the stay of the action was terminated and Midwest Amusement and the Institute were at liberty to sue him for fraud, which was a debt not discharged by his discharge from bankruptcy.

[55] Meanwhile, on November 27, 2015, Justice Diamond awarded Midwest Amusement a default judgment against Mr. McMaster and MMG Financial for the equivalent in Canadian dollars of $386,281.93 (USD) plus pre and post-judgment interest at 2% per annum.

[56] Mr. McMaster and MMG Financial have not paid the judgment, and the U.S. courts have declined to recognize the Ontario court's default judgment to offset the U.S. judgment.

[57] On September 7, 2016, as a result of correspondence with the trustee-in-bankruptcy, Midwest Amusement and the Institute learned for the first time that Mr. Cameron had been discharged from bankruptcy.

[58] On April 26, 2017, Master Abrams made a procedural order and ordered, among other things, that summary judgments or trials in the 2008-action and the 2010-action be heard together.

[59] In early 2018, Midwest Amusement in the 2008-action and Midwest Amusement and the Institute in the 2010-action brought motions for summary judgment.

[60] On February 27, 2018, Justice Firestone issued a scheduling order requiring Mr. Cameron and Cameron Motorsports to deliver its responding material by April 27, 2018. No material was

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delivered.

[61] On April 26, 2018, Cameron Motorsports filed an assignment in Bankruptcy and it delivered a notice of stay of proceedings pursuant to the *Bankruptcy and Insolvency Act*.

[62] Notwithstanding the notice, Midwest Amusement and the Institute continued with their motions for summary judgment and on this motion, they ask for the additional relief of an order lifting the stay against Cameron Motorsports in the 2008-action.

[63] On its motion for summary judgment in the 2008-action, Midwest Amusement seeks the equivalent in Canadian dollars of $386,281.93 (USD) to offset the judgment of the Wisconsin District Court.

[64] On its motion for a summary judgment in the 2010-action, Midwest Amusement and the Institute submit that as a result of the frauds perpetrated by Mr. Cameron: (a) they lost the expected profits of approximately $33 million (USD) between 2009 and 2013 from the Business and Loan Agreement; (b) in the alternative, they lost the expected profits of approximately $7 million (USD) from the loan portion of the agreement; (c) they lost the $175,000 (USD), which was taken by false pretences; (d) they lost approximately $21.5 million in investments in seven properties that were lost through foreclosures; and (e) in the alternative, they lost approximately $2.3 million in equity on the properties lost due to the foreclosures. In consequence of the various losses, they claim $5 million, which they submit very conservatively approximates the position they would have been in had the fraudulent agreements been performed.

[65] On its motion for a summary judgment in the 2010-action, Midwest Amusement and the Institute claim punitive damages of $500,000.

D. Discussion

1. Introduction

[66] There are five issues to determine on these two summary judgment motions; namely: (1) Should the stay of proceedings against Cameron Motorsports be lifted? (2) Are the cases appropriate for a summary judgment? (3) Should Mr. Cameron and Cameron Motorsports be found liable for deceit, fraudulent misrepresentation, and for obtaining property by false pretences? (4) What is the quantum of damages? and (5) Are Mr. Cameron and Cameron Motorsports liable for punitive damages?

2. Lifting the Stay of Proceedings

[67] Section 69 (1) of the *Bankruptcy and Insolvency Act* provides for a stay of proceedings against a person, which includes a corporation, that makes an assignment into bankruptcy. Section 69 (1) states:

> *Stay of proceedings — notice of intention*
>
> 69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or

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> shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
>
> […]

[68] Section 69.4 of the *Bankruptcy and Insolvency Act* empowers the court to lift the stay in certain circumstances.

> *Court may declare that stays, etc., cease*
>
> 69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> > (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
> >
> > (b) that it is equitable on other grounds to make such a declaration.

[69] Courts have a wide discretion based on the particular facts of the particular case to lift a stay of proceedings brought about by a bankruptcy.[2] In *Advocate Mines Ltd. (Re)*,[3] Registrar Ferron held that the court may remove the stay of proceedings in a variety of circumstances including: (1) where the action is against a bankrupt for a debt to which a discharge would not be a defence; (2) where the action is in respect of a contingent or unliquidated debt, the proof of which and the valuation of which has a degree of complexity that makes the summary procedure prescribed under the *Bankruptcy and Insolvency Act* inappropriate; (3) where there are other parties and the action is one in which the bankrupt is a necessary party for the complete adjudication of the matters at issue; (4) where the action is brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation; and (5) where the action at the date of bankruptcy has progressed to a point where logic dictates that the action be permitted to continue to judgment.

[70] Registrar Ferron's decision has been used and approved of in a variety of cases.[4] Applying it to the circumstances of the immediate case, the stay should be lifted because the case against Cameron Motorsports falls within criteria (1), (2), (3), and (5). In the immediate case, it may also be noted that the trustee-in-bankruptcy did not appear to oppose the lifting of the stay.

[71] In *Lincoln Trust and Savings Co. v. Wagman*,[5] the court lifted the stay in action in which the plaintiff sued the bankrupt for fraud.

[72] In *Royal Bank of Canada v. Société Générale (Canada)*,[6] Justice Ground held that that the stay will be lifted in circumstances where the claims against the Bankrupt are for debts which would not be released by an order of discharge; for example, where the claim is about a

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[2] *Fiorito v. Wiggins* 2017 ONCA 765 at para. 35.
[3] (1984), 52 C.B.R. (N.S.) 277 (Registrar).
[4] *Fiorito v. Wiggins* 2017 ONCA 765 at para. 38; *Global Royalties Ltd. v. Brook*, 2016 ONCA 50 (in chambers); *Toronto-Dominion Bank v. Mawji* 2011 ONSC 4259.
[5] (1977), 23 C.B.R. (N.S.) 240 (Ont. H.C.J.), aff'd (1978), 28 C.B.R. (N.S.) 179 (Ont. C.A.).
[6] (2003) 48 C.B.R. (4th) 103 (Ont. S.C.J.).

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fraudulent scheme, or where the Bankrupt is a necessary party for the completed adjudication of the matters in an action involving the other parties.

[73] I conclude that the stay of proceedings against Cameron Motorsports should be lifted.

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3. Are the Cases Appropriate for a Summary Judgment?

[74] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04 (2.1) states:

> 20.04 (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.

[75] In *Hryniak v. Mauldin*[7] and *Bruno Appliance and Furniture, Inc. v. Hryniak*,[8] the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[76] If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04 (2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole. To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings and to fairly and justly adjudicate the issues in the case.[9]

[77] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties

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[7] 2014 SCC 7.
[8] 2014 SCC 8.
[9] *Campana v. The City of Mississauga*, 2016 ONSC 3421; *Ghaeinizadeh (Litigation guardian of) v. Garfinkle Biderman LLP*, 2014 ONSC 4994, leave to appeal to Div. Ct. refused, 2015 ONSC 1953 (Div. Ct.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836 at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001.

have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.[10] Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.[11]

[78] In my opinion, the cases at bar are appropriate for summary judgments.

[79] With Mr. Cameron and Cameron Motorsports delivering no responding material and not appearing to resist the summary judgment motions, the motions were more like a default judgment motion than a summary judgment motion, but in any event, the court was in a position to decide the matter summarily and there would be little to nothing to be achieved by prolonging this thirteen-year saga that began in the winter of 2005 by deferring the matter to a trial.

[80] Mr. Cameron and Cameron Motorsports are the only remaining defendants, and having regard to Mr. Cameron's admissions - more like spiteful confessions - there are no genuine issues requiring a trial.

[81] If there were genuine issues requiring a trial (and there are none), there is a large and ample evidentiary record of documents and transcripts of examinations from which the court can decide the issues and there is no need for a trial.

[82] In the 2008-action and the 2010-action, the court has all it needs to fairly and justly decide the 2008-action and the 2010-action, and it is in the interests of justice that it do so.

4. Liability for Deceit, Fraudulent Misrepresentation, Obtaining Property by False Pretences

[83] Should Mr. Cameron and Cameron Motorsports be found liable for deceit, fraudulent misrepresentation, and for obtaining property by false pretences?

[84] To defraud a person is to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled.[12] The elements of a claim of fraudulent misrepresentation are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages.[13]

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[10] *Dawson v. Rexcraft Storage & Warehouse Inc*., [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc*. (1994), 18 O.R. (3d) 481 (C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11.
[11] *Toronto-Dominion Bank v. 466888 Ontario Ltd.*, 2010 ONSC 3798.
[12] *Scott v. Commissioner of Police for the Metropolis*, [1974] 3 All E.R. 1032 at p. 1038 (H.L.).
[13] *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8; *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 at p. 344 (S.C.C.); *Fiorillo v. Krispy Kreme Doughnuts, Inc*. (2010), 98 O.R. (3d) 103 at paras. 66-67 (S.C.J.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.).

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[85] All of the elements of a claim for deceit, fraudulent misrepresentation, and for obtaining property by false pretences are factually present in the 2008-action and in the 2010-action.

[86] Mr. Cameron and Cameron Motorsports mounted no defence because they have none.

[87] Mr. Cameron and Cameron Motorsports should be and are liable for deceit, fraudulent misrepresentation, and for obtaining property by false pretences.

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5. Quantum of Damages

[88] Turning to the matter of the quantification of damages, in the 2008-action, Midwest Amusement seeks to be placed in the same position it would have been in had the Defendants' fraud not induced it to enter into the contract to purchase go-karts.

[89] Midwest Amusement seeks the equivalent in Canadian dollars of $386,281.93 (USD), which is the amount that Justice Diamond ordered payable by the McMaster Defendants to offset the debt owed on account of the Wisconsin judgment debt incurred but for Mr. Cameron's and Cameron Motorsport's fraudulent misrepresentations.

[90] In the 2010-action, Midwest Amusement and the Institute Midwest seek damages of $5 million, which they submit very conservatively approximates the position they would have been in had the fraudulent agreements been performed. They also seek the equivalent in Canadian dollars an additional $175,000 (USD) on account of the consulting fees obtained by Mr. Cameron deceitfully and by false pretences in the fall of 2008.

[91] In an action in deceit or fraudulent misrepresentation, plaintiffs are entitled to be put in the same position they would have been in if the representations had not been made, but not to be put in the position they would have been if the representations had been true.[14]

[92] The measure of damages for fraudulent misrepresentation or deceit is the tort measure, not the measure used for breach of contract. In *Todd Family Holdings Inc. v. Gardiner*, the Court of Appeal stated:

> 25. We agree with counsel for the appellants' submission that the measure of damages for deceit requires that the injured party be placed in the position it would have been in had the misrepresentation not been made. Damages for deceit are not calculated on the assumption that the injured party is entitled to enforce the agreement entered into as a result of the misrepresentation. […]

[93] Thus, I have no difficulty in the 2008-action in awarding Midwest Amusement the equivalent in Canadian dollars of $386,281.93 (USD).

[94] In the 2010-action, with the exception of the claim seeking the equivalent in Canadian dollars of $175,000 (USD) on account of the consulting fees obtained by Mr. Cameron deceitfully and by false pretences, all of Midwest Amusement's and the Institute's claims for

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[14] *Fiorillo v. Krispy Kreme Doughnuts, Inc.*, [2009] O.J. No. 2430 at para. 101 (S.C.J.); *C.R.F. Holdings Ltd v. Fundy Chemical International Ltd*., [1982] 2 W.W.R. 385; leave to appeal to SCC refused (1982), 42 N.R. 358; *Parna v. G. & S. Properties Ltd.*, [1969] 2 O.R. 346 (C.A.); rev'd on other grounds, [1971] S.C.R. 306.

damages are essentially based on the notion that they lost profits and investments that would not have been lost had Mr. Cameron performed the Loan and Business Agreement. These alleged pecuniary losses underlie Midwest Amusement's and the Institute's claim for $5 million.

[95] I have no difficult in the 2010-action in awarding Midwest Amusement and the Institute the equivalent in Canadian dollars of $175,000 (USD), which is a genuine loss for which compensation is required to place them in the position they would have been had they not been fraudulently deceived. The $5 million claim, however, is not recoverable, because damages for deceit are not calculated on the basis that the injured party is entitled to enforce the agreement entered into as a result of the misrepresentation. That is the contract measure of pecuniary losses not the tort measure for deceit or fraudulent misrepresentation.

[96] That said, Midwest Amusement and the Institute are not limited only to a claim of the equivalent in Canadian dollars of $175,000 (USD).

[97] Damages at large may be awarded in cases of intentional torts in circumstances where there has been injury to the plaintiff's reputation and associated economic loss.[15] In the immediate case, I award Midwest Amusement and the Institute $500,000 for damages at large.

[98] Damages at large are a matter of impression, and unlike pecuniary damages, damages at large are not capable of precise measurement.[16] The principles for calculating damages at large are: (1) damages at large include compensation for loss of reputation, injured feelings, or victimization from the defendant's bad conduct; (2) damages at large compensate for losses that can be foreseen but cannot be readily quantified; (3) damages at large are a matter of discretion and are more a matter of impression, not addition; and (4) damages at large provide an opportunity to condemn flagrant abuse of the legal process.[17]

[99] In the immediate case, Midwest Amusement and the Institute suffered an outrageous and egregious attack on their reputation, and I am satisfied that their business suffered financially and that their principals and representatives suffered from the abuse, threats, and slanders and hate mongering of Mr. Cameron.

[100] Not surprisingly, there is no comparable cases where a defendant combined the harm caused by his frauds with the bad conduct boastfully and unabashedly undertaken by Mr. Cameron. As a matter of impression, in my opinion, the appropriate award of damages at large is

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[15] *Grand Financial Management Inc. v. Solemio Transportation Inc*., 2016 ONCA 175 at paras. 82-89, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 183; *Foschia v. Conseil des Écoles Catholique de Langue Française du Centre-Est*, 2009 ONCA 499 at para. 37; *PSC Industrial Canada Inc. v. Ontario (Ministry of the Environment)* (2005), 48 B.L.R. (3d) 58 at paras. 60-62 (Ont. S.C.J.), rev'd in part on other grounds (2005), 258 D.L.R. (4th) 320 (Ont. C.A.); *Uni-Jet Industrial Pipe Ltd. v. Canada (A.G.)* (2001), 198 D.L.R. (4th) 577 at paras. 66-72 (Man. C.A.); and *Alleslev-Krofchak v. Valcom Ltd*., 2009 at para. 361 (S.C.J.), aff'd 2010 ONCA 557.

[16] *Grand Financial Management Inc. v. Solemio Transportation Inc*., 2016 ONCA 175 at paras. 82-89, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 183; *Howard v. Madill*, 2010 BCSC 525, at para. 89; *Foschia v. Conseil des Écoles Catholique de Langue Française du Centre-Est*, 2009 ONCA 499 at para. 37; *Uni-Jet Industrial Pipe Ltd. v. Canada (A.G.)* (2001), 198 D.L.R. (4th) 577 at para. 72 (Man. C.A.).

[17] *Grand Financial Management Inc. v. Solemio Transportation Inc*., 2016 ONCA 175 at paras. 84-85, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 183; *Howard v. Madill*, 2010 BCSC 525, at para. 89.

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$500,000.

6. Punitive Damages

[101] Punitive damages are only awarded in extraordinary situations. In general, punitive damages are considered in situations where the defendant's misconduct is so malicious, oppressive, and high-handed that it would offend the court's sense of decency. Punitive damages do not bear any relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate a party, but rather to punish someone. It is the means by which a court expresses its outrage at what it considers egregious conduct of a party.[18]

[102] In the leading case of *Whiten v. Pilot Insurance Co.*,[19] the Supreme Court of Canada restored a punitive damages award of $1 million made by a jury in an action against an insurer who had breached its duty of good faith and fair dealing to its insured. At para. 94 of his judgment, Justice Binnie described how to instruct a jury about punitive damages; he stated:

> 94. [I]t would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[103] It follows from Justice Binnie's remarks that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. These factors must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish their

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[18] *Whiten v. Pilot Insurance Co*., [2002] 1 S.C.R. 595; *Vorvis v. Insurance Corp. of British Columbia* [1989] 1 S.C.R. 1085.
[19] [2002] 1 S.C.R. 595.

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purposes.

[104] Earlier in his judgment, at para. 74, Justice Binnie stated:

> [T]he governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation).

[105] Later in his judgment, at para. 100, he stated: "The 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 quantum."

[106] The cases at bar is certainly an extraordinary case. For many of the same reasons and because of the factual circumstances that justified the above compensatory award of damages at large of $500,000, the case at bar is an appropriate case to award punitive damages.

[107] I assess the punitive damages at $500,000, the amount requested by Midwest Amusement and the Institute. If the far less egregious circumstances in *Whiten v. Pilot Insurance Co.*, justified a $1 million punitive damages award, the circumstances of the 2010-action justify a punitive damages award of $500,000.

E. Conclusion

[108] For the above reasons, I lift the stay of proceedings in the 2008-action brought about by the assignment into bankruptcy of Cameron Motorsports. In the 2008-action, I grant Midwest Amusement a judgment against Mr. Cameron and Cameron Motorsports for: (a) the equivalent in Canadian dollars of $386,281.93 (USD), plus post-judgment interest at 2%; and (b) costs of $40,000 on a substantial indemnity basis. In the 2010-action, I grant Midwest Amusement and the Institute a judgment against Mr. Cameron for: (a) the equivalent in Canadian dollars of $175,000 (USD) plus pre-judgment and post-judgment interest at 2% per annum from November 1, 2008; (b) damages at large of $500,000 with post-judgment interest at 2% per annum; (c) punitive damages of $500,000 plus post-judgment interest at 2% per annum; and (d) costs of $40,000 on a substantial indemnity basis.

_____

Perell, J.

Released: July 26, 2018

2018 ONSC 4549 (CanLII)

CITATION: Midwest Amusement Park, LLC v. Cameron Motorsports Inc., 2018 ONSC 4549
COURT FILE NO.: CV-08-00361674
COURT FILE NO.: CV-10-00404713
DATE: 20180726

2018 ONSC 4549 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Midwest Amusement Park, LLC

Plaintiff

– and –

Cameron Motorsports Inc., Robert Cameron, MMG Financial Corp. Malcolm McMaster and Team Hurricane Inc.

Defendants

AND BETWEEN:

Dr. R.C. Samanta Roy Institute of Science & Technology, Inc. and Midwest Amusement Park, LLC

Plaintiffs

-and –

Robert Cameron

Defendant

REASONS FOR DECISION

PERELL J.

Released: July 26, 2018

TAB 48

COURT FILE NO.: 94-CQ-57215
DATE: 20030715

2003 CanLII 43753 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
MIKEALICE MANAGEMENT CORP. and DR. MICHAEL LAI	)	*David A. Payne* for the plaintiffs
Plaintiffs	)	
- and -	)	*Cheryl Bong Lee Lim* self-represented at trial; written submissions by *Alden M. Dychtenberg* and *Elizabeth Hall*
DE THOMAS FINANCIAL CORP., CHERYL BONG LEE LIM, VINCENT CHANYI, BOTCO DEVELOPMENTS INC., FRANK W. SOMER and TRENDSETTER REAL ESTATE SERVICES INC.	)	
Defendants	)	Heard: March 3 to 7, 10, 2003

BLENUS WRIGHT J.:

[1] In 1994, the plaintiff Mikealice Management Corp. invested $1,218,300 U.S. in a Youngstown, New York, condominium project. The project never proceeded and Mikealice lost its investment. Dr. Michael Lai is the sole shareholder of Mikealice.

[2] The plaintiffs claim that the lost investment was caused by the defendants' breach of contract and fiduciary duties, negligence and deceit. The plaintiffs claim damages in the amount of the lost investment and aggravated and punitive damages.

[3] At the commencement of trial, counsel for the plaintiffs advised the court that the defendants Frank W. Somer and Trendsetter Real Estate Services Inc. were bankrupt and the plaintiffs did not intend to proceed against them. The action against those defendants is dismissed without costs.

[4] On March 7, 2003, the fifth day of trial, the plaintiffs and the defendant De Thomas Financial Corp. entered into a settlement. On consent I ordered a dismissal of all claims against De Thomas Financial Corp. without costs. The cross-claim of De Thomas Financial Corp. against all other defendants were withdrawn without costs.

[5] The defendant Vincent Chanyi appeared in person on the first day of trial on his own behalf and on behalf of his company Botco Developments Inc. Previously, the Statement of Defence of these defendants was struck out. No new Statement of Defence was filed. Mr. Chanyi, having been advised that a judgment could issue against him if he did not defend decided not to be present to defend the allegations against him and his company. He was called as a witness for the plaintiffs. A default judgment will issue against Vince Chanyi and Botco Developments Inc.

[6] Cheryl Bong Lee Lim represented herself at trial. These reasons concern the plaintiffs' allegations against Ms. Lim.

[7] Dr. Lai indicated that he has a net worth of between five and six million dollars. He is experienced in investing in stocks and bonds, mutual funds, gold, limited partnerships and real estate. Prior to the Youngstown Project he had been involved numerous times in many kinds of investments.

[8] Ms. Lim worked at De Thomas Financial Corp. She is registered with the Ontario Securities Commission. Her registration is: "Mutual Funds Only".

[9] Ms. Lim's first contact was a cold call to Dr. Lai in September 1990. Apparently from time to time she would recommend certain investments to Dr. Lai but he declined.

[10] The first business they did together concerned Dr. Lai's investment portfolio with Nesbitt Thompson. Dr. Lai complained that his broker was churning his account causing him to pay too much in commissions. He wished to lessen the costs of commissions. Ms. Lim suggested transferring his portfolio to a discount broker to sell his shares and invest in mutual funds with De Thomas Financial Corp.

[11] In order to transfer the portfolio and sell the shares, Dr. Lai entered into a trading authorization with Marathon Brokerage dated July 4, 1993 to allow Ms. Lim to instruct Marathon to sell the shares on his behalf. I find that it was Dr. Lai who suggested that Ms. Lim put down the word "relative" with respect to "Relationship of agent to account holder" on the Trading Authorization form. Ms. Lim did not disclose to Marathon that she was registered with the Securities Commission to sell mutual funds. The evidence is that if she had disclosed her registration it is unlikely that Marathon would have accepted the trading authorization. Both Dr. Lai and Ms. Lim were dishonest in filling out the Trading Authorization form. I infer that they probably discussed how best to fill out the form so that Marathon would not question Dr. Lai's authorizing Ms. Lim to be his trading agent.

[12] The Nesbitt Thompson stock portfolio shares were sold and mutual funds purchased through De Thomas. Subsequently Dr. Lai's investment portfolio with AIC

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Investment Planning Limited was also transferred into mutual funds with De Thomas. Dr. Lai appears to have done well through his mutual fund investments and makes no claim against Ms. Lim with respect to mutual fund advice.

[13] Dr. Lai's general impression of Ms. Lim was:

> She told me she had good training at De Thomas and could get me good returns. She would look after my total investments. She is not pushy and has a lot of products she can help me with. I trusted her. She gave me very good personal service. She came to my office. She did not tell me that she could only deal in mutual funds. She inferred she was an all-around financial advisor.

[14] Some time in August 1993, Ms. Lim, Vince Chanyi, Dr. Lai and Dr. Lai's father-in-law S.W. Yip, went to Youngstown to see the property and find out more about the investment. As a result of that trip Ms. Lim retained lawyer Allan Mandel to review mortgage documents for Mr. Yip who was considering an investment in the Youngstown Project. Mr. Yip did invest $250,000 as a one-third interest in a $750,000 mortgage held in trust by Chanyi.

[15] Dr. Lai testified that he kept receiving information on the Youngstown Project but indicated to Ms. Lim that he had no cash to invest.

[16] At some point Dr. Lai and Ms. Lim had a discussion of a Lai Family Trust situated in the Cayman Islands in the amount of $1,750,000. The CIBC was the trustee of the Family Trust. Both Lim and Chanyi became involved in attempting to get the Family Trust monies transferred to Canada without tax consequences so that Dr. Lai could invest in the Youngstown Project.

[17] The CIBC (Cayman) wrote to Chanyi on February 10, 1994, as follows:

> **PROPOSED INVESTMENT OF TRUST T855**
>
> I am pleased to confirm the details of our telephone conversation this morning concerning the above investment. As advised we have carefully considered this proposal and are unable to undertake this investment as trustee for the following reasons.
>
> A trustee has a duty to protect and enhance the value of a trust fund for the benefit of the beneficiaries of the Trust. Trustees are guided by both statute and common law as to the nature and types of investments which may be prudently undertaken. A trustee has a duty to minimize risk by investing in a diversified portfolio of high quality investments. Typically no one investment in a trust fund should constitute more than 5% of the total value and for this reason an investment of such a large proportion of the Trust fund is unacceptable to a trustee.
>
> The percentage of the Trust fund which will be placed in this investment is the main reason for not agreeing to undertake this investment. A figure of 20% of the

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> value of the Trust fund would be more acceptable from a diversification perspective although we would then need to look at the individual investment concerned. On the basis of the proposal provided I see that the loan is unsecured and whilst it will carry a return of 19.95% the risk reward ratio of holding an unsecured loan of this magnitude would not be acceptable to a trustee.

[18] Dr. Lai had not been happy with the CIBC as trustee. He stated:

> It was difficult to contact CIBC and talk to someone knowledgeable about the Trust. It is too big a company. It likes to hold on to your funds at a lower interest rate. I knew that under the rule CIBC would not do the transfer for the Youngstown investment.

[19] On February 18, 1994, Dr. Lai signed a power of attorney to Ms. Lim which reads in part:

> To arrange for a replacement Trustee for the existing Trustee at the CIBC (Canadian Imperial Bank of Commerce)
>
> To arrange to have the Trust Deed amended in order to allow Dr. Michael Lai more control with respect to the types of investments these trust funds are placed in, without affecting the tax-free consequences of the Trust.

[20] On March 23, 1994, Dr. Lai signed an even broader power of attorney to Ms. Lim which states in part:

> To arrange for the transfer of trustee of the Michael Wai-Kee Lai Family Trust from the CIBC Bank and Trust Company (Cayman) Limited to the RHB Trust Company Limited or to any other qualified and registered trust company in the Cayman Islands as she may deem to be necessary;
>
> To execute all documents required by the Trustee to arrange for future investments including the project known as 'Harbour Gates of Youngstown' by purchase or by loan either directly or indirectly as my agent may deem appropriate;

[21] On April 14, 1994, The RHB Trust Co. Ltd. assumed trusteeship of the Family Trust. Shortly thereafter the funds were transferred to the plaintiff Mikealice Management Corp.

[22] Serious discussions about the Youngstown project took place on April 14, 1994, at Dr. Lai's home with Lim and Chanyi. Initially, a joint venture agreement was considered but abandoned. Several drafts of an agreement were exchanged between Lim, Chanyi and Dr. Lai. Dr. Lai reviewed the drafts and made changes.

[23] Dr. Lai had a talk with Lim on April 19, 1994, and he made some notes. I will set out the notes by numbers as Dr. Lai did, followed by Dr. Lai's testimony expanding on his notes.

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1. Why I don't feel comfortable with this investment.

   She was urging too fast, no mortgage was proposed and the Youngstown project is not possible. Lim said, 'You are too suspicious, you have to trust people – always second guessing is not good in business'

2. Something that you know that haven't told me.

   She said she told me everything.

3. Feel that you are on the other side of the bargaining table

   She said, 'No, I'm on your side'

   I feel a lot of pressure to go fast. Chanyi had a lot of proposals and asked me to sign. I was reluctant. Lim was upset, 'How you not make up your mind.'

4. Plans – approved? If so stamped?

   Lim said building permit already there.

5. Terms all agreed – see lawyer so fine tune the wording – get principle agree 1st.

   Lim said to agree in principle and refer to lawyer to finalize wording.

6. Once/month – up-date

   Lim said – "of course."

[24] From these notes, Dr. Lai had reservations about the Youngstown Project. It is unfortunate that he did not follow his instincts.

[25] Dr. Lai testified that he would never have invested without the promise of a first mortgage. He said that Lim and Chanyi confirmed that he would get a mortgage at the time he advanced the money. According to Dr. Lai the procedure was that he would give $1.2 million to a lawyer in the U.S. to be held in trust. After a first mortgage was registered the money would be transferred to Botco.

[26] However, on April 23, 1994, Dr. Lai signed a three-part agreement on behalf of Mikealice with Chanyi on behalf of Botco. There is an Agreement of Purchase and Sale; another agreement setting out three conditions to be performed by Botco failing which certain financial provisions result; and, a Mortgage Intent.

[27] It is difficult to interpret the true meaning of the three agreements. Dr. Lai was to advance $1,256,300 at the time of signing the Agreement of Purchase and Sale but there is no reference to when a first mortgage would be registered.

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[28] I accept Ms. Lim's evidence that in order to save money Dr. Lai did not want to retain a lawyer to assist in drafting any agreement or to review any agreement before he signed it. Dr. Lai now agrees that he should have consulted with a lawyer before he signed the agreements.

[29] Even if the agreements had stipulated a time for registration of a mortgage in Dr. Lai's favour he had no idea when he signed the agreement who actually owned the property and were there other encumbrancers because he did not retain someone to search the title and to advise him on these matters.

[30] In fact there was a $1,000,000 mortgage given by Botco which was subordinate to the $750,000 mortgage to which Dr. Lai's father-in-law had contributed $250,000.

[31] Dr. Lai met with Ms. Lim on April 25, 1994. His note of that meeting reads:

> Told her can't forward any money because need 1st mortgage legally sign 1st. Told had to pay off existing mortgage 1st.

[32] On April 27, 1994, Dr. Lai had another meeting with Ms. Lim. His notes of that meeting read:

> Asking for money to wire to Vince (to Botco) $968,300 – because other 1st mortgagee has retained a lawyer to sue Vince – Foreclose the property pay them 1st, Mr. Yip can be paid later. All condition will be agreed by Vince, documents can be signed later. Cheryl said Vince is honest, 'trust me.'

[33] There is no indication that Dr. Lai inquired as to who it was that intended to sue Vince or why Vince would be sued. There is no evidence that Dr. Lai even discussed the apparent problem with his father-in-law who had invested $250,000 and who, according to Cheryl, would not be paid out of Dr. Lai's money but would be paid later.

[34] The next day, April 28, 1994, Ms. Lim faxed Dr. Lai this message:

> Michael, it is urgent that to see you this morning. Is it possible to see you at ten o'clock?

Dr. Lai testified that Ms. Lim told him that the project would be in jeopardy if he did not wire the money and the first mortgagee would sue Chanyi.

[35] Dr. Lai instructed his bank to wire $968,300 to Botco although he did not know why that amount of money was needed or to whom it was eventually to be paid.

[36] Why did Dr. Lai not stick with his understanding of the agreement and insist that he send the money to a lawyer to be held in trust until he obtained a valid first mortgage? What was the urgency? Apparently, Dr. Lai did not ask himself these questions.

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[37] Dr. Lai was asked if he had any concern about sending the money without getting a mortgage. He responded, “I was concerned but Lim said Vince was honest – trust me – you have to trust people in doing business.”

[38] From his testimony I recorded these questions and answers:

> Q. Why send funds to Botco instead of directly to the mortgagee or to a lawyer in trust?
>
> A. We were to go to a lawyer on May 11. Lim said trust me – it was against my common sense.
>
> Q. Why not wait until May 11 to advance funds?
>
> A. Lim had been successful in getting the funds transferred from Cayman. This convinced me to follow her advice and she persisted over two days.

[39] Unfortunately, most of Dr. Lai’s decisions with respect to his investment in the Youngstown Project were against common sense.

[40] Shortly before May 11, Lim advised Dr. Lai that the meeting would be cancelled because there was a problem getting a lawyer. Apparently, Dr. Lai did not question why it was a problem to retain a lawyer.

[41] On May 11, Dr. Lai had a meeting with Vince Chanyi. Dr. Lai asked, “when register my mortgage and pay off father-in-law?” Chanyi’s response: “Next week.”

[42] Subsequent to the meeting Dr. Lai testified that Chanyi was active in calling him to give him updates on the progress of the project.

[43] On June 8, 1994, Chanyi sent Dr. Lai a letter with an outline of additional funds to be sent to Botco in the amount of $589,154.95 U.S. Dr. Lai’s response: “I not send you a cent.”

[44] However, Dr. Lai said that Chanyi called him many times using the “F” word and stating that if the money was not sent the project would be blown out. Chanyi said, “I would never get my first mortgage, the construction company would walk out and costs would increase.”

[45] On June 10, 1994, Dr. Lai sent Botco what he called, “a minimum amount of $250,000”. In his cross-examination he said:

> Over a period of four or five days Vince kept calling me and using the ‘F’ word and pounding me that the whole project would blow up. I had no choice. Out of desperation I sent funds.

[46] Apparently, Dr. Lai did not take time to reflect on the attitude displayed by Vince in harassing him to send more money. Dr. Lai did not ask himself, “Is this the kind of

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person I want to do business with?" He also did not reflect back to his May 11 meeting in which Vince had promised that Dr. Lai's mortgage would be registered and Dr. Lai's father-in-law paid off, "next week". Dr. Lai's mortgage was not registered and Dr. Lai's father-in-law had not received a cent back from his $250,000 even though, according to Dr. Lai, part of his first advance of $968,300 was to pay off the $750,000 first mortgage which Chanyi held in trust. Yet, Dr. Lai advanced an additional $250,000 to Botco on June 10, 1994. Dr. Lai sought no independent advice before he advanced the additional funds.

[47] I accept Ms. Lim's evidence that she was in China on June 10, 1994, when Dr. Lai advanced the $250,000 and, prior to her departure, she advised Dr. Lai not to advance any further funds until he obtained his first mortgage.

[48] There is no question that the main culprit who caused Dr. Lai to lose $1,218,300 U.S. is Vince Chanyi. Even if Chanyi had defended this action I would have found him liable for Dr. Lai's loss. Chanyi was simply dishonest in his dealings with Dr. Lai and Ms. Lim with respect to the Youngstown Project.

[49] In a U.S. proceeding brought by the plaintiff Mikealice Management Corporation against Botco and Vince Chanyi and others, Justice John P. Lane of the Supreme Court of the State of New York, stated the following in his judgment of November 10, 2000:

> Vincent Chanyi has not faithfully and honestly performed his duties as trustee under the trust declaration and as holder of the trust mortgage.

[50] But, what about the liability of Ms. Lim? In her defence she submits that her only role was to introduce Dr. Lai to Vince Chanyi and that it was Vince Chanyi who supplied all of the information to Dr. Lai about the Youngstown Project and it was Vince who convinced Dr. Lai to invest in the project. It is Ms. Lim's position that she did not give Dr. Lai any advice but was acting only as an intermediary between Dr. Lai and Chanyi.

[51] However, I find that Ms. Lim was intimately involved in providing information to Dr. Lai about the project and urging him to invest in it. Ms. Lim sent Dr. Lai a fax on August 24, 1993, which was a brief summary of the Youngstown Project indicating that if he invested he could take out certain amounts of profit tax-free. In conclusion she said, "I will call you tomorrow to answer any questions you may have".

[52] It was also Ms. Lim who, on April 27 and 28, 1994, on an urgent basis, convinced Dr. Lai to send $968,300 U.S. to Botco because, "Vince is honest, trust me".

[53] Ms. Lim was registered with the Securities Commission to sell mutual funds only. She could not trade in stocks and bonds or deal in other products governed by the Commission.

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[54] However, there was no prohibition prohibiting Ms. Lim from presenting herself as a financial advisor. Apparently, there are no regulations governing financial advisors. Anyone can be a financial advisor.

[55] But, Ms. Lim must have been aware that Dr. Lai was relying on her for sound financial advice. He had given her a trading authorization to instruct Marathon to sell his stock portfolio so that she could invest his money in mutual funds. He provided her with a power of attorney in order to have the Family Trust monies transferred from the Cayman Islands to Toronto to invest in the Youngstown Project.

[56] Even after the "horse had bolted from the barn", Dr. Lai continued to rely on Ms. Lim, and on August 24, 1994, gave her power of attorney re the Youngstown Project:

> … to explore all avenues to protect my portion of investments and interests. Miss Cheryl Lim can have the right to retain a lawyer if she feels fit. It is understood that Cheryl will keep me informed all the time and as soon as possible.

[57] When Ms. Lim placed herself in the position of financial advisor to Dr. Lai she had a duty of care toward Dr. Lai with an obligation to know the product she was advising on, to be sure that Dr. Lai knew the risks of investing in the product and was comfortable in investing in the product and, to ensure, where possible, that there was security for the investment.

[58] The problem with Ms. Lim advising Dr. Lai on the Youngstown Project; it was not her product that she was advising on. It was Vince Chanyi's product.

[59] It is difficult to know, with respect to the Youngstown Project, whether Ms. Lim was naïve and simply trusted Vince Chanyi or did she in fact know that Vince Chanyi was being dishonest?

[60] Ms. Lim had known Vince Chanyi because they had worked together at De Thomas Financial Corp.

[61] What did Ms. Lim know about who was behind the Youngstown Project? She was aware that Alberto Decouto had some involvement with Vince Chanyi in the Youngstown Project. She had previous involvement with Decouto's company, Mater's Management Ltd. Ms. Lim had sold mortgages to investors for Mater's projects. She knew that a number of investors had lost their investments. I suggest her prior knowledge should have twigged her into exploring the background of the Youngstown Project.

[62] There is no evidence that Ms. Lim ever questioned Vince Chanyi about the details of the Youngstown Project. An inference could be made that the reason she did not question Vince Chanyi is that she knew what was going on and was part and parcel of the scheme to get Dr. Lai to invest. Or, did she blindly accept Chanyi's information as true?

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[63] Counsel for the plaintiffs submits that Ms. Lim was deceitful in her relationship with Dr. Lai and in the advice provided to him. On the evidence I am not prepared to find that Ms. Lim was deceitful.

[64] However, she did have a conflict of interest. Apparently, if Dr. Lai invested in the Youngstown Project, Ms. Lim was to receive one condominium unit. She did not advise Dr. Lai that she would receive a benefit from his investment.

[65] Dr. Lai put his trust and confidence in Ms. Lim and relied on her advice. I find that Ms. Lim breached her fiduciary duties to Dr. Lai.

[66] I find that Ms. Lim, in advising Dr. Lai, did not know sufficient information about the background of the Youngstown Project to give adequate advice to Dr. Lai on whether he should invest, what the risks were, and whether he would have security for his investment.

[67] In particular, Ms. Lim urged Dr. Lai, on April 27 and 28, 1994, to send Botco $968,300 U.S. She made no enquiries on Dr. Lai's behalf as to why that amount or what that amount would be used for. She did not question the urgency issue. Even if someone intended to retain a lawyer to sue Chanyi, why was the money needed immediately? Ms. Lim also knew that Dr. Lai expected to have a registered first mortgage before he advanced any funds. She knew that a meeting with a U.S. lawyer was to take place on May 11 to ensure that Dr. Lai had protection for his investment. Notwithstanding her knowledge of Dr. Lai's wishes for security for his investment and her apparent lack of knowledge of what the funds were for and the reason for the urgency, she persuaded Dr. Lai to advance the funds. Ms. Lim breached her duty of care to her client in every respect.

[68] I find that Ms. Lim was negligent in the advice she gave to Dr. Lai. Her negligence caused Dr. Lai to lose $968,300 U.S.

[69] But did Dr. Lai's negligence contribute to his loss. When asked what he expected Ms. Lim to do for him Dr. Lai said:

> I don't have any mandate for her. She knows my financial status. My bottom line is to make me investment which makes money.

[70] I asked Dr. Lai why he was so attracted to the Youngstown Project. He responded, "Because it was very profitable". Indeed it would have been profitable if it had been successful. Dr. Lai's total investment was to be $2,040,000 for 24 condo units at a cost of $85,000 each. They were to be sold at a minimum of $115,000 for a profit of $30,000 on each unit for a total of $720,000 profit. He would also receive some interest on his $2,040,000 at 21.93%. It appears also that he would share in Botco's net taxable income to the tune of at least $250,000. All of this profit was within a time frame of one and a half years. It is apparent that Dr. Lai did not ask himself the question, "Is this too good to be true?"

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[71] Dr. Lai testified that this large investment was out of the ordinary for him; he went to the site several times but saw no evidence of construction; and, although he received pamphlets describing the Youngstown Project, he did not see or ask to see any construction drawings.

[72] I believe Dr. Lai was “penny wise and pound foolish”. The average person when purchasing a car will only purchase a car that has been certified. The average person when buying a house will require a satisfactory inspection report before agreeing to purchase.

[73] The average person does not have $2 million to invest. However, I suggest that the average person would have suggested to Dr. Lai that he required more than advice from a financial advisor before forking out that kind of money for the Youngstown Project.

[74] Dr. Lai is an educated person. He ought to have performed some level of due diligence and not relied totally on Ms. Lim who could not provide him with all of the advice required before investing in a real estate development.

[75] A few thousand dollars would have been well spent to retain a lawyer to search the title of the Youngstown Project, to provide an opinion on its feasibility, to draft the appropriate agreements, and to ensure the proper security documents were prepared and registered.

[76] Alas, Dr. Lai’s philosophy of maximize profit at minimal costs has now provided him with a costly lesson in how disastrous such a philosophy can be. Sometimes it is wise to accept just half a loaf.

[77] I believe that Dr. Lai was so mesmerized by the huge profit to be gained from this investment that he threw caution to the wind and common sense out the window, along with $1,218,300 U.S..

[78] What percentage of contributory negligence should be assessed against Dr. Lai. Chanyi was deceitful. Dr. Lai cannot be contributorily negligent where deceit is involved.

[79] The best statement of the law is contained at p.238 of the Ontario Law Reform Commission’s 1988 report entitled, “Report on Contribution Among Wrongdoers and Contributory Negligence”. That report states:

> It has long been established that the gullibility of the plaintiff in believing the defendant’s misrepresentation, or lack of care in failing to make an independent investigation, is no defence to an action based on fraud. It does not lie in the mouth of one who makes a statement on which another relies to say that the other was careless in believing her. …

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[80] The root of the law stems from a comment by Lord Chelmsford L.C. at pp.120-21 in *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, which reads:

> 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'.

[81] In the result, Vince Chanyi and Botco Developments Inc. are 100% responsible for Dr. Lai's losses. There will be judgment for the plaintiffs against Vince Chanyi and Botco Developments Inc. for $1,336,254, plus applicable prejudgment interest from April 28, 1994, and for $345,000, plus applicable prejudgment interest from June 10, 1994, plus costs.

[82] With respect to Ms. Lim, I did not find her deceitful. However, I find that Dr. Lai must accept the greater responsibility for his losses. I assess Dr. Lai's contributory negligence at 60%. Therefore, there will be judgment for the plaintiffs against Ms. Lim for 40% of $1,336,254, plus applicable prejudgment interest from April 28, 1994, plus costs.

[83] Ms. Lim shall have default judgment on her cross-claim against Vince Chanyi and Botco Developments Inc. for the full amount of the plaintiffs' judgment against Ms. Lim, plus costs.

[84] At the commencement of trial it was agreed that any judgment would not be enforceable until after it was determined what proceeds the plaintiffs would receive as a result of the U.S. judgment.

[85] If the parties are unable to agree on costs they may provide me with written submissions.

_____

Blenus Wright J.

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Released: July 15, 2003

cc

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COURT FILE NO.: 94-CQ-57215
DATE: 20030715

2003 CanLII 43753 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MIKEALICE MANAGEMENT CORP. and DR. MICHAEL LAI

Plaintiffs

- and -

DE THOMAS FINANCIAL CORP., CHERYL BONG LEE LIM, VINCENT CHANYI, BOTCO DEVELOPMENTS INC., FRANK W. SOMER and TRENDSETTER REAL ESTATE SERVICES INC.

Defendants

REASONS FOR JUDGMENT

BLENUS WRIGHT J.

Released: July 15, 2003

cc

TAB 49

National Bank of Canada v. Merit Energy Ltd., 2001 ABQB 583

Date: 20010703
Action No. 0001-04994
Bankruptcy No. 073154

2001 ABQB 583 (CanLII)

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

NATIONAL BANK OF CANADA, BANK ONE,
NA AND BANK ONE, CANADA

Plaintiffs

- and -

MERIT ENERGY LTD.

Defendant

- and -

IN THE MATTER OF THE BANKRUPTCY OF MERIT ENERGY LTD.

[Note: An Erratum has been filed on July 5, 2001; the correction has been made to the text and the Erratum is appended to this Judgment.]

[Note: An Erratum has been filed on July 9, 2001; the correction has been made to the text and the Erratum is appended to this Judgment.]

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

APPEARANCES:

Frank Dearlove and Chris Simard, Bennett Jones, LLP
for Arthur Andersen Inc.

William E. McNally, McNally and Cuming; David A. Klein, Klein Lyons
for Larry Delf, Representative Flow-Through Shareholder

Jim G. Shea, Shea Nerland Calnan
for the Flow-Through Shareholders who are not members of the Representative Class

Norman D. Anderson
agent for Magellan Aerospace Limited and Canada Dominion Resources Limited Partnership III

Matthew R. Lindsay and Phil J. Schreiber, Fraser Milner Casgrain
for the Underwriters except First Energy Capital Corporation

Tristram Mallet, Osler,Hoskin & Harcourt
for First Energy Capital Corporation

Douglas G. Stokes, Rooney Prentice
for certain Directors

D. Detomasi, Scott Hall
for Barry Stobo

Jeff Sharpe, Burnett Duckworth & Palmer
for Duncan Chisholm and Laurence Waller

Graham McLennan, McLennan Ross
for PriceWaterhouseCoopers LLP

Steven H. Leitl, Macleod Dixon
for National Bank of Canada, Bank One, NA and Bank One, Canada

INTRODUCTION

[1] On August 31, 2000, applications were brought by Dundee Securities Corporation, Peters & Co. Limited, Nesbitt Burns Inc., Newcrest Capital Inc., RBC Dominion Securities, Bunting Warburg Dillon Read Inc., First Energy Capital Corporation (being the underwriters in the flow-through common share offering of Merit Energy Ltd., described below), certain directors and officers of Merit Energy Ltd. and Larry Delf, a representative purchaser of flow-through common

2001 ABQB 583 (CanLII)

shares in Merit, to determine whether these applicants were entitled to a priority in the nature of an equitable lien over the proceeds of the sale of Merit's assets.

[2] I dismissed the equitable lien applications. The Underwriters, except First Energy Capital Corporation, appealed that decision.

[3] Needless to say, the applicants wanted to be recognized as ordinary creditors of Merit in the event they did not have an equitable lien.

[4] Pending the hearing of the equitable lien appeal, the administration of the estate of Merit continued. As a result of my dismissal of the equitable lien claim, the Trustee anticipated that a fund of approximately $10 million would be available for distribution to unsecured creditors.

[5] Accordingly, the Trustee sought a determination as to the right of the Flow-Through Shareholders, the Underwriters and the Directors and Officers to be recognized as ordinary creditors of Merit and to be included in the distribution.

[6] I heard argument on that issue on April 30, 2001 but reserved my decision until the results of the appeal were known. On May 18, 2001, the appeal was heard and dismissed[1], so it is now appropriate to make the requested determination.

[7] The Trustee takes the position that the claims in issue are in substance claims by shareholders for the return of equity and, on the basis of the decision in ***Re: Blue Range Resource Corp***.[2], must rank behind the claims of Merit's unsecured creditors.

[8] Alternatively, the Trustee argues that their claims are too contingent to constitute provable claims under the ***Bankruptcy and Insolvency Act***. [3]

[9] The Flow-Through Shareholders, the Underwriters and the Directors and Officers[4] submitted that their claims were in substance creditor claims and that they were not too contingent, thus qualifying them to rank as unsecured creditors in Merit's insolvency. If that position is sustained, the quantification of those claims will be a separate issue.

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[1] Reasons followed the dismissal from the bench 2001 ABCA 138.

[2] (2000), 15 C.B.R.(4th) 169 (Alta. Q.B.).

[3] R.S.C.1985, c.B-3

[4] PriceWaterhouseCoopers LLP, Merit's auditor at the material times, was not involved in previous applications but made similar submissions to the Underwriters, Directors and Officers. PriceWaterhouseCoopers' position will be addressed separately in these reasons.

2001 ABQB 583 (CanLII)

BACKGROUND

[10] Merit was in the business of the exploration, development and production of natural gas and crude oil in Alberta and Saskatchewan.

[11] On July 15, 1999, the Underwriters entered into an underwriting agreement with Merit whereby they agreed to participate in a public offering of 2,222,222 Flow-Through Shares of Merit. Paragraph 16 of the Underwriting Agreement states in part:

> The Corporation shall indemnify and save each of the Indemnified Persons harmless against and from all liabilities, claims, demands, losses, (other than losses of profit in connection with the distribution of common shares), costs, damages and expenses to which any of the Indemnified Persons may be subject or which any of the Indemnified Persons may suffer or incur, whether under the provisions of any statute or otherwise, in any way caused by, or arising directly or indirectly from or in consequence of:
>
> (a) any information or statement contained in the Public Record (other than any information or statement relating solely to one or more of the Underwriters and furnished to the Corporation by the Underwriters for inclusion in the Public Record) which is or is alleged to be untrue or any omission or alleged omission to provide any information or state any fact the omission of which makes or is alleged to make any such information or statement untrue or misleading in light of all the circumstances in which it was made;
>
> (b) any misrepresentation or alleged misrepresentation (except a misrepresentation or alleged misrepresentation which is based upon information relating solely to one or more of the Underwriters and furnished to the Corporation by the Underwriters for inclusion in the Public Record) in the Public Record.

[12] The Underwriting Agreement provides in Paragraph 2 (entitled "Corporation's Covenants as to Qualification") that:

> [Merit] agrees:
>
> (a) prior to the filing of the Preliminary Prospectus and thereafter and prior to the filing of the Prospectus, to allow the Underwriters to participate fully in the preparation of the Preliminary Prospectus (excluding the documents incorporated therein by reference) and such other documents as may be required under the Applicable Securities Laws in the Filing Jurisdictions to qualify the distribution of the Common Shares in the Filing Jurisdictions and allow the Underwriters to conduct all due diligence which the Underwriters may reasonably require (including with respect to the documents incorporated therein by reference) in order to (i) confirm the Public Record is accurate and current in all material respects; (ii) fulfill the Underwriters' obligations as agents and underwriters; and

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(iii) enable the Underwriters to responsibly execute the certificate in the Preliminary Prospectus or the Prospectus required to be executed by the Underwriters;

(b) the Corporation shall, not later than on July 19, 1999, have prepared and filed the Preliminary Prospectus...with the Securities Commissions...

(c) the Corporation shall prepare and file the Prospectus...as soon as possible and in any event not later than 4:30 p.m. (Calgary time) on August 3, 1999...

...

(e) that, during the period commencing with the date hereof and ending on the conclusion of the distribution of the Common Shares, the Preliminary Prospectus and the Prospectus will fully comply with the requirements of Applicable Securities Laws of the Filing Jurisdictions and, together with all information incorporated therein by reference, will provide full, true and plain disclosure of all material facts relating to the Corporation and the Common Shares and will not contain any misrepresentation; provided that the Corporation does not covenant with respect to information or statements contained in such documents relating solely to one or more of the Underwriters and furnished to the Corporation by one or more of the Underwriters for inclusion in such documents or omissions from such documents relating solely to one or more of the Underwriters and the foregoing covenant shall not be considered to be contravened as a consequence of any material change occurring after the date hereof or the occurrence of any event or state of facts after the date hereof if, in each such case, the Corporation complies with subparagraphs 3(a), (b), (c) and (d).

[13] In accordance with its covenant, Merit filed a Preliminary Prospectus and a Prospectus to qualify the shares for issue and ultimately the offering closed on August 17, 1999, at which time 2, 222, 222 Flow-Through Shares of Merit were issued.

[14] The Prospectus indicated that:

The gross proceeds of this Offering will be used to incur CEE in connection with the Corporation's ongoing oil and natural gas exploration activities. The Underwriters' fee and the expenses of this Offering will be paid from Merit's general funds...

The Flow-through Common Shares will be issued as 'Flow-through Shares' under the Act. The Corporation will incur on or before December 31, 2000, and renounce to each purchaser of Flow-through Common Shares, effective on or before December 31, 1999, CEE in an amount equal to the aggregate purchase price equal to the aggregate purchase price paid by such purchaser.

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> Subscriptions for Flow-through Common Shares will be made pursuant to one or more subscription agreements ('Subscription Agreements') to made between the Corporation and one or more of the Underwriters or one or more sub-agents of the Underwriters , as agent for, on behalf of and in the name of the purchasers of Flow-through Common Shares...

[15] The Prospectus also indicated that:

> ... Pursuant to the Subscription Agreements, the Corporation will covenant and agree (i) to incur on or before December 31, 2000 and renounce to the purchaser, effective on or before December 31, 1999, CEE in an amount equal to the aggregate purchase price paid by such purchaser for the Flow-Through Common Shares and (ii) that if the Corporation does not renounce to such purchaser, effective on or before December 31, 1999, CEE equal to such amount, or if there is a reduction in such amount renounced pursuant to the provision of the Act and as the sole recourse of the purchaser for such failure or reduction, the Corporation shall indemnify the purchaser as to, and pay in settlement thereof to the purchaser, an amount equal to the amount of any tax payable or that may become payable under the Act...by the purchaser as a consequence of such failure or reduction...
>
> In respect of CEE renounced effective on December 31, 1999, and not incurred prior to the end of the period commencing on the date that the Subscription Agreement is entered into and ending on February 29, 2000, the Corporation will be required to pay an amount equivalent to interest to the Government of Canada. Any amount of CEE renounced on December 31, 1999 and not incurred by December 31, 2000 will result in a reassessment of deductible CEE to subscribers. However, interest in respect of additional tax payable under the Act by a purchaser of Flow-Through Common Shares will generally not be levied in respect of such reassessment until after April 30, 2001.

[16] The Underwriters each entered into Subscription and Renunciation Agreements with Merit for the purchase of the Flow-Through Shares, containing the covenants described in paragraph 15 above.

[17] Merit did not incur CEE as anticipated and in fact only approximately $4 million (of the anticipated $15 million of CEE) was renounced to the Flow-Through Shareholders prior to Merit being placed in receivership, leaving an $11 million shortfall. As a result, those Flow-Through Shareholders, who anticipated tax deductions based on $15 million of CEE, were potentially faced with a tax problem.

[18] The Directors and Officers entered into indemnity agreements with Merit, which state in part that:

> To the full extent allowed by law, [Merit]...agrees to indemnify and save harmless the Indemnified Party, his heirs, successors and legal representatives from and against any

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> and all damages, liabilities, costs, charges or expenses suffered or incurred by the Indemnified Party, his heirs, successors or legal representatives as a result of or by reason of the Indemnified Party being or having been a director and/or officer of [Merit] or by reason of any action taken by the Indemnified Party in his capacity as a director and/or officer of [Merit], including without limitation, any liability for unpaid employee wages, provided that such damages, liabilities, costs, charges or expenses were not suffered or incurred as a direct result of the Indemnified Party's own fraud, dishonesty or wilful default.

[19] Merit, the Underwriters and the Directors and Officers have been named as defendants in several actions commenced throughout Canada by or on behalf of the Flow-Through Shareholders. These actions allege that Merit, the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are liable to the Plaintiffs because of misrepresentations made in the Prospectus. The Plaintiffs seek, *inter alia*, damages against all defendants, recission of their purchase of the Flow-Through Shares and damages for lost tax benefits associated with the Flow-Through Shares. The Underwriters have third-partied Merit and the Directors and Officers. As noted, the Underwriters and the Directors and Officers previously sought recognition as equitable lien holders (which was denied) and now they seek recognition as ordinary creditors.

[20] PriceWaterhouseCoopers was at all material times the auditor of Merit. As PriceWaterhouseCoopers had not yet filed a proof of claim at the time the Trustee filed its motion, the Trustee's materials did not address its claim as part of its application. However, the Trustee did not object to PriceWaterhouseCoopers participating in this application.

[21] PriceWaterhouseCoopers is in a similar position as the Underwriters and the Directors and Officers as it too has an indemnity from Merit and has also been sued by the Flow-Through Shareholders for misrepresentation. Its indemnity states that:

> Merit Energy Ltd. hereby indemnifies PriceWaterhouseCoopers LLP ("PriceWaterhouseCoopers")...and holds them harmless from all claims, liabilities, losses, and costs arising in circumstances where there has been a knowing misrepresentation by a member of Merit Energy Ltd.'s management, regardless of whether such a person was acting in Merit Energy Ltd.'s interest. This indemnification will survive termination of this engagement letter. This release and indemnification will not operate where PriceWaterhouseCoopers ought to have uncovered such knowing misrepresentation but failed to, due the gross negligence or willful misconduct of PriceWaterhouseCoopers, its partners and/or employees.

ISSUES

1. Are the claims of the Flow-Through Shareholders subordinate to the claims of Merit's unsecured creditors?

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2. Are the claims of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers subordinate to the claims of Merit's unsecured creditors?

DECISION - ISSUE 1

The claims of the Flow-Through Shareholders are subordinate to the claims of Merit's unsecured creditors as they are in substance shareholder claims for the return of an equity investment.

ANALYSIS

[22] Central to this application are the reasons of my sister Romaine J. in ***Re: Blue Range Resource Corp***.

[23] In that case, Big Bear Exploration Ltd. completed a hostile takeover for all of the shares of Blue Range Resource Corporation. After the takeover was completed, Big Bear alleged that the publicly disclosed information upon which it had relied in purchasing the Blue Range shares was misleading and that the shares were worthless. As sole shareholder, Big Bear authorized Blue Range to commence CCAA proceedings and then submitted a claim as an unsecured creditor in Blue Range's CCCA proceedings, based on the damages it alleged it had suffered as a result of Blue Range's misrepresentations.

[24] Romaine J. rejected Big Bear's attempt to prove as an unsecured creditor and held that Big Bear's claim was "in substance" a shareholder claim for a return of an equity investment and therefore ranked after the claims of unsecured creditors according to the general principles of corporate law, insolvency law and equity.

[25] Romaine J. stated at pp. 176-177:

> In this case, the true nature of Big Bear's claim is more difficult to characterize. There may well be scenarios where the fact that a party with a claim in tort or debt is a shareholder is coincidental or incidental, such as where a shareholder is also a regular trade creditor of a corporation, or slips and falls outside the corporate office and thus has a claim in negligence against the corporation. In the current situation, however, the very core of the claim is the acquisition of Blue Range shares by Big Bear and whether the consideration paid for such shares was based on misrepresentation. Big Bear had no cause of action until it acquired shares of Blue Range, which it did through share purchases for cash prior to becoming a majority shareholder, as it suffered no damage until it acquired such shares. This tort claim derives from Big Bear's status as shareholder, and not from a tort unrelated to that status. The claim for misrepresentation therefore is hybrid in nature and combines elements of both a claim in tort and a claim as shareholder. It must be determined what character it has in substance.

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> It is true that Big Bear does not claim recission. Therefore, this is not a claim for return of capital in the direct sense. What is being claimed, however, is an award of damages measured as the difference between the "true" value of Blue Range shares and their "misrepresented" value - in other words, money back from what Big Bear "paid" by way of consideration...A tort award to Big Bear could only represent a return of what Big Bear invested in equity of Blue Range. It is that kind of return that is limited by the basic common law principle that shareholders rank after creditors in respect of any return on their equity investment. ...
>
> I find that the alleged share exchange loss derives from and is inextricably intertwined with Big Bear's shareholder interest in Blue Range. The nature of the claim is in substance a claim by a shareholder for a return of what it invested qua shareholder, rather than an ordinary tort claim.

[26] Romaine J. went on at pp. 177-184 to describe five policy reasons which justified the conclusion that shareholders' claims such as Big Bear's should be ranked behind the claims of Blue Range's unsecured creditors. In summary, they are:

> (i) the claims of shareholders rank behind the claims of creditors in insolvency;
>
> (ii) creditors do business on the assumption that they will rank ahead of shareholders in the event of their debtor's insolvency;
>
> (iii) shareholders are not entitled to rescind their shares on the basis of misrepresentation after the company has become insolvent;
>
> (iv) United States jurisprudence supports the priority of creditors in "stockholder fraud" cases; and
>
> (v) to allow the shareholders to rank *pari passu* with the unsecured creditors could open the floodgates to aggrieved shareholders launching misrepresentation actions.

[27] ***Re Canada Deposit Insurance* v. *Canadian Commercial Bank*** [5] is also central to this application. That case involved an issue of priorities with respect to the insolvency of the Canadian Commercial Bank. In an effort to preserve the bank, a participation agreement was entered into among the governments of Canada and Alberta, the Canada Deposit Insurance Corporation and six commercial banks. The sum of $255 million was advanced and it was to be repaid by CCB out of certain portfolio assets and pre-tax income. The agreement promised an indemnity in the event of insolvency, and gave the participants a right to subscribe for shares in CCB at a named price.

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[5] (1992), 97 D.L.R. (4th) 385 (S.C.C)

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[28] The Supreme Court of Canada held that although the participation agreement contained both debt and equity features, it was, in substance, a debt transaction. Iacobucci J. stated at p. 406:

> As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeon-hole the entire agreement between the Participants and C.C.B. in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a creditor-debtor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore those features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to coexist in the given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement. [emphasis added]

[29] As noted, the Flow-Through Shareholders have commenced several actions. Against Merit, they seek recission or damages due to an alleged misrepresentation in the Prospectus (based on their statutory rights to these remedies as disclosed in the Prospectus). They also claim damages relating to lost tax benefits associated with the Flow-Through Shares. While this is a contractual remedy based on the Subscription and Renunciation Agreements, it also has elements of misrepresentation flowing from certain descriptive statements made in the Prospectus.

[30] The Flow-Through Shareholders submitted that they are entitled to be treated as creditors based on the actions they have commenced, but the Trustee objects to this treatment and has sought the direction of the Court in this regard.

i. The Trustee's Position

[31] The Trustee (through counsel) focussed on the allegations made in the statements of claim in its analysis. It suggested that the essential allegation of the Flow-Through Shareholders in their actions is misrepresentation and that as a result of such misrepresentation they have suffered damages. The Trustee then described the remedy sought as, in essence, a claim for a return of equity. The Trustee suggested that the claim for the anticipated tax benefits was no

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more than a claim for a benefit that was ancillary to their shareholding interest. The Trustee also described the Flow-Through Shareholders' application to prove as unsecured creditors as an attempt to take a "second kick at the can", following the failure of their equity investment.

[32] Using the reasoning of Romaine J. in ***Re: Blue Range Resource Corp***, the Trustee argued that the claim of the Flow-Through Shareholders must be subordinated to Merit's unsecured creditors. The Trustee submitted that all five policy reasons listed in that case (and described above) are present in this case, emphasizing that the dividend will be reduced 20 to 27% (from 15 to 11-12 cents) if the Flow-Through Shareholders' claims are included in the unsecured creditors' pool and that the facts in this case favour subordination even more than the facts in ***Re: Blue Range Resource Corp***., as some of the Flow-Through Shareholders are seeking to rescind their purchase of the Flow-Through Shares in their actions.

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ii. The Flow-Through Shareholders' Position

[33] Arguments were filed separately by Mr. McNally, as Counsel for Larry Delf (Mr. Delf being the designate of the Representative Flow-Through Shareholders group), and by Mr. Shea as Counsel for certain other Flow-Through Shareholders.

The Representative Flow-Through Shareholders Group's Position

[34] Mr. McNally did not take issue with the suggestion that as a general rule, shareholders rank after secured creditors. He also did not object to the reasoning of Romaine J. in ***Re: Blue Range Resource Corp***., provided the case is limited to its context and not used to stand for the general proposition that in no circumstances may a shareholder ever have a claim provable in bankruptcy.

[35] Mr. McNally did object to the Trustee's characterization of the claim as a single claim for misrepresentation seeking damages equal to their purchase price for the shares. He suggested that the claims involved firstly, a right to damages or recission *qua* shareholder under securities legislation and secondly, a right to damages for breach of an indemnity provision *qua* debt holder. He also submitted that this latter claim may also be seen as having nothing to do with misrepresentation in the Prospectus or a return of capital, but arises independently as a result of Merit's failure to incur and then renounce CEE to the shareholders to enable them to obtain certain tax deductions.

[36] Mr. McNally suggested that this latter claim for tax losses was also a claim provable in bankruptcy. He referenced Laskin J.A.'s recognition in ***Re Central Capital Corporation*** [6] that shareholders may participate as creditors in the context of declared dividends because the liquidity provisions of corporate legislation would not have been triggered if the dividends had

[6] (1996), 27 O.R. (3d) 494 (C.A.)

been declared prior to insolvency and would therefore be enforceable debts. Laskin J.A. stated at p.536:

> It seems to me that these appellants must either be shareholders or creditors. Except for declared dividends, they cannot be both... Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared it is a debt on which each shareholder can sue the corporation.

[37] Mr. McNally also relied on ***Re G.M.D. Vending Co.*** [7] where the British Columbia Court of Appeal allowed declared but unpaid dividends to rank with other unsecured claims in a bankruptcy.

[38] He also emphasized that the CEE aspect of the relationship between the Flow-Through Shareholders, on the one hand, and Merit, the Underwriters and the Directors and Officers, on the other, possesses many of the indicia of debt mentioned by Weiler J.A. in ***Re Central Capital Corporation*** in that: (1) Merit is obliged to expend the funds raised by the Prospectus on CEE and the funds are advanced by Flow-Through Shareholders for this specific purpose alone, (2) there is an indemnity provision in the Prospectus itself to the Flow-Through Shareholders if this does not occur, evidencing an intention that the investors are to be fully repaid for the loss of the tax benefit,[8] and (3) interest becomes due for the amount of the failed tax write-off and is covered by the indemnity provision as tax payable.

[39] He suggested that the indemnity provisions in the Subscription and Renunciation Agreements are enforceable at law without consideration of corporate liquidity and are an acknowledgment of the unique commercial position of the Flow-Through Shareholders in the event that the CEE is not renounced. He concluded by submitting that the potential liquidity problem and contingent liability must constitute the rationale for the presence of the indemnity in the Subscription and Renunciation Agreements in the first place.

The Other Flow-Through Shareholders Group's Position

[40] Mr. Shea suggested that not only were the claims for tax losses relating to the CEE provable claims, the tort/statutory aspects of their claims were also provable claims, albeit they

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[7] (1994), 94 B.C.L.R. (2d) 130 (B.C.C.A.)

[8] See ***Ontario Securities Commission*** **v.** ***Consortium Construction Inc***. (1993), 1 C.C.L.S. 117 at 138-139.

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would be dealt with as "contingent" claims within the meaning of ss. 121 and 135 of the BIA[9]. He further submitted that the fact they are claims by shareholders is irrelevant.

[41] He relied on ***Gardner* v. *Newton*** [10] as authority for the proposition that a contingent claim is a claim that may or may not ripen into a debt depending on the occurrence of some future event. Mr. Shea also suggested that so long as the claim is not too remote or speculative, a claim, even though it has not yet been reduced to judgment, may still be a contingent claim. Mr. Shea pointed out that the Ontario Court of Appeal in ***Re Confederation Treasury Services Ltd.*** [11] departed from the earlier cases relied upon by the Trustee, including ***Claude Resources (Trustee of)* v. *Dutton*** [12]. The Court of Appeal stated they imposed too high of a threshold for the

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[9] **121(1)** All 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 ...shall be deemed to be claims provable in proceedings under this Act.**(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135(1.1) The trustee shall determine whether any contingent or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[10] (1916), 29 D.L.R.276 (Man.K.B.)

[11] (1997), 43 C.B.R. (3d) 8.

[12] (1993), 22 C.B.R. (3d) 56 (Sask.Q.B.), referred to favourably by Farley J. in ***Canadian Triton International Ltd. (Re)*** (1997), 49 C.B.R. (3d) 192 (Ont. Gen. Div.) and follow

establishment of a contingent claim and held that it was not necessary to demonstrate probability of liability but merely to show they were not too remote or speculative.

[42] He asserted that the claims are not shareholder claims, but claims for statutory remedies and for breach of contract and must rank with Merit's other unsecured creditors for that reason. Mr. Shea also said the Court must look to the substance of the relationship between the claimant and the bankrupt and most importantly, the context in which the claim is made.

[43] Mr. Shea then argued that it would not be equitable to subordinate these claims while other claims based on tort, breach of contract or statutory remedy are allowed to rank as unsecured claims and concluded that the traditional principles for subordinating claims by shareholders do not apply to this case.

[44] He suggested that allowing claims for statutory remedies and/or breach of contract based on misrepresentation to rank as unsecured claims will not affect how creditors do business with companies. Further, he argued that allowing this result will not "open the floodgates" as the statutory remedies involved are narrow in scope and have strict and relatively short time frames.

iii. The Underwriters' Position

[45] Firstly, the Underwriters supported the Flow-Through Shareholders' submissions regarding the nature of their claims. They emphasized that ***Re: Blue Range Resource Corp*** should not stand for the proposition that shareholders must always be subordinated to unsecured creditors simply because they are shareholders. Rather, the nature and substance of their claims determines the treatment they receive in the estate.

[46] The Underwriters also suggested that ***Re: Blue Range Resource Corp*** turned on its unique facts of a purchaser of Blue Range shares having knowledge of misrepresentations yet exercising shareholder rights, such as authorizing the company to take CCAA proceedings and then making an unsecured claim in those proceedings for the loss associated with its share purchase. The shareholder in that case did not claim recission and did not deny or attempt to

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ed in ***Re Wiebe*** (1995), 30 C.B.R. (3d) 109 (Ont. Gen. Div.)

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avoid its shareholder status. Moreover, there was no contractual right to be treated by the company as anything but a shareholder.

[47] The Underwriters distinguished the claims of the Flow-Through Shareholders from those of Big Bear in ***Re: Blue Range Resource Corp*** as follows: (1) the Flow-Through Shareholders are not pursuing tort claims based on their status as shareholders, but rather are asserting a statutory right of recission, thereby refuting their status as shareholders, (2) the Flow-Through Shareholders also allege a direct contractual claim for indemnity against Merit pursuant to Subscription and Renunciation Agreements in which Merit agreed to incur qualifying expenditures (CEE), to renounce the resulting tax benefits to them and to indemnify them if it failed to incur the CEE, and (3) if their claims are ultimately successful, the Flow-Through Shareholders will be former shareholders and current creditors of Merit.

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Resolution- ISSUE 1

[48] I agree with Romaine J. that the correct approach is to first examine the substance of the claim made against the insolvent. There are the two claims mentioned by counsel for the Flow-Through Shareholders. The first is an alternate remedy for damages or recission based on the alleged misrepresentations contained in the Prospectus. I was advised that some have advanced only one of these alternative claims. The second is cast as a claim in damages under the indemnity in the Subscription and Renunciation Agreements for the failure to renounce CEE.

[49] The Flow-Through Shareholders' claims for recission or damages based on misrepresentation derive from their status as Merit shareholders. Regardless of how they are framed[13], the form the actions take cannot overcome the substance of what is being claimed. It is plain from the Prospectus and the Subscription and Renunciation Agreements that the Flow-Through Shareholders invested in equity. It is equally plain from their actions that what they seek to recoup, in substance, is their investments. As in ***Re: Blue Range Resource Corp***, the "very core" of these claims arises from the circumstances surrounding the acquisition of Merit shares. The Flow-Through Shareholders had no cause of action until they acquired the Flow-Through Shares and their claims include a direct claim for return of capital in their request for recission and in the case of a damage claim, just as in ***Re: Blue Range Resource Corp***, the measure of damages enables them to recover the purchase price of the shares.

[50] It is true these shareholders are using statutory provisions to make their claims in damages or recission rather than the tort basis used in ***Re: Blue Range Resource Corp***, but in substance they remain shareholder claims for the return of an equity investment. The right to a return of this equity investment must be limited by the basic common law principle that shareholders rank after creditors in respect of any return of their equity investment.

[51] Now what about the second aspect of the claims?

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[13] Counsel described the claims variously as "statutory", "statutory/tort and "contractual"

[52] The second claim of the Flow-Through Shareholders has some of the features of a debt and the Subscription and Renunciation Agreements provide for a specific remedy in the event Merit fails to comply with its undertaking to make and renounce the CEE expenditures .

[53] While the discussion in ***Re Central Capital Corporation*** regarding the claim for declared dividends is appealing, it does not precisely apply in these circumstances. The tax advantages associated with flow-through shares is reflected in a premium paid for the purchase of the shares[14]. In essence, what happens in a flow- through share offering (as sanctioned by the ***Income Tax Act***[15]) is the shareholder buys deductions from the company. As the company has given up deductions, it wants to be paid for those deductions that it is renouncing. From the perspective of the purchaser of the shares, the premium for the shares would not have been paid without some assurance that the deductions will be available. I note the purchaser is also required to reduce their adjusted cost base of the shares (for tax purposes) by the amount of the deductions utilized by the purchaser.

[54] While the Flow-Through Shareholders paid a premium for the shares (albeit to get the deductions), in my view the debt features associated with the CEE indemnity from Merit do not "transform" that part of the relationship from a shareholder relationship into a debt relationship. That part of the relationship remains "incidental" to being a shareholder.

[55] In summary, the Flow-Through Shareholders' claims, regardless of the basis chosen to support them, are in substance claims for the return of their equity investment and accordingly cannot rank with Merit's unsecured creditors.

DECISION - ISSUE 2

The claims of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are not subordinate to the claims of Merit's unsecured creditors as they are in substance creditors' claims that are not too contingent to constitute provable claims.

i. The Trustee's Position

[56] The Trustee argued that while on their face, the Underwriters' and the Directors and Officers' claims are not shareholder claims, "in substance", they are shareholders' claims and are no more than an indirect passing-on to Merit of the Flow-Through Shareholders' claims. As a result, the Trustee submitted, equity dictates that since the Flow-Through Shareholders' claims must rank behind those of the unsecured creditors, the claims of the Underwriters and the

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[14] V.M. Jog et al, "Flow Through Shares: Premium-Sharing and Trust-Effectiveness", (1996), 44 Can. Tax J. at p. 1017.

[15] R.S.C. 1985, (5th Supp.),c. 1.

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Directors and Officers must fail as well. The Trustee suggested this subordination follows from the policy considerations set out by Romaine J. in ***Re: Blue Range Resource Corp***. Alternatively, the Trustee asserted that the claims of the Underwriters and the Directors and Officers are so contingent they must be valued at nil.

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ii. The Underwriters' Position

[57] The Underwriters argued that regardless of how the Court characterized the Flow-Through Shareholders' claims, the Trustee cannot succeed against the Underwriters because: (1) the indemnity claims are based on contractual, legal and equitable duties owed to the Underwriters by Merit, to which the Flow-Through Shareholders are strangers and to which ***Re: Blue Range Resource Corp*** has no application; (2) equitable subordination has never been applied by Canadian courts and the Trustee cannot satisfy the test even if the court chooses to apply it, and (3) the Underwriters' claims are precisely the type of contingent claims contemplated by the BIA.

iii. The Directors' and Officers' Position

[58] The Directors and Officers conceded that, while some of the potential liability they face is as a result of the Flow-Through Shareholders' claims against them, or via indemnity claims brought by the Underwriters and Auditors against them, their claim is simply a claim in contract that is not an effort to obtain a return of equity. They argued that the enforceability of the indemnity is not contingent on the source of the potential liability.

[59] In any case, the Directors and Officers face claims other than from Merit's shareholders, which include: (1) a Saskatchewan action alleging the Directors and Officers assented to or acquiesed in Merit not paying its accounts and ought to be held liable for them, and (2) an Alberta action relating to ownership and lease payments on oilfield equipment. The Directors and Officers asserted that the existence of these claims demonstrate that they are not simply attempting to pass on shareholder claims, but rather they are making a contractual claim for all the potential liability they face, as the indemnity intends.

[60] The Directors and Officers also suggested that, as with the Underwriters, some of the contingency in their claim under the indemnity has been realized to the extent of legal fees incurred in defending the various actions. In any case, they agreed with the Flow-Through Shareholders and Underwriters that a contingent claim need not be "probable" in order to be "provable" but need only something more than to "remote and speculative in nature".

[61] Further, directors and officers require indemnities and commercial necessity dictates that these indemnities have real value.

Resolution - ISSUE 2

Nature of the Underwriters and the Directors' and Officers' claims against Merit

[62] The fundamental premise of the Trustee's argument is that the Underwriters' indemnity simply "flows through" or "passes on" the Flow-Through Shareholders' claim to Merit. This ignores the nature of the causes of action being advanced by the Underwriters and the existence of a contractual indemnity freely given by Merit for good and valuable consideration. The Trustee did not suggest that the indemnity was invalid or unenforceable, rather, it argued that this valid and enforceable right should be treated as a "shareholders' claim" and subordinated. With respect, I cannot agree with the Trustee's position.

[63] The Trustee's argument attempts to shift the Court's focus from the Underwriters' claim against Merit to the claim being asserted against the Underwriters, even though it is the former that the Trustee wants the Court to subordinate. The Flow-Through Shareholders' cause of action against the Underwriter's is predicated on the Underwriters' alleged failure to discharge a statutory duty and their liability is not contingent in any way on a successful claim by the Underwriters against Merit under the indemnity.

[64] The Underwriters' indemnity claims against Merit are not made as a shareholder or for any return of investment made by the Underwriters. Rather, they are based on contractual, legal and equitable duties owed directly by Merit to the Underwriters. Similarly, the other causes of action advanced by the Underwriters against Merit in the Third Party Notice do not arise from any equity position in the company, but are based on agency, fiduciary and contractual relationships between the Underwriters and Merit, to which the Flow-Through Shareholders are strangers and are unavailable for them to assert.

[65] For example, the Underwriters are entitled to an indemnity for defence costs even if the Flow-Through Shareholders' claims fail completely. The ultimate success or failure of the Flow-Through Shareholders' claims makes no difference to the existence and enforceability of this right against Merit.

[66] As the Underwriters' claims are not claims for a return of equity, ***Re: Blue Range Resource Corp*** does not apply. That decision only addressed equity claims of shareholders and I am not prepared to extend its application to the claims of the Underwriters in the application before me, simply because the claims triggering an indemnity by the Underwriters against Merit were shareholders' claims.

[67] As Firstenergy Capital Corp. emphasized, even if I were to apply the policy considerations for subordinating claims identified by Romaine J. in ***Re: Blue Range Resource Corp*** to the Underwriters' claims, these policy considerations support a conclusion that the Underwriters' claims are of the type I believe that Romaine J. would protect, not subordinate:

> **1. Shareholders rank behind creditors in insolvency** - the issue here is whether the Underwriters are properly characterized as equity stakeholders or creditors. This is done by considering the substance of their claim. Regardless of how the Flow-Through

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Shareholders' claims are characterized, the substance of the Underwriters' claims against Merit are contractual. They arise out of a contract for indemnity between Merit and the Underwriters. This is clearly distinct from a claim for return of shareholders' equity. The Trustee asked the court to consider the fact of a possible future payment from the Underwriters to the Flow-Through Shareholders in characterizing the claim of the Underwriters against Merit. Given the nature of the obligations under an indemnity, this is inappropriate. Describing the Underwriters' claims as "no more than and indirect passing-on of the Flow-Through Shareholders' claims" is based on a flawed analysis of the obligations under an indemnity and ignores the statutory duty of the Underwriters to the Flow-Through Shareholders. There are two distinct obligations.

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The first obligation relates to the Flow-Through Shareholders' claims against the Underwriters and any obligations that may be imposed on the Underwriters as a result. This obligation is completely unrelated to, and unaffected by the Underwriters' indemnity. The second obligation is between Merit, as indemnifier, and the Underwriters. This second obligation is the obligation that must be characterized in this application. The Flow-Through Shareholders are strangers to this claim.

2. Creditors do business with companies on the assumption they will rank ahead of shareholders on insolvency - the focus of this analysis is the degree of risk-taking respectively assumed by shareholders and creditors. Unlike shareholders who assume the risks of insolvency, the Underwriters bargained, as any other creditor, for their place at the creditor table in an insolvency. An indemnity is a well-known commercial concept business people routinely use to eliminate or reduce risk and should be recognized as a necessary and desirable obligation.

To subordinate the Underwriters' claim would amount to a reversal of the expectations of the parties to the indemnities. The evidence before me suggests that the Underwriters would not have participated in Merit's offering without the indemnity. I need not decide whether that is true.

Subordinating the Underwriters would fundamentally change the underlying business relationship between underwriters and issuers, and would be unexpected in the industry. Such a result might make it impossible for an underwriter to recover under an indemnity from a bankrupt issuer in respect of an equity offering.

3. Shareholders are not entitled to rescind shares after insolvency - this consideration has no bearing on the Underwriters as they are not shareholders seeking to rescind shares. Their claims against the bankrupt are for damages under a contract for indemnity. Further, I was not asked to determine this particular question in this application.

4. The principles of equitable subordination - In ***Re Canada Deposit Insurance* v. *Canadian Commercial Bank***, the Supreme Court of Canada expressly left open the

question of whether equitable subordination formed part of Canadian insolvency law, but expressed its opinion as to the applicable test as developed in the United States:

> ...(1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute...(p. 420)

An application of these criteria would lead to the conclusion that equitable subordination would not apply in this case, even if it was part of Canadian law.

Although the Trustee suggested that the Underwriters may have "participated" in the misrepresentation, there is no evidence before me of inequitable conduct on their part. It is perhaps significant that the Flow-Through Shareholders have not alleged any such misconduct as against the Underwriters, but rather they have only advanced the statutory causes of action available to them under securities legislation.

As there is no evidence of inequitable conduct on the part of the Underwriters, there can be no corresponding injury to Merit's other creditors, or enhancement of the Underwriters' position.

Finally, the application of equitable subordination of the Underwriters' claims in this case would be inconsistent with the established priority scheme contained in the ***BIA***. The United States Supreme Court addressed this third requirement of consistency in ***United States* v. *Noland*** [16]:

> [t]his last requirement has been read as a 'reminder to the bankruptcy court that although it is a court of equity, it is not free to adjust the legally valid claim of an innocent party who asserts the claim in good faith merely because the court perceives the result as inequitable'

This statement encapsulates what the Trustee is asking to the Court to do: subordinate the claims of the Underwriters, who have asserted their claims under their indemnities as they are entitled to do, merely because the result may be perceived as inequitable. The words of the US Supreme Court are consistent with the view that equitable subordination is an extraordinary remedy that ought to be employed only where there is some misconduct on the part of the claimant. The statutory scheme of distribution in the ***BIA*** must be paramount, and if it is to be interfered with, it should only be in clear cases where demonstrable inequitable conduct is present.

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[16] (1996), 517 U.S. 535 at 539.

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5. Floodgates - Romaine J. considered that allowing Big Bear's claim for misrepresentation to rank with unsecured creditors would encourage aggrieved shareholders to claim misrepresentation or fraud. This consideration has no application to the Underwriters, who are not shareholders. Allowing the Underwriters' claims, which are based on a contractual right of indemnity, will not open the door to increased claims of misrepresentation or fraud by shareholders. The nature of the claims against the Underwriters and the Underwriters' claim against Merit are entirely different.

[68] In summary, the Underwriters' claims against Merit are creditors' claims which rank with Merit's other unsecured creditors.

[69] With this result I appreciate the potential for the Flow-Through Shareholders to be seen as obtaining some recovery from the estate before all the unsecured creditors are paid in full. It might even be suggested it may ultimately allow the Flow-Through Shareholders to achieve indirectly what they could not achieve directly, based on the substance of their claims. This may be the final economic result.

[70] However, success by the Flow-Through Shareholders against the Underwriters is not contingent upon success by the Underwriters against Merit nor does it automatically follow that success by the Flow-Through Shareholders against the Underwriters must inevitably lead to success by the Underwriters against Merit. A successful claim by the Underwriters against Merit will be determined on the basis of the provisions of the indemnity and the result of the claim against the Underwriters will be one of the factors in that analysis.

[71] As the possible economic result described in paragraph 69 does not flow from a continuous chain of interdependent events, the possibility that the Flow-Through Shareholders may indirectly recover some of their equity investment from others prior to Merit's unsecured creditors being paid in full would not be a sufficient reason to decide this application differently.

[72] As with the Underwriters, I find that the Directors and Officers have creditors' claims entitled to rank with Merit's other unsecured creditors.

Contingent claims

[73] While the Trustee's primary argument was the claims of the Underwriters and the Directors and Officers are merely indirect shareholder claims, alternatively, it argued that these claims are too contingent and cannot constitute a provable claim on that basis.[17]

[74] The Trustee relied on the case of ***Claude Resources (Trustee of)* v. *Dutton*** in support of its position. In that case, an indemnity agreement was executed between the bankrupt and its sole

[17] *Supra* footnote 9 for ***BIA*** definitions in ss. 121 and 135

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shareholder, officer and director and entitled the individual to be indemnified for any liabilities arising out of actions taken in his capacity as an officer and director of the bankrupt. This individual was sued in relation to a debenture offering and sought to prove using his indemnity. Noble J. described the claim as having a "double contingency", in that as a first step the action on the debenture offering must be successful, and if so, then the claim on the application of the indemnity agreement must also succeed. Noble J. held that more is needed beyond evidence that the creditor has been sued and that liability may flow; some element of probability is needed.

[75] The Trustee submitted that there is no evidence as to the potential success of the Flow-Through Shareholders' claims against the Underwriters and/or the Directors and Officers, nor was it possible prior to judgment in those actions, to determine whether any liability of the Underwriters and/or the Directors and Officers to the Flow-Through Shareholders would qualify for indemnification.

[76] The fact that a claim is contingent does not mean it is not "provable"[18]**.** Provable claims include contingent claims as long as they are not too speculative: ***Negus* v. *Oakley's General Contracting*** [19]. Section 121 defines provable claims to include "all debts and liabilities, present or future,...to which the bankrupt may become subject...".

[77] Section 121 does not specify the degree of certainty required to make a claim provable, other than to include as provable all debts or liabilities to which the bankrupt may become subject. As stated, the Ontario Court of Appeal addressed this in ***Re Confederation Treasury Services Ltd.*** and held that the test of probable liability set out in ***Claude Resources (Trustee of)* v. *Dutton*** and ***Re Wiebe*** (also relied on by the Trustee) imposed too high of a threshold to establish a valid contingent claim. Rather, the Ontario Court of Appeal expressed that contingent claims must simply be not too "remote or speculative in nature". I agree with the Ontario Court of Appeal's view of the test.

[78] On a plain reading of the Underwriting Agreement, the indemnity appears to be engaged by the Flow-Through Shareholders' actions. The actions are under case management and are proceeding through discoveries at this time. Further, there are several authorities that suggest an indemnity becomes enforceable as soon as a claim of the type indemnified is alleged.[20] Finally, at least one part of the Underwriters' claim is not contingent - they have incurred costs and disbursements in defence of the Flow-Through Shareholders' claims and according to the terms of the indemnity are currently entitled to reimbursement for those costs, regardless of the outcome of the litigation.

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[18] *ibid.*

[19] (1996), 40 C.B.R. (3d) 270 (N.S.S.C.)

[20] See for example, ***Re Froment; Alta. Lumber Co.* v. *Department of Agriculture*** ,[1925] 2 W.W.R. 415 (Alta. S.C.)

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iv. PriceWaterhouseCoopers

[79] PriceWaterhouseCoopers made similar submissions to the Underwriters and the Directors and Officers and emphasized the strong policy reason behind supporting auditors' indemnities as unsecured and not subordinated claims. In addition, PriceWaterhouseCoopers has an independent claim for negligent misrepresentation against the Directors and Officers, arising out of the provision of information to PriceWaterhouseCoopers by Merit management which PriceWaterhouseCoopers alleges was known, or ought to have been known, to be incorrect. PriceWaterhouseCoopers suggested this further distinguishes PriceWaterhouseCoopers' situation from the situation before the Court in ***Re: Blue Range Resource Corp***.

[80] I find that PriceWaterhouseCoopers' indemnity claim is a creditor's claim entitled to rank with Merit's other unsecured creditors. My reasoning with respect to the Underwriters' claims, as based on their indemnities, applies equally to PriceWaterhouse Coopers' claim based on its indemnity.

[81] I am aware that the indemnities of the Flow-Through Shareholders are not being accorded creditor status, while those of the Underwriters, the Directors and Officers and PriceWaterhouseCoopers are. However, as noted, the indemnity feature of the Flow-Through Shareholders' claims is related to certain deductions and those deductions were part of the purchase price for the shares. This in my view is more analogous to ***Re Canada Deposit Insurance* v. *Canadian Commercial Bank*** than to ***Re Central Capital Corporation*** and that to me is sufficient to justify the distinction.

CONCLUSION

[82] The claims of the Flow-Through Shareholders are in substance claims for the return of equity investment and rank behind the claims of Merit's unsecured creditors, which shall include the claims of the Underwriters, the Directors and Officers and PriceWaterhouse Coopers.

[83] If the parties cannot agree on costs, they may see me within 30 days.

HEARD on the 30th day of April 2001.
DATED at Calgary, Alberta this 3rd day of July 2001.

_____

J.C.Q.B.A.

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An errata has been issued for the above Judgement as follows:

ERRATA OF THE REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

The Appearances have been revised to include Mr. David A. Klein. Mr. Klein of Klein Lyons attended with Mr. William E. McNally of McNally and Cuming, for Larry Delf, Representative Flow-Through Shareholder.

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An errata has been issued for the above Judgement as follows:

ERRATA OF THE REASONS FOR JUDGEMENT
OF THE HONOURABLE MR. JUSTICE SAL J. LoVECCHIO

Please replace page 2 of your copy of the Judgement.

The initials Q.C. should not follow the name of Douglas G. Stokes, of Rooney Prentice.

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TAB 50

Court of King's Bench of Alberta

Citation: National Bank of Canada v Sunterra Food Corporation, 2025 ABKB 599

Date: 20251014
Docket: 2501 06120
Registry: Calgary

2025 ABKB 599 (CanLII)

Between:

National Bank of Canada

Applicant

- and -

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., Ray Price, Debbie Uffelman and Craig Thompson

Respondents

Endorsement
of the
Honourable Justice Michael J. Lema

I. Introduction

[1] Do these *CCAA* proceedings reach and, if so, should they govern what is at least in part an inter-creditor dispute?

[2] Specifically, should the Court compel one claimant against the various Canadian Sunterra entities to advise whether it proposes to sue another claimant and, if so, the basis or bases and associated quantum of its claim(s) against the other claimant, on pain of having those claim(s) barred otherwise, to assist the other claimant in proving and valuing an contribution-and-

indemnity claim against the Canadian Sunterra entities or some of their directors and officers (or both) in these proceedings?

[3] The answer is no, as explained below.

II. Background

[4] National Bank of Canada, the primary lender to various Canadian Sunterra companies, seeks an order obliging Compeer Financial PCA, a U.S. lender, to advise by September 30, 2025 (or, presumably, based on submissions at the application, an extended deadline) whether it intends to pursue recovery from NBC for losses caused by NBC's dishonouring of certain cheques payable by some of the Canadian companies to certain Sunterra U.S. entities or Compeer itself. And, if so, the basis or bases of Compeer's anticipated claims against NBC and the range (in dollars) of those anticipated claims.

[5] NBC's proposed order says that, if Compeer does not perform this step or these steps (as applicable) by the deadline, Compeer's claim(s) against NBC in respect of the dishonoured cheques are barred.

[6] Per NBC, it needs the requested details to prove in the present *CCAA* proceedings a contribution-and-indemnity claim against the Canadian entities related to the dishonoured cheques i.e. tagging them with some or all of whatever liability Compeer succeeds in attaching to NBC. (The contribution-and-indemnity claim would be in addition to NBC's direct claim against the Canadian entities for loans advanced.)

[7] Further per NBC, section 11 of the *CCAA* provides jurisdiction to make the requested order. As well, the *CCAA* case law confirms that, while ordinarily the statute does not extend to addressing inter-creditor disputes (instead focusing centrally on claims against the insolvent company), the *CCAA* will reach, and govern, such disputes where their resolution would promote the accomplishment of *CCAA* purposes.

[8] Per Compeer, NBC has sufficient information to identify its legal exposure to Compeer on the dishonoured cheques by definition, since it was NBC's own decisions to dishonour them, in circumstances known to NBC, that underlie its potential liabilities to Compeer. In any case, Compeer says it does not have all the information it needs to decide what claim(s) it has or may have against NBC in respect of the dishonoured cheques, whether it will pursue NBC for those claim(s), and the actual or potential range of its claims.

[9] As well, per Compeer, NBC's cases are distinguishable, with the cited "inter-creditor disputes" not properly thus characterized, instead involving matters intertwined with the *CCAA* proceedings, including the proper administration of court-approved plans of reorganization.

[10] Other arguments raised by both sides are noted and addressed in the analysis below.

[11] For greater certainty, I note that Compeer has not yet sued NBC (if it sues at all) on or in respect of the dishonoured cheques, and (though the parties did not address limitations in any substantive way) it appears that the limitation period to do so has not yet expired and will apparently not expire until after December 2025, when further applications are scheduled in this matter, including one (as I understand it) to determine whether NBC can prove a contribution-and-indemnity claim against some or all of the Canadian entities and, if so, value that claim for the purpose of the *CCAA* proceedings.

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III. Analysis

A. *CCAA* proceedings do not extend to resolving pure inter-creditor disputes

[12] It is not a proper use of a *CCAA* proceeding to determine disputes between parties other than the debtor company: ***Stelco (Re)***, 2005 CanLII 42247 (ONCA) (para 32). See also ***Green Growth Brands Inc (In the matter of a plan of compromise or arrangement)***, 2020 ONSC 3565 (paras 33-37).

[13] An exception is where the resolution of such disputes is "inextricably connected to the restructuring process": ***Stelco Inc (Re)***, 2006 CanLII 16526 (ONCA) (paras 11 and 12) and ***Alderbridge Way GP Ltd***, 2023 BCSC 1718 (Fitzpatrick J.) (paras 34-57). For examples of such connections, see ***Stelco (2006)*** (paras 5-10), ***Alderbridge*** (paras 58-72) and ***Dynamic Technologies Group Inc (Re CCAA)***, 2023 ABKB 172 (Mah J.).

[14] NBC did not point to any cases where *CCAA* proceedings were extended to inter-creditor disputes to assist in proving and valuing claims in those proceedings.

[15] I do not see such a purpose as "inextricably connected to the restructuring process" or as "likely to further the remedial purposes of the *CCAA*" (***US Steel Canada Inc (Re)***, 2016 ONCA 662 (para 102).

[16] The *CCAA* provides a mechanism for proving and (if proved) valuing claims: ss 19 and 20 *CCAA*. That mechanism has apparently been adequate for proving and valuing claims even where the claims are for contribution and indemnity i.e. turn in part on separate claims involving the claimant and one or more third parties. Even where those claims are contingent, as appears to be the case here, with the existence of NBC's (possible) claim-over against the Canadian Sunterra entities depending on whether Compeer decides to pursue NBC on the dishonoured cheques and, in turn, whether NBC's indemnification rights extending to such claim(s). On the suitability of the *CCAA* claims process for proving and valuing such claims, see ***Conforti Holdings Ltd (In the matter of the proposal to creditors of)***, 2022 ONSC 3264 (Cavanagh J.) (paras 42-51).

[17] See also ***SemCanada Crude Company (Celtic Exploration Ltd #2, Re)***, 2012 ABQB 489 (Romaine J.):

> It may well have been difficult to value a contingent claim for future suspension damages that was filed before the Claims Bar Date, but that is often the nature of a contingent or future claim. In particular, there may have been issues relating to when the IGPA could reasonably be reinstated. As noted by SemCAMS, contingent claims are routinely filed in CCAA proceedings and in proceedings under the BIA. [para 27]

[18] Again, NBC did not point to any case where, for *CCAA* proving and valuation purposes, the *CCAA* proceeding reached into those separate claims for any purpose.

[19] NBC itself acknowledged in its application (para 10) that " ... it is possible to determine and value the NBC v Sunterra Claim in the absence of [the] details [sought from Compeer]", albeit submitting that "the process would benefit from, and would be significantly more efficient and efficacious [with those details]."

[20] Compeer stated that it may obtain more information about its possible claim against NBC after conducting certain already-scheduled examinations, which might clarify the nature and

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scope of its possible claim against NBC. Compeer did not state or imply that it was averse to providing such information to NBC, only that it was premature (now) to ask for such information and, in any case, to compel Compeer to provide it, particularly on pain of losing its claim entirely via a claims-bar provision (as discussed further below).

[21] In these circumstances, the "inextricable connection" to the *CCAA* proceedings is lacking.

[22] Leaving the normal approach – *CCAA* proceedings do not extend to resolving inter-creditor disputes – in place.

B. No likely benefit to the *CCAA* process via the proposed order

[23] Alternatively, if potential assistance in the *CCAA* proof-and-valuation-of-claims process reflects an inextricable connection or would likely further the *CCAA*'s remedial purposes, as explained below I perceive no such assistance here.

[24] The terms of NBC's proposed order (reproduced here) illuminate this point.

> Compeer … is required to **file an election** ("the Compeer Election"), on or before September 30, 2025 [or extended deadline, as discussed at the conclusion of the application on September 3, 2025] (the "Compeer Claims Bar Date"), in which Compeer: (i) indicates **whether it intends to advance a claim against NBC** in respect of any facts, circumstances or matters giving rise to a Compeer v NBC Claim [i.e. a defined term focusing on the dishonoured cheques described above]; and, (ii) if Compeer indicates that it intends to advance such a claim, requiring Compeer to: (a) **outline the bases** of such claim(s); and (b) provide a **range of the quantum** of such claim(s). [emphasis added]

[25] Starting with the **election element**, Compeer has already advised NBC that it *may* pursue it for losses caused by the dishonoured cheques.

[26] As I understand NBC's position, as apparently reflected in the "file an election" requirement, the order, if granted, would require Compeer to answer "yes" or "no."

[27] While Compeer would apparently prefer, in the circumstances it describes (i.e. incomplete information), to provide a "may pursue" response, I infer that, if faced with a "yes" or "no" election, Compeer would invariably answer "yes" i.e. at minimum to preserve potential recourse against NBC on the cheques. Particularly with nothing in the order creating any prejudice or disadvantage to Compeer, after a "yes" election, if it were later to decide against pursuing NBC on the cheques or, if a pursuit had been launched, abandoning it. In other words, a "yes" election would not appear to lock Compeer into pursuing NBC regardless of any re-evaluation of present circumstances or a downstream change of circumstances.

[28] I find that NBC's understanding of Compeer's present position would not increase appreciably via the election itself, with no real chance, in the present circumstances, that Compeer would elect "no" and with a "yes" election being the product of what I find would be inevitable desire on Compeer's part to preserve its rights. In other words, Compeer's position will continue (on the ground) to be "maybe" or "it depends", albeit preserved under cover of a non-binding "yes" election.

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[29] On the **"bases" aspect**, NBC understands from Compeer's direct claim against some or all of the Canadian entities that it is alleging a tracing claim, which NBC understands references and is aimed, at least in part, at recovering against NBC in respect of the dishonoured cheques.

[30] Accordingly, NBC is apparently looking for Compeer to outline whether it alleges any other basis or bases for recovery on or in respect of those cheques.

[31] As a bank, NBC is presumably familiar with the recourse(s) of collecting banks where cheques are dishonoured (i.e. to the extent Compeer had that status in respect of some or all of the cheques) and those of drawees or holders of dishonoured cheques (i.e. to the extent Compeer had that status on any of the cheques) or otherwise what liabilities it may have to Compeer in respect of the cheques in the circumstances here.

[32] In other words, in advance of Compeer starting an action against NBC (if it does at all) and even without a catalogue of potential liability from Compeer as contemplated by the proposed order, NBC is presumably already aware of the liabilities it has or may have incurred to Compeer on the dishonoured cheques.

[33] And, as noted by Compeer, NBC (by definition) has a window into its own decisions to dishonour the cheques, including its own understanding of the prevailing circumstances and its rationale(s) for dishonouring.

[34] As well, the proposed order does not call for details of the requested bases, whether particulars, facts, or evidence.

[35] Accordingly, Compeer could properly, and might, respond to the proposed order, bases-wise, by answering "tracing claims as detailed in our claim against the Canadian entities directly, plus all liabilities to Compeer otherwise triggered by the dishonouring of the cheques, whether under statute (including the *Bills of Exchange Act*), the common law, or in equity i.e. the orthodox species of liability to downstream parties where cheques are dishonoured."

[36] Which I infer NBC is already familiar with, at least in terms of the potential grounds of liability relating to dishonoured cheques.

[37] Particularly where Compeer has advised that its causes of action against NBC "would presumably not be fraud, conspiracy or oppression" i.e. some or all of the causes of action Compeer asserts against the *CCAA* debtors and their principals (or some of them).

[38] NBC's real concern is more likely with the quantum of Compeer's claims.

[39] From earlier materials on this file, I understand that Compeer suffered losses from certain chequing-relate activities of the Canadian and U.S. Sunterra entities of approximately $35 million (USD) and that it may have recovered approximately $15 million (USD) via certain asset sales in the U.S. i.e. that it is currently owed approximately $20 million (USD) by the U.S. entities.

[40] It may be that Compeer is able to achieve more recoveries out of the U.S. entities.

[41] It may also achieve recoveries via its claims already asserted against some or all of the Canadian entities.

[42] It may have other sources of recovery i.e. beyond those noted and its possible claim against NBC.

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[43] I infer that Compeer's "lack of information" also extends to the possible quantum of its claim against NBC i.e. given possible recoveries on these other fronts.

[44] I also infer, given the narrow information sought on this aspect in the proposed order ("a range of quantum of such claim(s)"), that, if obliged to provide such information via the proposed order, Compeer would not provide a range that would or could impair its position i.e. would not see any need to cap its own claim i.e. would in all likelihood provide a range like "while lacking full information at present, it may be that, via the cheque dishonouring in question, NBC became liable to us for some or even all of our cheque-related losses i.e. $35 million (USD), of which we have recovered $15 million (USD). Accordingly, we currently provide a range of possible recovery against NBC of up to $20 million (USD), plus a further $X million (USD) in consequential losses, interest, costs, and other amounts, for a grand total range of up to $20 + X million i.e. if it turns out that we do not recover any material amounts on other fronts or, alternatively, if we are not obliged at law to exhaust or factor in other recoveries when pursuing NBC."

[45] In other words, I cannot foresee that Compeer, acting rationally, would, in the present circumstances, answer "no" to the pursuit-of-NBC election, do anything other than list the already implicitly-asserted tracing recourse and all known-to-law liabilities triggered by cheque-dishonouring, or limit its range estimate below the absolute maximum of its conceivable claim(s) against NBC.

[46] I also note that the proposed order does not ask Compeer to provide a range or ranges per asserted ground of liability (e.g. "we estimate recovery of up to $X million from NBC on [ground #1], $Y million on [ground #2], etc.), instead calling only for a range of overall recovery.

[47] NBC is presently aware of all that information.

[48] Accordingly I do not foresee that NBC would receive any materially and incrementally helpful information from Compeer via the proposed order.

[49] In any case, NBC's counsel advised at the application that, if Compeer wished to reserve a right to amend its response (e.g. as I understand it, to add a new basis of liability or revise its claim range) with newly acquired information, it could do so.

[50] For that matter, the proposed order does not purport to block Compeer from revising its responses (e.g. to add a further ground of liability or revise its claim range) on account of pre-existing and discoverable information or even pre-existing and known but now reconsidered information e.g. "we overlooked but now invoke ground of recovery E, and we knew about but had discounted but now invoke ground of recovery F, and we also have reconsidered our range estimate, based on the same information, which we now set at $[new figure] million (USD)."

[51] In other words, as presently framed, the proposed order only calls for point-in-time information, which (per its terms) Compeer could change, whether between now and the December hearing on the proof and valuation of NBC's contribution-and-indemnity claim or afterwards, and whether on the basis of new information, existing information not yet factored in, or even existing information reconsidered.

[52] Viewed differently, as much as NBC might wish to pin down Compeer as part of understanding NBC's potential liability to it for the cheque dishonouring and, in turn, obtain more clarity on the scope and extent of its contribution-and-indemnity claim against the

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Canadian Sunterra entities, the order leaves Compeer free to depart from its point-in-time position e.g. whether to add perceived grounds of liability or increase its loss-range estimate or even to subtract grounds ("we are no longer pursuing X or Y theories of liability") or reduce its estimate.

[53] In such circumstances, it is hard to see what additional clarity any point-in-time set of positions casts on either the Compeer v NBC claim or NBC's claim-over against the Canadian Sunterra entities.

[54] In its brief, NBC characterized the present circumstances as "shadow boxing" with Compeer i.e. with uncertainty over whether the latter will pursue relief on the cheques and, if so, on what basis or bases and for what perceived losses.

[55] But as explained above, the proposed order would not move things out of the shadows.

[56] In other words, the limited and changeable information sought by the proposed order would not materially assist in the *CCAA* claims process.

C. Claims-bar provision not warranted

[57] In any case, even if Compeer should be compelled to comply with the order (i.e. if it were found that doing so would or would likely yield materially useful information for the December application), NBC has failed to show the necessity of enforcing the order with a claims-bar provision.

[58] NBC is not proposing that Compeer's potential claim against it be determined (i.e. on the merits) within the Sunterra *CCAA* proceedings.

[59] As noted, it is simply seeking information from Compeer to assist in advancing its (NBC's) contribution-and-indemnity claim in those proceedings.

[60] The hammer of a claims-bar provision is both incongruous and disproportionate here, with Compeer's claim ultimately, if pursued, being advanced in separate (non-*CCAA*) proceedings i.e. no need to corral and move Compeer's claim through the *CCAA* claims process.

[61] If an election order were granted here, and if Compeer failed to comply, other court-order-enforcement remedies could be invoked.

IV. Conclusion

[62] NBC has not shown that requiring Compeer to make the proposed election and, if electing "yes", to provide the requested information would yield materially and incrementally helpful information.

[63] In other words, that the proposed information would materially boost the *CCAA* proceeding here.

[64] In any case, the acknowledged right of Compeer to amend the information, whether new information emerged or otherwise, materially undercuts the ostensible certainty created by any order responses.

[65] In other words, the proposed order would not materially increase certainty here.

[66] And no claims bar date is warranted here in any case.

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[67] I dismiss NBC's application for the proposed order.

Heard on the 5th day of September, 2025.
Dated at Calgary, Alberta this 14th day of October, 2025.

Michael J. Lema
J.C.K.B.A.

Appearances:

Sean Collins, KC
McCarthy Tetrault LLP
For the Applicant, National Bank of Canada

Keely Cameron
Bennett Jones LLP
For the Respondent, Compeer Financial, PCA

Scott Chimuk
Blue Rock Law
For the Canadian Sunterra entities

Gunnar Benediktsson
Norton Rose Fulbright
For the *CCAA* Monitor

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TAB 51

COURT FILE NO.: 02-CV-241004CM2
DATE: 20040107

2004 CanLII 8031 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
NATIONAL BANK OF CANADA	)	*Andrea M. Habas,* for the plaintiff
	)	
	)	
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
SOPHIE TANEV	)	*Donald J. Brown, Q.C.*, for the defendant
	)	
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** December 9, 2003

STINSON J.

[1] In this action the plaintiff seeks payment of the sum of $228,298.61 said to be owed by the defendant, arising from the operation of two line of credit accounts. The defendant resists the claim, relying on the circumstances under which the alleged indebtedness arose and also on the terms of the line of credit agreements.

FACTS

[2] On November 8, 2001 the parties signed two standard form line of credit agreements, one with a credit limit of $154,000 and the other with a credit limit of $146,000. As security for the monies to be advanced under the lines of credit the defendant gave the plaintiff a mortgage on her matrimonial home, for the principal sum of $300,000, being the equivalent of the total of the

credit limits under the two lines of credit. The defendant's husband, Michael Tanev, signed the two line of credit agreements and the mortgage as guarantor.

[3] The relevant portions of the $154,000 line of credit agreement (the other agreement was identical, save for a credit limit of $146,000 and a different account number) are set out below:

> **1. TERMS AND CONDITIONS**
>
> The Bank establishes, in favour of the Client, a Line of Credit on the date this agreement was signed, under the following terms and conditions:
>
> Credit limit: _$154,000.00_ Interest rate: Prime rate 4.5% + _0 %_ = 4.5%
> (Spread)
> (Effective November 8, 2001)
>
> Expiry date of agreement November 8, 2006 Account No. 70·694-97
>
> The Client shall use the Line of Credit by way of items drawn on the account (the "Account"), the number of which is indicated above, or in any other way agreed upon between the Bank and the Client; any item paid by the Bank may be debited from the Account. Items must be drawn on cheques authorized by the Bank. As long as the Line of Credit is in effect, the Bank shall pay the Client's items, except if the debit balance of the Account exceeds the credit limit or if the payment would create such an overrun.
>
> ….
>
> **4. ADVANCES**
>
> All amounts charged to the Account, including fees in effect at the Bank for the handling of such Account as well as insurance premiums, if applicable, are considered advances made by the Bank to the Client; the Client must repay such advances in the manner provided for herein.
>
> **5. MONTHLY STATEMENT**
>
> Every month, the Bank shall prepare and send to the Client a statement (the 'Statement'), as well as other items, if applicable, confirming the debits and credits posted to the Account during the period covered by the Statement. On receipt of each Statement, the Client shall pay the Bank the interest, fees and insurance premiums charged to the Account during the period covered by the Statement as well as any additional amount required so that the debit balance of the Account does not exceed the credit limit. This payment shall be made without using the Line of Credit. In the case of the Home Improvement Line of Credit, the Client is

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not obliged to pay interest, fees and insurance premiums charged to the Account before the expiry of the Line of Credit.

….

7. AMENDMENTS TO THIS AGREEMENT

The Bank may, at its discretion, increase or decrease the term of the line of Credit or the amount of the credit limit, and. with 30 days' prior notice, amend the terms hereof. The Bank may terminate the Line of Credit upon re-evaluation of the Client's financial situation or if the Client becomes insolvent or does not fulfill his obligations to the Bank hereunder or otherwise.

8. PAYMENT OF BALANCE AT EXPIRY

When the Line of Credit expires, the Client must pay to the Bank forthwith the debit balance of the Account with interest at the prime rate of the Bank grossed up as indicated in article 1 until payment in full; unpaid interest is compounded monthly.

….

11. AGREEMENT COVERING PERSONAL DEPOSIT ACCOUNTS

This agreement is subject to the provisions of the agreement Governing Personal Deposit Accounts; the Client acknowledges receipt of a copy thereof.

….

[4] Although article 11 of the line of credit agreements referred to something called the "Agreement Governing Personal Deposit Accounts" the latter document was not put into evidence before me.

[5] According to an agreed statement of fact, the lines of credit were obtained for the purpose of financing Mr. Tanev's business. According to the testimony of the bank official who testified before me, two separate line of credit accounts were opened because the proceeds of one were to be used to pay out an existing mortgage with the Canadian Imperial Bank of Commerce.

[6] Once the line of credit accounts were established, Mr. and Mrs. Tanev were provided with cheques that could be written on the accounts, thereby drawing down the credit facility provided by the bank. Although Mrs. Tanev was the bank's client and thus the account holder, pursuant to signature cards signed by her and her husband, either of them was authorized to sign cheques on these two accounts. Accordingly, although Mr. Tanev was not the account holder, but only the guarantor under the line of credit agreements and the mortgage, with the knowledge and

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approval of the defendant, Mr. Tanev was authorized to write cheques on the account and thereby draw down the lines of credit, utilizing only his own signature.

[7] Almost as soon as they were established the two line of credit accounts were drawn down almost to their maximum amount. Thereafter, between mid-November 2001 and mid-February 2002, various deposits were made to and cheques drawn against the accounts. Unbeknownst to the plaintiff, however, most of the cheques drawn on the accounts (which were apparently all signed by Mr. Tanev) and the deposits made to them (all made by Mr. Tanev) were part of an elaborate cheque-kiting scheme in which Mr. Tanev and others (but not the defendant) were participants. Briefly stated, Mr. Tanev and his confederates entered into an arrangement whereby they exchanged cheques, each in the same amount, which were then deposited and withdrawn in like amounts from their respective banks, simultaneously. There was no underlying transaction to support the exchange of cheques and at the time the cheques were written, there were insufficient funds in the drawer's account to cover them. The purpose of exchanging the cheques was simply to obtain funds from the participants' respective bankers.

[8] In effect, by depositing a confederate's cheque in one of the defendant's line of credit accounts, Mr. Tanev was able to artificially reduce the debit balance, thus enabling him to write further cheques on the account which, but for the credit arising from the deposit, would have exceeded the credit limit on the account. So long as the confederate's cheque was honoured, the line of credit account would continue to operate within its credit limit. In part at least, the scheme succeeded because of the plaintiff bank's practice of crediting the line of credit account with the full amount of the deposit at the time the confederate's cheque was deposited, instead of waiting until the cheque cleared or otherwise confirming that there were sufficient funds in the confederate's account to pay it.

[9] As of February 7, 2002, the first line of credit account was drawn down to the extent of $132,989.71. On February 8, 2002, a deposit of $180,000 was made to that account, and cheques totalling $185,000 together with interest of $391.95 were charged against the account, resulting in a net draw down of $138,381.66. On February 12, 2002 three cheques previously deposited into this account totalling $161,000, were returned NSF, apparently because the cheque-kiting scheme had been discovered. The bank charged these NSF cheques against the account by way of debit memos, increasing the draw down on this account from $138,381.66 to $299,381.66, almost double the credit limit of $154,000.

[10] With respect to the second line of credit account, as of February 7, 2002, it was drawn down to the extent of $138,487.37. On February 8, 2002, a deposit of $85,000 was made, a cheque of $90,000 was processed and interest of $429.65 was charged, resulting in a net draw down of $143,916.95. On February 12, 2002 a cheque previously deposited in the amount of $85,000 was returned NSF. The NSF cheque charged to this account by way of a debit memo, resulting in a net draw down of $228,916.95, well in excess of the credit limit of $146,000.

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[11] As a result of the bank having charged the two accounts with the amounts of the deposited cheques that had been returned NSF, the credit limits established for both accounts were substantially exceeded: as compared to the total authorized credit limit of $300,000, the total of the charges to the two accounts was $528,298.61. In light of the fact that the charges to the two accounts had substantially exceeded the credit limits and upon the cheque-kiting scheme coming to light, the plaintiff "froze" the two accounts and did not process any further cheques drawn on them.

[12] Subsequently, the plaintiff took three legal steps. The first was to issue a Notice of Sale Under Mortgage in relation to the mortgage granted by the defendant on the matrimonial home. That Notice of Sale was dated August 21, 2002. According to the agreed statement of fact, in November 2002, the defendant, through counsel, arranged for a payment to the plaintiff in the amount of $317,351.70 (representing principal and accrued interest on the mortgage) in exchange for a discharge of the mortgage. Although the mortgage was discharged, there was no release given in respect of the line of credit liability.

[13] The second step taken by the plaintiff was to commence a separate action against Mr. Tanev and his confederates in the cheque-kiting scheme. Mr. Tanev did not defend that action and the plaintiff ultimately obtained a judgment against him in the principal amount of $799,556.52. According to the statement of claim in that action, it was founded on allegations of fraud and conspiracy relating to the cheque-kiting scheme and did not involve any claim based on the line of credit accounts, the mortgage, or Mr. Tanev's guarantee of same. Mr. Tanev has subsequently made an assignment in bankruptcy.

[14] The third step taken by the plaintiff was the commencement of this action against Mrs. Tanev, in December 2002, seeking payment of the balance of the indebtedness said to be owing on the line of credit accounts, after giving credit for the $300,000 payment in November 2002. Thus the amount claimed in this proceeding is the total drawn down on the two lines of credit, being $528,298.61, less the $300,000 paid to obtain the discharge of the mortgage, leaving a balance of $228,298.61.

[15] The only witness to testify at trial was Darcy Hamilton, the bank official who processed the original application by which the two line of credit accounts were opened. She testified that the bank did not monitor the accounts save to confirm that the cheques drawn on them had been signed by a signatory authorized to do so pursuant to the signature cards filed with the bank. She said that she did not know where the funds from the line of credit accounts went. She testified that, provided the accounts operated within their credit limits, she did not receive copies of the statements or the cheques drawn on them. If an account exceeded its credit limit, notice to this effect would appear on a computer screen and cheques drawn on the account in excess of the credit limit would not be paid.

[16] Ms. Hamilton testified that there was no practice in place to verify that funds were available to pay cheques that were deposited into the account. Thus, if a cheque for $50,000 had

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been deposited into one of the line of credit accounts, the bank would permit those funds to be drawn down by allowing the customer to write a cheque on the account for a like amount, without first verifying that the deposited cheque would be honoured by the bank upon which it was drawn by confirming that there were sufficient funds in the drawer's account.

[17] Mrs. Tanev did not testify. The plaintiff read in a portion of her examination for discovery transcript in which she confirmed that her agreement with Mr. Tanev was that Mr. Tanev would be using the line of credit accounts, would be writing the cheques and would be making the deposits. It would thus appear that Mrs. Tanev was content to leave the operation of her accounts to her husband. This was reflected in the signature cards that she provided to the bank by which she authorized the bank to process cheques on the accounts that were signed by her husband alone and further by her agreement with her husband that I have just mentioned.

THE POSITIONS OF THE PARTIES

The Plaintiff

[18] The plaintiff asserted that, as the bank's customer, the defendant is fully liable for the amounts drawn down on the two lines of credit. In essence, the bank asserted that it advanced funds for the defendant's account by paying cheques drawn on her line of credit accounts based and in reliance upon deposits made to that account, which deposits ultimately were worthless. Those deposits were made by the defendant's authorized agent, her husband, and when the underlying cheques were returned NSF, the bank properly charged them back as debits to the accounts.

[19] The bank argued that the debit memos by which the NSF cheques were processed reflect amounts charged to the accounts which must be repaid. Because the debit balances exceeded the credit limits, the customer is required to pay the excess amounts. Further, because the lines of credit have been terminated, the customer has to pay the full debit balances.

The Defendant

[20] In her statement of defence the defendant denied that she had signed the line of credit agreements. That defence would appear to have been abandoned prior to trial. In the statement of defence the defendant denied receipt of any money from the plaintiff. She further denied that she wrote any cheques against the two line of credit. Neither of these further defences was strenuously advanced at trial. Further, there was no suggestion of unconscionability, lack of independent legal advice or other equitable ground upon which the defendant's obligation could be avoided.

[21] Rather, at trial the position of the defendant was that she never agreed to incur any liability to the plaintiff in excess of the $300,000 total credit limit provided by the two line of credit agreements. In particular, she did not authorize the bank to advance funds in excess of

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$300,000 pursuant to the agreements nor did she authorize the bank to charge back against the accounts deposited cheques that might have been returned NSF.

[22] Additionally, defence counsel submitted that there was a duty imposed on the bank to verify the validity of the deposits before paying cheques on the line of credit accounts that would exceed the credit limit of those accounts in the event that the deposited cheques were returned NSF. He pointed out that the bank make no effort to determine whether funds were available to pay the cheques that were deposited into the accounts from time to time, against which deposits further cheques were drawn on the account. Defence counsel also argued that there was nothing in the line of credit agreements (which were drafted by the bank) that authorized debits to be charged against the accounts where deposited cheques were returned NSF.

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ISSUES AND ANALYSIS

[23] In light of the positions advanced by the parties, the plaintiff's entitlement to recover the amount claimed from the defendant raises three issues, as follows:

1. Was the plaintiff entitled to debit the defendant's line of credit accounts when the deposited cheques were returned NSF?

2. Under the terms of line of credit agreement, was the defendant's liability limited to the total amounts of the credit limits?

3. Based on the terms of the agreements and applying the principle of *contra proferentem*, is the defendant obliged to repay any deficiencies?

[24] I will deal with each of these issues in turn.

Issue 1 - Was the plaintiff entitled to debit the defendant's line of credit accounts when the deposited cheques were returned NSF?

[25] The law in relation to this topic is summarized by M.H. Ogilvie in *Canadian Banking Law*, 2nd ed. (Toronto: Carswell, 1998) as follows (at pp. 631-632):

> Once a cheque has been dishonoured, the collecting bank is entitled to reverse the provisional credit in its customer's account. Today, provision for reversal of a provisional credit is normally made in the banker and customer contract; this common law right has long been established in England although, quite remarkably, less well so in Canada where it has only been clearly accepted since the mid-1970s. Normally, the bank will have recourse to reversal of a provisional credit where the account of a customer has sufficient funds, but where the account is in overdraft or reversal of the provisional credit does not yield the full amount of the dishonoured cheque, the bank still has enforceable rights in relation to the

> cheque. The bank may either enforce such rights against the drawer of the cheque or other parties liable on it or against its own customer.

[26] In the present case, the line of credit agreements are silent on the subject of reversal of a provisional credit arising from the deposit of a cheque in the customer's account and the subsequent dishonouring of the cheque. It may be that this subject is addressed in the Agreement Governing Personal Deposit Accounts but, as I have noted, that document was not proved at trial. As Professor Ogilvie notes, however, the right to reverse a provisional credit is a common law right that is clearly accepted in Canada. See, for example, *Bank of Nova Scotia v. Sharpe* (1975), 57. D.L.R. (3d) 260 (B.C.C.A.) at 264.

[27] Counsel for the defendant submitted that the plaintiff had a duty to verify the validity of the cheques that were being deposited before it paid further cheques on the line of credit account that would exceed the credit limit if the deposited cheques were dishonoured. He was unable to cite any authority in support of that proposition. With the greatest of respect, it seems to me that this proposition is at odds with the law that I have summarized above, which expressly contemplates a bank providing a provisional credit to its customer's account when a third party's cheque is deposited. The effect of this submission would be to preclude banks from extending any provisional credit for deposited cheques before taking steps to confirm those cheques would be honoured. The imposition of such a requirement would, it seems to me, cause considerable inconvenience to both customer and bank. The current regime benefits the customer by making funds available at the time of the deposit, it being understood that a dishonoured deposit would be charged back to the customer.

[28] I pause to observe that there is no evidence to indicate whether, had the plaintiff bank adopted the practice of calling other banks to confirm that funds were available to cover deposited cheques, it would have been told that the cheques would not be honoured.

[29] At all material times, the bank was dealing with the defendant, through the defendant's authorized agent, Mr. Tanev. The defendant knowingly gave full signing authority on the account to her husband, and the bank was thus entitled to deal with him on her behalf. The credit that the bank extended through the line of credit accounts was extended to the defendant and the draws on that account, while carried out by Mr. Tanev, were, in effect, loans to the defendant. Similarly, the provisional credits to the accounts arising from the deposits of the cheques drawn on other banks were provisional credits in favour of the defendant. The account operated on this basis (that is, with the bank providing the customer with provisional credits and the customer's cheques being paid in reliance on that extra credit) throughout the month of January 2002. The bank could have declined to give the customer the benefit of the provisional credit until the deposited cheques had cleared, but it chose to credit the customer's account at the time of deposit. The defendant was content to enjoy the benefit of the provisional credit so long as the deposited cheques were honoured. It seems to me somehow incongruous to permit the customer to enjoy the benefits of the provisional credit arrangement while it operated in the customer's favour, and to disavow it when asked to repay the credit she enjoyed.

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[30] I therefore conclude that the plaintiff bank was entitled to debit the defendant's line of credit accounts as it did when the deposited cheques were returned dishonoured, by applying the established principle of reversal of provisional credits.

Issue 2 - Under the terms of line of credit agreement was the defendant's liability limited to the total amounts of the credit limits?

[31] The result of the deposited cheques being dishonoured subsequent to the bank having paid further cheques on the line of credit accounts was that the total credit limit of $300,000 for the two accounts was substantially exceeded. Counsel for the defendant argued that his client had not authorized a borrowing on the accounts for anything greater than $300,000 and, therefore, she was not liable for the excess amount.

[32] In my opinion, the defendant's argument is not well founded. It is true that the agreements established lines of credit in favour of the defendant with specified credit limits. Pursuant to those agreements, the bank agreed to "pay the client's items, except if the debit balance of the account exceeds the credit limit or if the payment would create such an overrun." Thus, in my view, what the specified credit limits did was to place a ceiling on the customer's permissible borrowings and on the obligation of the bank to fund those borrowings. In other words, so long as the customer's cheques on the line of credit account were within the limit, the bank was obliged to honour them.

[33] Contrary to the defendant's submissions, the agreements in fact contemplated situations in which the credit limits might be exceeded. To begin with, as noted above, the bank was no longer obliged to pay the customer's cheques "if the debit balance of the account exceeds the credit limit". As well, pursuant to article 5 of the agreements, the customer was obliged to pay the bank not only interest, fees and insurance premiums charged to the account during each monthly period, but as well "any additional amount required so that the debit balance of the account does not exceed the credit limit."

[34] The foregoing provisions are difficult to reconcile with the defendant's submission that the credit limits recited in the agreements should be equated with a limit on the customer's liability to the bank. I am unable to find any language in the agreement that is capable of being construed in such a fashion nor, in my respectful view, given the context of the overall commercial relationship between the parties, would such a provision make sense. After all, this was a credit facility provided by the bank to its customer. The defendant was the customer and the primary borrower, not a guarantor. On the face of it, the funds advanced were for her benefit and her account. To quote Master Funduk in *Bank of Montreal v. Ralph*, [1997] A.J. No. 146 (Alberta Queen's Bench) at para. 19:

> It does not lie in the Defendant's mouth to say that the Plaintiff should not have lent her an amount in excess of the credit limit and so she is not liable for the excess. She is liable for whatever amounts she borrowed."

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[35] The reality is that the total amounts debited to the accounts (either by way of cheques drawn on the accounts, interest charges or reversals of dishonoured deposits) represented funds advanced to the defendant which exceeded the limits of the credit which the bank had agreed to extend to its customer, through no fault of the bank. This is not a situation caused by any breach of duty by the plaintiff, but rather by the defendant's authorized agent depositing cheques that he knew were bad, and writing further cheques in reliance on the provisional credit granted by the bank, with a view to borrowing more money than the bank had agreed to lend. In light of these facts it would, in my respectful view, be nonsensical to construe the credit limits as, in effect, a limitation on the extent of the borrower's liability.

[36] I would therefore not give effect to this defence.

Issue 3 - Based on the terms of the agreements and applying the principle of *contra proferentem*, is the defendant obliged to repay any deficiencies?

[37] Pursuant to article 4 of the line of credit agreements "all amounts charged to the account, including fees in effect at the bank for the handling of such account as well as insurance premiums, if applicable, are considered advances made by the bank to the client; the client must repay such advances in the manner provided for herein." Article 7 of the agreements provided "the bank may terminate the line of credit upon re-evaluation of the client's financial situation or if the client becomes insolvent or does not fulfill his obligations to the bank hereunder or otherwise." Article 8 of the agreements provided: "When the line of credit expires, the client must pay to the bank forthwith the debit balance of the account with interest …."

[38] It was the position of the plaintiff that, read collectively, the foregoing provisions imposed an obligation on the defendant to repay the full debit balance, together with interest. The plaintiff argued that the lines of credit were terminated when the bank "froze" the accounts when the cheque-kiting scheme came to light.

[39] In my opinion, the debits to the accounts to reverse the provisional credits given upon the initial deposit of the (subsequently) dishonoured cheques were proper and in accordance with the legal principles that I have discussed earlier. It follows that they were proper "amounts charged to the account".

[40] It seems logical to interpret the bank's actions in the face of the discovery of the cheque-kiting scheme and the significant overages arising from the dishonoured cheques, to amount to a termination of the lines of credit, as contemplated by article 7 of the agreements. It follows that the defendant, as the customer, was obliged pursuant to article 8 to pay to the bank the debit balance of the accounts. Any other interpretation of the agreements or the defendant's obligations, in my respectful view, would make no commercial sense and would, in effect, ignore the reality that the defendant's total borrowings from the bank exceeded $528,000, of which she has repaid only $300,000.

2004 CanLII 8031 (ON SC)

[41] With respect to the defendant's submission that the principle of *contra proferentem* should be applied in the present case, counsel for the defendant relied upon the decision of the Supreme Court of Canada in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415. That case, however, concerned a guarantee given by the defendant in favour of the plaintiff bank. The Supreme Court applied the principle of *contra proferentem* and concluded that any ambiguity in the guarantee should be construed against the bank as the party that drew it. In my view, the *Manulife* case is distinguishable from the present one on two grounds. Firstly, the liability of the defendant in the present case is not founded upon a guarantee of the obligations of another party; rather she is being sued as a principal debtor for a debit balance in her own account. Thus, she does not enjoy the favoured position of a surety. Secondly, and more importantly, I do not find any ambiguity in the language of the line of credit agreement that would operate to release the customer from her obligations to the bank.

[42] I would therefore not give effect to this submission.

CONCLUSION

[43] For the foregoing reasons I have concluded that the defendant is liable to pay the plaintiff the full debit balance of the line of credit accounts. To date she has paid $300,000, plus accrued interest on the mortgage. As I understand the plaintiff's claim, it seeks to recover the remaining deficiency, totalling $228,011.68, plus accrued interest since the date of the mortgage repayment. The calculation submitted to me indicates that additional interest to December 9, 2003 amounted to $11,300.63. Assuming that there is no dispute with respect to that interest calculation, the plaintiff shall recover judgment against the defendant for the total sum of $239,312.31 on account of outstanding principal and interest.

[44] If the parties disagree with respect to the interest calculation they should make arrangements to file written submissions concerning this point within the next 15 days.

[45] With respect to costs, if the parties are unable to resolve this issue, they should make written submissions on that point subsequent to the determination of the interest question (i.e. once the total recovery for principal and interest is fixed). The timetable and procedure for doing so will be as follows:

(a) plaintiff's submission due fifteen (15) days after final determination of total quantum of the judgment;

(b) defendant's response due within ten (10) days thereafter;

(c) plaintiff's reply, if any, due within five (5) days thereafter.

Rather than each party filing these documents individually with the court, I direct the plaintiff to collect and assemble into a single brief all submissions relating to costs and to file them with my assistant so that I may receive them all at once.

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Stinson J.

Released: January 7, 2004

2004 CanLII 8031 (ON SC)

COURT FILE NO.: 02-CV-241004CM2
DATE: 20040107

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

NATIONAL BANK OF CANADA

Plaintiff

- and -

SOPHIE TANEV

Defendant

REASONS FOR JUDGMENT

Stinson J.

Released: January 7, 2004

2004 CanLII 8031 (ON SC)

TAB 52

2007 TCC 152, 2007 CCI 152
Tax Court of Canada [General Procedure]

Peek v. R.

2007 CarswellNat 6086, 2007 CarswellNat 610, 2007 TCC 152, 2007 CCI 152, [2007] 3 C.T.C. 2355, 156 A.C.W.S. (3d) 717, 2007 D.T.C. 602 (Eng.)

David Peek, Appellant and Her Majesty the Queen, Respondent

M.A. Mogan D.J.

Heard: September 20, 2006
Judgment: March 16, 2007
Docket: 2004-2723(IT)G

Counsel: Jack Anderson, for Appellant
Susan Wong, for Respondent

***M.A. Mogan D.J.*:**

1 The Appellant filed income tax returns for the years 1996, 1997, 1998, 1999 and 2000 reporting net income in the range of $6,000 to $20,000 for the first four years and net income of $55,000 for the year 2000. During that five-year period, the Appellant obtained through unlawful means approximately $602,000 from HSBC Bank Canada ("HSBC"). By Notices of Assessment dated February 19, 2003, the Minister of National Revenue (the "Minister") added to the Appellant's reported income for the five years 1996 - 2000 significant amounts relating to the amounts which the Appellant had obtained from HSBC. The Appellant has appealed from the reassessments for those five years.

2 There are two principal issues in these appeals. First, did the money unlawfully obtained from HSBC have the character of income in the hands of the Appellant? And second, is the Minister permitted to reassess the taxation years 1996, 1997 and 1998 after the normal reassessment period as defined in subsection 152(3.1) of the *Income Tax Act* (the "*Act*")? Those first three years are commonly referred to as "statute-barred years". At the commencement of the hearing, counsel for the parties filed as Exhibit 1 an Agreed Statement of Facts comprising 10 paragraphs which are set out below.

> 1. At all material times, the Appellant sold life insurance policies on a commission basis.
>
> 2. The Appellant had previously worked in banking, first with Lloyds Bank, then with the Bank of Montreal, and lastly with HSBC, which was formerly known as the Bank of British Columbia;
>
> 3. At all material times the Appellant had two accounts at HSBC;
>
> 4. From 1993 to 2000, the Appellant engaged in a "kiting" scheme in which he would typically write a cheque from one account with insufficient funds and deposit the cheque into his second account to cover the outstanding payments against the second account. Prior to the cheque clearing, the Appellant would write a cheque from the second account to cover the overdraft created in the first account;
>
> 5. By June 27, 2000, the Appellant was indebted to HSBC for $659,877.27;
>
> 6. On June 8, 2001, HSBC obtained judgment against the Appellant in the Supreme Court of British Columbia for the full amount of the indebtedness, plus interest from and after June 22, 2000;

7. The Appellant also engaged in the practice of purchasing life insurance policies for himself and his family in order to receive sales commissions which would initially exceed premiums initially paid by him;

8. The Appellant was subsequently charged criminally for his actions against HSBC;

9. The Appellant was convicted of these criminal charges; and

10. On February 19, 2003, the Minister of National Revenue reassessed the Appellant for unreported income from the "kiting" scheme totalling $367,526.00 for the 1996, 1997, 1998, 1999 and 2000 taxation years.

3 The Appellant was born in the U.K. in 1940. He started working at Lloyds Bank in 1957 and continued there until 1970 when he and his wife moved to Canadafor greater opportunities. He worked briefly for the Bank of Montreal (1970-72) and then with the Bank of British Columbia (which later became HSBC) from 1972-1983. He was required to leave his employment at HSBC in 1983 because he had placed a second mortgage on his home without informing HSBC when it held the first mortgage. In 1983, he decided to sell life insurance and, after the necessary qualifications, was sponsored by North American Life Insurance Co.

4 Although the Appellant lost his house through foreclosure in 1985 and was forced to declare personal bankruptcy in 1986, North American Life continued to sponsor him because of his early success in the life insurance business. The Appellant's financial problem in the late 1980s and early 1990s arose from the fact that his commission cheques from North American Life were irregular but his cost of living - maintaining his family - was constant on a week-by-week basis.

5 North American Life would issue a commission cheque each week if there was money in the Appellant's account but, if he finalized the sale of a life policy in a particular week, it could take two or three months to be paid his commission on that policy because medical examinations, blood tests, doctors' reports, etc. were required before an underwriting decision was made by the Company. Accordingly, if there were some weeks when the Appellant did not sell a life policy, there would be weeks when he was not paid any commission. By 1993, the Appellant had two financial problems. He was not receiving a commission cheque every week from North American Life to help meet his weekly cost of living. Also, he was not earning enough to maintain his standard of living

6 To overcome his 1993 financial problems, the Appellant embarked upon two programs which, by June 2000, brought him financial ruin. In the first program, he engaged in a "kiting" scheme. In the second program, he started selling life insurance policies to himself and members of his family. I will consider first the kiting scheme. At the HSBC branch in Campbell River, BC, the Appellant had account number [Number Omitted-150] in his own name. I will hereafter refer to this account as "150". At the same HSBC branch, account number [Number Omitted-170] was in the joint names of the Appellant and his wife, Rona Peek. I will hereafter refer to this joint account as "170". The Appellant regarded 150 as his savings account and 170 as his chequing account. It was the kiting of cheques between 150 and 170 which caused him to be charged criminally for his actions against HSBC.

7 As I understand the evidence, the Appellant would write a cheque to himself drawn on 150 and deposit that cheque through an automated banking machine ("ABM") in 170 to cover outstanding payments from 170 without having funds in 150 to cover the cheque. He would repeat the process the following day by writing a cheque drawn on 170 and depositing it through an ABM to cover the overdraft in 150 created the previous day. Due to the one day delay in clearing cheques deposited through an ABM, he was able to keep 150 and 170 in a credit balance as far as HSBC records showed but, in actual fact, his own records showed an overdraft in each account. On many days, he would have to write more than one cheque on each account in order to create a credit balance in the HSBC records.

8 Exhibit R-1, Tab 28, contains page 4 of the monthly statement for account 150 as at January 19, 2000 showing transactions from December 30, 1999 to January 4, 2000. The same exhibit also contains pages 3 and 4 of the monthly statement for account 170 as at January 21, 2000 showing transactions from December 30, 1999 to January 5, 2000. These two extracts from the monthly statements for 150 and 170 over the December 31, 1999 year end show how the Appellant kited cheques between the

two accounts to create a credit balance in the HSBC records. For example, on December 31, he deposited in 150 through ABMs the following three cheques drawn on 170:

December 31	$85,790.09
December 31	84,701.25
December 31	78,335.72
Total	$248,827.06

The monthly statement for 170 shows that these three cheques were not charged to 170 until January 4, 2000.

9 Also, on December 31, the Appellant deposited in 170 through ABMs the following five cheques drawn on 150:

December 31	$71,567.90
December 31	76,891.42
December 31	83,460.17
December 31	79,840.55
December 31	78,654.38
Total	$390,414.42

Page 4 of the monthly statement for 150 in Exhibit R-1, Tab 28 has only one entry after December 31, 1999; and so it does not show the above five cheques being charged to 150. I note, however, in Exhibit R-1, Tab 29, that the Revenue Canada auditor (Mr. B. Anderson) has listed the above five cheques plus the three cheques listed in paragraph 8 as the eight cheques which the Appellant kited over the year end of December 31, 1999 in order to keep 150 and 170 out of an overdraft position.

10 The aggregate of the three cheques listed in paragraph 8 plus the five cheques listed in paragraph 9 is $639,241. That is a staggering amount of money to be floating like a "kite" between 150 and 170 on New Year's Eve 1999 when one considers the relative impecuniosity of the Appellant reporting net income of only $29,000 in 1999. HSBC finally noticed the unusual activity in the two accounts 150 and 170. After interviewing the Appellant, the Bank determined that there was a kiting operation. On June 21, 2000, the Appellant's banking card was blocked and the two accounts 150 and 170 were frozen, preventing him from depositing any further cheques. When the outstanding kited cheques were finally processed, the Appellant owed the Bank $657,985.76 as at June 21, 2000.

11 One of the Respondent's witnesses was John K. Paterson, Corporate Security Manager at HSBC. He was involved in the Bank's investigation of the Appellant's kiting operating. He identified his memorandum dated June 28, 2000 at Exhibit R-1, Tab 24. In that memorandum, he summarized the Appellant's kiting operation as follows under the heading "Methodology":

> Essentially it can be seen that Peek deposited cheques through the ABM machines at the above noted Credit Unions for deposit to his HSBC accounts. There is a one day delay in the clearing of the cheques and this afforded him the opportunity to write a cheque on account [Number Omitted029] for say $50.00 and deposit it via ABM for credit to account [Number Omitted665] As account 029 had no funds, he would write a cheque on 665 in a slightly higher amount - say $60.00 for deposit to 029 to cover the $50.00 cheque plus provide a small extra balance (which would be the "profit" that he would subsequently remove as stolen funds). He would then write a cheque on 029 for a higher amount again - say $70.00 to cover the $60.00 cheque and so it would go. At the time of discovery, he was writing 5 cheques a day against one account - all in amounts of $75,000 to $85,000 and overlying them with a similar number of cheques on the other account for slightly increased amounts. The essence of the kite can therefore be seen to be writing cheques on an account for which there are no funds but prior to the cheques clearing and being debited to that account, a deposit is made sufficient to cover them. There is no "real" money belonging to Peek at all and he simply creates the illusion of real money through the above manipulation.

12 Referring to numbers 5 through 9 of the Agreed Statement of Facts set out in paragraph 2 above, HSBC sued the Appellant and obtained judgment against him in the British Columbia Court for approximately $659,000 plus interest from June 22, 2000;

criminal charges were laid against him with respect to his kiting operation and he was convicted of those charges. In paragraph 6 above, I refer to the two programs which the Appellant commenced in 1993 and which brought him financial ruin. The second program was selling life insurance policies to himself and members of his family.

13 The Appellant explained that upon the sale of certain life policies, the commission he would earn over a few months would easily exceed the cost of monthly premiums over the first two years. The downside of such life policies was that, if a particular policy was not maintained for a minimum period like four years, the insurance company would reclaim from the salesperson any commission received on the sale of that policy. In 1993, the financial pressure on the Appellant was such that he decided to sell such policies to himself on his own life and to members of his family in order to receive commissions notwithstanding the downside. In a statement prepared for the British Columbia Court in December 2001 (Exhibit R-1, Tab 32), the Appellant described his life insurance program as follows:

> ... I wrote a small policy on my own life (no medical requirements) on which the company would pay me on an annualized premium basis, as they always did on life insurance sales. This means that for one monthly premium deposit, they would assume that during the first year of the policy all subsequent premiums are paid. The agent therefore was paid "up front" at around 70% of annual premium, plus bonus of another 100% (this varied) of the commission. In short, for an initial outlay of $100, for example, I would 'earn' almost $1700. This sounds very lucrative, until you realize that premiums have to continue in order to maintain the policy and eventually payments will far exceed commissions earned. Nevertheless, I did this several more times over the next two years during slow months and in the absence of overdraft facilities. This must seem very foolish to an outsider, as it wasn't long before this got out of hand with monthly insurance premiums well over $1000. I couldn't cancel the policies as the insurer had a 4 year chargeback restriction in place, whereby agents lose most of the commissions earned, especially in the first two years.

14 Exhibit R-1, Tabs 19, 20 and 29 demonstrate how the Revenue Canada auditor (Brad Anderson) deducted annual premiums paid by the Appellant for life insurance policies on his own life and other members of his family from amounts which the Appellant "earned" each year through his cheque kiting operation. According to Tab 20, the Appellant had about 25 life policies on his family in 1996 for which he paid aggregate premiums of $79,609. The number of family policies began to decline after 1996 when he allowed the older policies to lapse after they had been in effect for five years to secure his sales commissions (no reclaiming by the company!).

15 Tab 29 shows the amounts earned by the Appellant through his cheque kiting operation. The amount "earned" in a particular year was the amount by which the overdrafts in 150 and 170 at the end of that year exceeded the comparable overdrafts at the end of the preceding year. Tab 20 shows the total premiums paid by the Appellant each year on family life policies. Tab 19 shows how Mr. Anderson deducted the total premiums paid each year from the cheque kiting profit for each year to arrive at amounts identified as "unreported income". And, in Tab 18, the Appellant has confirmed in writing his agreement with Mr. Anderson's computation of the amounts which Revenue Canada regards as unreported income for the years 1996 to 2000 being the years under appeal.

16 In Exhibit R-2, Mr. Anderson summarized his method of computing the Appellant's net unreported income according to Revenue Canada. Set out below are the relevant parts of Exhibit R-2.

Year	**Net Reported Income**	**Income from cheque kiting**	**Insurance premiums deducted**	**Net unreported income**
1996	$6,000	$158,143	$79,609	$78,534
1997	18,000	177,367	74,949	102,418
1998	20,000	129,443	62,638	66,805
1999	16,000	118,347	16,940	101,407
2000	55,000	18,762	400	18,362
Totals	$115,000	$602,062	$234,536	$367,526

The amounts in the right-hand column under the heading "Net Unreported Income" are the amounts which were added to the Appellant's reported income for the respective years under appeal. See Exhibit R-1, Tabs 12 to 16 inclusive.

The Issues

17 The primary issue is whether the money unlawfully obtained from HSBC had the character of income in the hands of the Appellant. In argument, I asked Appellant's counsel if the Appellant had only one business (i.e. selling life insurance) for which the kiting of cheques was an integral part; or if his cheque kiting operation was separate from his business of selling life insurance. Counsel replied that he thought that the two operations were integrated because the banking for both was done through the same bank (HSBC). Indeed, both operations were conducted through the same two accounts at only one branch of HSBC.

18 There is extrinsic evidence that the two operations were integrated. According to Exhibit R-1, Tab 20, the annual premiums paid on the family life policies in the three statute-barred years were:

1996	$79,609
1997	74,949
1998	62,638

In each of those years, the Appellant reported very modest income of $20,000 or less. Therefore, the Appellant could not have paid those high annual premiums on the family life policies (required to secure his retaining the commissions earned on the sale of such policies) unless he kited cheques from 150 (his savings account) to 170 (his chequing account) to pay those premiums. I find as a fact that the cheque kiting operation was an integral part of the Appellant's life insurance business.

19 In the circumstances of this case, the kiting of cheques by the Appellant was a fraudulent act because HSBC was induced to honour *bona fide* cheques issued to third parties (i.e. North American Life) believing that the Appellant had his own funds on deposit to support such third party cheques. The funds which appeared to be on deposit in account 170 (the chequing account) were drawn by the Appellant from account 150 (the savings account) using one or more kited cheques when the Appellant knew that he did not have sufficient funds of his own in 150 to cover the kited cheques.

20 In paragraphs 8 and 9 above, I refer to Exhibit R-1, Tab 28 to show that the Appellant had eight kited cheques "in the air" over December 31, 1999; and the aggregate face value of those cheques was $639,241. Also, Mr. Paterson's memorandum (Exhibit R-1, Tab 24) states that when the Bank closed down accounts 150 and 170 in June 2000, the Appellant was writing five cheques a day on each account, and that all cheques were in the range of $80,000. This was a constant, daily operation juggling significant amounts of money to deceive HSBC.

21 The law is well settled that money obtained by fraud may be income in the hands of the wrongdoer. In *R. v. Poynton* (1972), 72 D.T.C. 6329 (Ont. C.A.), the Ontario Court of Appeal convicted an employee of income tax evasion when he obtained money from his employer by fraud and failed to report it as income. In *Buckman v. Minister of National Revenue* (1991), 91 D.T.C. 1249 (T.C.C.), the taxpayer was a lawyer convicted of fraud for having embezzled money (approximately $520,000) from his clients. When Revenue Canadaincluded the embezzled amounts in Mr. Buckman's income for 1983, 1984 and 1985, he appealed claiming that the embezzled funds were not income but money borrowed from his clients. When dismissing Mr. Buckman's appeal, Sobier J. stated at paragraphs 30 and 31:

> The Appellant received the money, appropriated it unto himself and used and enjoyed it for his own benefit. It was never treated by him as a loan. There was no intention to repay the Funds. Mr. Buckman was engaged in an on-going, long term scheme to steal from his clients. In reality, he intended to hold the Funds for his own account and did so in fact.
>
> The number of misappropriations and the methods employed by the Appellant had all the earmarks of a business. He took risks in stealing the Funds and being found out. His reward however, was his hope of escaping detection and keeping the Funds for his own use. There is no difference whether the thief acted as a solicitor, agent or employee. The fact that the

Funds are to be treated as income flows from the realities of the situation. Paraphrasing Evans, J.A. in Poynton: What is being sought to be taxed didn't accrue to Mr. Buckman *qua* solicitor or *qua* mortgage broker but *qua* thief.

22 The Appellant's circumstances are similar to Mr. Buckman's situation. The amounts of money (approximately $650,000) which the Appellant obtained unlawfully from HSBC are substantial. The frequency of the transactions (many cheques), the magnitude of the kited cheques, and the period of time when the transactions were effected (seven years 1994 - 2000) had the earmarks of a commercial operation. The Appellant took the risk of being found out. His potential reward, however, was escaping detection. Mr. Peek's misdeeds were not those of an office boy pilfering petty cash from the till!

23 A letter dated June 30, 2000 from HSBC's lawyers to the Appellant (Exhibit A-1, Tab 1) demanded payment of the "Indebtedness". The letter used the notations Loan 258029-150 and Loan 258665-170 to identify the accounts in which the kited cheques were deposited but HSBC never regarded itself as a "lender" to the Appellant. From the moment when the kiting operation was discovered, HSBC regarded the $650,000 as money unlawfully obtained; and HSBC notified the police.

24 I have no hesitation in concluding that the money unlawfully obtained from HSBC had the character of income in the hands of the Appellant.

25 The remaining issueis whether the Minister may reassess the statute-barred years 1996, 1997 and 1998. Subsection 152(4) permits the Minister to make a reassessment "at any time" except that, after the normal reassessment period, a reassessment may be made only if the taxpayer "has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed fraud" in filing his return. For the statute-barred years, the relevant amounts speak for themselves:

Year	**Other Income**	**Profit from Kiting Operation**
1996	$6,616	$158,143
1997	18,438	177,367
1998	20,245	129,443

26 In each year, the profit from the kiting operation was never less than six times the Appellant's income from other sources. The Appellant claimed that he was astonished to learn in 2002 that Revenue Canada was going to include the profit from his kiting operation with his income from other sources. He may have been astonished to learn that fact in 2002 but, during 1996, 1997 and 1998, the Appellant knew year-by-year that the financial benefits he was achieving each year from his extensive kiting operation far exceeded his income from other sources.

27 Having regard to the Appellant's experience and sophistication from working 26 years in banking (1957 to 1983), and having regard to the very substantial number of cheques which were kited on a daily basis in the years 1996, 1997 and 1998, the Appellant's failure to report any profit from his kiting operation in those years was a misrepresentation attributable to neglect or carelessness. And if he had reflected upon his standard of living with respect to his modest income from other sources, his failure to report such profit would have been attributable to wilful default. The appeals for all five years are dismissed, with costs.

Appeals dismissed.

TAB 53

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Before Lords Atkinson, Shaw, Wrenbury and Carson, and Sir Robert Younger

Peninsular and Oriental Steam Navigation Company, Limited (Plaintiff)

v. **Eastern Shipping Company, Limited** (Defendant) Appellant

and **Quah Beng Kee** (Third Party) Respondent

W. H. Upjohn, K.C., and *R. J. Simery*, for defendant, appellant.

M. Macnaghten and *H. M. Giveen*, for third party respondent.

November 16, 1923.

The judgment of their Lordships was delivered by

LORD WRENBURY—The facts in this case are simple and before their Lordships neither are, nor can be, disputed. Lord Wrenbury

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P.C.
1923

P. & O. STEAM NAV. CO., LTD. *v.* EASTERN SHIPPING CO., LTD. AND QUAH BENG KEE

Lord Wrenbury

The Peninsular and Oriental Steam Navigation Co. were owners of a wharf at Belawan in Sumatra. They granted to the Eastern Shipping Co. a right to berth their ships at the wharf upon terms which included terms that the latter should pay 100 guilders a day for every day of 24 hours, and that all damages which might be brought about by the berthing of their steamers at the wharf should be made good by them. Quah Beng Kee was managing director of the Eastern Shipping Co. Slot and Co. were the shipping agents of that company. Beng Kee, who had control of the business of the Eastern Shipping Co. and was entitled, as managing director, to berth at the wharf ships of the Eastern Shipping Co., appointed Slot and Co. as his own agents at Belawan as charterer of a ship called the "Kamakata Maru," and instructed them to berth that ship at the wharf in question. The "Kamakata Maru" was a ship in which Beng Kee was, and the Eastern Shipping Co. were not, in any way interested. Beng Kee's instructions to berth this ship at the wharf were wholly unauthorized and were in breach of his duty to the Eastern Shipping Co. Owing to unskilful unloading excessive weight was put upon the wharf and it collapsed. Damage was thus occasioned which the P. & O. Co. were under their grant to the Eastern Shipping Co. entitled to recover. They brought their action against the Eastern Shipping Co.; the latter brought in Beng Kee under third party procedure and obtained an order on January 6, 1919, to the effect that Beng Kee should be at liberty to defend and to appear at the trial and should be bound by the judgment and that he might raise points of defence not raised by the Eastern Shipping Co. and that he should deliver his defence to the claim for indemnity raised by the Eastern Shipping Co., and that the question of his liability to indemnify should be tried at or immediately after the trial of the action.

Beng Kee appeared and pleaded and appeared at the trial of the action and in his presence the P. & O. Co. established their case and recovered damages to the extent of $79,860. The trial Judge found that the acts of Beng Kee were within the apparent scope of Beng Kee's authority, and upon that ground held the Eastern Shipping Co. to be liable and he reached the same conclusion upon another ground, namely, that by a letter of August 28, 1918, the Eastern Shipping Co. had ratified and accepted responsibility for the acts of Beng Kee in the matter. This was a letter signed "H. Oxenham, Manager." The trial Judge found as a fact that this was in reality Beng Kee's letter written and sent by H. Oxenham by his instructions. The result of that letter was that Beng Kee

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thereby raised an additional ground for throwing upon his principals a burden which Beng Kee ought himself to have discharged.

After trial of the action the trial Judge proceeded to try the third party issues, and upon the evidence arrived at findings which are summarized in the appellants' case as follows:

(7) That instructions to use the wharf purported to be given by Quah Beng Kee as managing director of the defendant company;

(8) That the instructions for the berthing were given by Quah Beng Kee in his own interest, and not in the interest of the defendant company;

(9) That Quah Beng Kee stood in a fiduciary relationship to the defendant company; and

(10) That he unjustifiably used his position in the defendant company for his own benefit and so was guilty of a clear breach of duty towards them.

These findings were justified by the evidence and are binding upon the parties.

The trial Judge, however, found that the defendants, the Eastern Shipping Co., had no right of indemnity against Quah Beng Kee, and inasmuch as under third party procedure relief can be given against a third party only in cases where the defendant has against the third party a direct right of indemnity, the proceedings against Quah Beng Kee failed.

An appeal from this order was dismissed with costs.

It was not disputed before their Lordships that in proceedings otherwise constituted Quah Beng Kee on the above findings would have been liable. The present appeal by the Eastern Shipping Co. is of the greater importance to the parties by reason of the fact that an action by the Eastern Shipping Co. against Beng Kee for damages is now barred by *The Statute of Limitations*, and unless he can be made liable in these proceedings his liability cannot be enforced at all.

The question for discussion is therefore whether upon the facts stated the appellants have as against Beng Kee a right of indemnity. There is no other question.

A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance,

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cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract, it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring v. Ward*, 7 Ves. Jun., 332, at p. 336, a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his [the purchaser's] conscience an obligation to indemnify the vendor against the personal obligation" of the vendor. These considerations were all dealt with by the Lord Justices in *Birmingham Land Co. v. L. & N.W. Ry.*, 34 Ch. D. 261, 56 L.J. Ch. 956.

The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his *cesui que trust*. This class of case was particularly discussed by Lord Lindley in *Hardoon v. Belilios* [1901] A.C. 118, 70 L.J.P.C. 9. The present case is converse. The *cestui que trust* is here claiming to be indemnified by the trustee. Beng Kee has been found to stand in fiduciary relation to the Eastern Shipping Co. and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of his exercise of those powers. The nearest simile that was put in argument was that of a trustee in the fullest sense of the word who abuses his powers; say, the trustee of real estate with power to mortgage who mortgages for his own benefit and in breach of his duty as trustee and puts the mortgage money into his own pocket. In such a case an action would lie in the Chancery Division for a declaration that the defendant was guilty of breach of trust and was liable to indemnify the *cestui que trust* against the mortgage and for an order that he do redeem the mortgaged property and indemnify the *cestui que trust* against the mortgage debt.

In the present case, suppose that it would have taken, say, a month to discharge the "Kamakata Maru" at the wharf and

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that the Eastern Shipping Co. had learned, say, three days after the ship was berthed that the breach of duty had been committed, an action would have lain to restrain the defendant from continuing the ship at the berth and for an order that he do indemnify the plaintiffs against the three days' rental that had been incurred.

In their Lordships' opinion these results follow from the following considerations. If Beng Kee as managing director had been granting to a third party the right to berth a ship at the wharf it would have been his duty to his principals to stipulate that the third party should accept the burden which would be cast upon his principals by the user of the wharf. What happened was that Beng Kee as managing director gave to himself, as charterer of the ship, the user of the wharf. He cannot be heard to say that in so doing he did not, as managing director, require from himself as charterer of the ship the same promise as that which it would have been his duty to require from a third party, viz., a promise that he would indemnify his principals against the consequences of his act. In other words, the relations between the parties was such that the law implies the promise which it was his duty to make and from this arises a right of indemnity. Upon these grounds their Lordships are of opinion that this appeal succeeds.

There should be a declaration that Quah Beng Kee is liable to indemnify the Eastern Shipping Co. against or to repay to them the damages awarded to the P. & O. Co. by the order made in the action as well as all costs ordered to be paid by them in the several orders for costs made in the action and in the third party proceedings and is liable to pay to the Eastern Shipping Co. the costs incurred by them in the action and in the third party proceedings, the costs incurred by them in the action to be taxed as between solicitor and client, but having regard to the fact that they are payable by the third party, and an order to give effect to that declaration. The respondent must pay the costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

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TAB 54

In the Court of Appeal of Alberta

Citation: Peters v. Remington, 2004 ABCA 5

Date: 20040113
Docket: 01-00346
Registry: Calgary

2004 ABCA 5 (CanLII)

Between:

R. Kent Remington, a.k.a. B. Kent Remington, a.k.a. Barry Kent Remington

Appellant (Defendant)

- and -

Robert G. Peters

Respondent (Plaintiff)

The Court:

The Honourable Madam Justice Picard
The Honourable Mr. Justice Wittmann
The Honourable Mr. Justice Ritter

Reasons for Judgment of The Honourable Mr. Justice Wittmann
Concurred in by the Honourable Madam Justice Picard
and Concurred in by the Honourable Mr. Justice Ritter

Appeal from the Judgment by The Honourable Madam Justice C. A. Kent
dated the 20th day of August, 2001; Filed the 5th day of September, 2001

Reasons for Judgment of
The Honourable Mr. Justice Wittmann

2004 ABCA 5 (CanLII)

Introduction

[1] When a guarantor, not yet found liable on his guarantee, claims against a co-guarantor who has made a proposal in bankruptcy and the claim is denied as offending the "rule against double proofs", can the guarantor pursue the co-guarantor successfully after the proposal has been accepted?

Facts

[2] In 1990, the respondent, Peters, and the appellant, Remington, pursuant to separate guarantees, each guaranteed the same loan from Metropolitan Trust Company of Canada (Met Trust) in the sum of $1,250.000.00. They both agreed to indemnify each other for 50 percent of the guarantees and all damages, liabilities, costs, charges and expenses incurred in connection with the guarantees, pursuant to a written indemnity agreement.

[3] In 1993, after default on the loan, Met Trust commenced an action against Peters and Remington based on the guarantees. Summary judgment was awarded against Remington. Peters vigorously defended the action and consequent interest and costs increased the overall debt owed to Met Trust.

[4] On April 24, 1996, Remington lodged a formal Proposal under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, as amended (***BIA***), with BDO Dunwoody Ltd. as the trustee named in the Proposal (the Trustee).

[5] Met Trust filed a Proof of Claim in the Proposal dated May 10, 1996, which was accepted by the Trustee as a provable claim. Peters filed a Proof of Claim dated May 13, 1996 in the Proposal which was disallowed by the Trustee as a duplication of the Met Trust claim on May 21, 1996. On appeal, this decision of the Trustee was upheld by Bankruptcy Registrar Laycock. A further appeal to Paperny, J., (as she then was) was dismissed. Neither provided additional reasons.

[6] The Proposal under the ***BIA*** was approved by all creditors on August 12, 1996, and approved by the Bankruptcy Court August 27, 1996. The distribution to creditors did not include Peters. Met Trust received a dividend of $189,961.39 under the Proposal. Remington received a Certificate of Full Performance of Proposal November 5, 1996.

[7] On April 21, 1997, Peters negotiated a settlement with Met Trust by paying $600,000 and receiving an assignment of Met Trust's security.

[8] On September 18, 1997, Peters commenced this action in which he demanded payment from Remington under the indemnity agreement for his share as a co-guarantor.

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Decision of the Trial Judge (2001), 291 A.R. 189; 2001 ABQB 584

[9] A summary trial determined whether Peters' claim under the indemnity agreement survived the Proposal under the ***BIA***. The trial judge's decision did not address the issue of *res judicata*, but rather, considered anew whether Peters' claim survived Remington's Proposal. Peters was therefore permitted to pursue his claim against Remington despite Remington having obtained an Order of Discharge under the ***BIA***. The trial judge gave judgment for $205,019.30, representing one-half of the actual settlement with Met Trust, after deducting the dividend, and deferred the issue of damages, liabilities, charges and expenses in connection with the guarantees for further argument.

Summary

[10] This appeal can be determined on the basis that the issue of Peters' claim was *res judicata* before the trial judge. His claim was dismissed by the Bankruptcy Court as not provable in the bankruptcy and therefore, on that basis, survives, not being a claim provable in bankruptcy. The BIA, s. 178(2) released Remington only from all claims provable in bankruptcy. It is not necessary to decide whether Peters' claim was provable in bankruptcy upon fresh examination.

Legislation

[11] The relevant subsections the ***BIA*** are:

> s. 62(2) **On whom approval binding** - A proposal accepted by the creditors and approved by the Court is binding on creditors in respect of;
>
> (a) all unsecured claims, and
>
> (b) the secured claims in respect of which the proposal was made but does not release the insolvent person from the debts and liabilities referred to in s. 178, unless the creditor assents thereto.
>
> 121. (1) All 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 shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> ...
>
> S.124(1) **Creditors shall prove claims** - Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

> 135. (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed to be a proved claim to the amount of its valuation.
>
> (2) The trustee may disallow, in whole or in part,
>
> (a) any claim...
>
> S. 178(2) **Claims relief** - Subject to subsection (1), an Order of Discharge releases the Bankrupt from all claims provable in bankruptcy.

Standard of Review

[12] Determining if *res judicata* applies is a question of law: Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000) at 12; ***Gibson Mining Co. v. Hartin***, [1940] 2 D.L.R. 605 at 607 (B.C.C.A.). As a result, this Court must review the trial judge's decision on a standard of correctness.

Analysis

Estoppel by Res Judicata

[13] In ***Guarantee Trust Co. of Canada v. Bailey*** (1987), 77 A.R. 387 at paras. 38-41, this Court reviewed the principle of *res judicata* and confirmed that three requirements must be satisfied in order for the principle to apply:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[14] Even if the three prerequisites exist, the court retains discretion to refuse to give effect to estoppel *per rem judicatum*: ***Danyluk v. Ainsworth Technologies Inc.***, [2001] 2 S.C.R. 460.

[15] In this case, the last two requirements are not in dispute. The only issue is whether the same question has been decided: did the Trustee decide the same question that was the subject of the summary trial?

[16] Remington submitted that Peters had a provable claim but the Trustee held it was a

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duplication of Met Trust's claim and therefore, it was a provable claim without value.

[17] In evaluating what was decided for the purpose of *res judicata*, the court may look to documentation beyond the formal judgment itself: Lange, *The Doctrine of Res Judicata in Canada*; ***Maynard v. Maynard***, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 at 251-52, leave to appeal to Privy Council denied, [1952] 1 S.C.R. vii; and ***Smode v. Deveaux*** (1996), 216 A.R. 20 at para. 3 (C.A.).

[18] In this case, the Trustee's actions, his testimony in cross-examination and what reasons he gave in disallowing the Peters' claim support the conclusion that he determined that Peters did not have a provable claim.

[19] In the Notice of Disallowance dated May 21, 1996, the Trustee gave the following reason:

> Your claim is a duplicate of the claim being made against the estate by Metropolitan Trust Company. This claim can be advanced only by one party and to be eligible to advance a claim, you would have to pay the claim yourself.

[20] Similarly, Hall, a senior vice president of the Trustee stated in an affidavit as follows:

> I verily believed that had [Peters] discharged all or part of his obligations to Met Trust pursuant to his guarantee, he would have had a claim provable in the proposal proceedings ... Having allowed the Met Proof in full, I verily believed that allowing [Peters'] Proof would have offended the rule against double proofs.

[21] This statement clearly indicates that the Trustee's position was Peters would have had a provable claim only if he discharged all or part of his obligation to Met Trust. The Trustee did not find that Peters' claim was in fact a provable claim. Nor was the finding expressed in terms of Peters not having a provable claim.

[22] When Hall was cross-examined on his affidavit, he stated that Peters did not have a provable claim:

> Q: Sir, Mr. Peters didn't receive a dividend from the Estate of Remington, did he?
>
> A: No.
>
> Q: Was that because he did not have a provable claim?
>
> A: That's right.

[23] Section 135(1.1) of the ***BIA*** requires that "the trustee shall determine whether any contingent claim or unliquidated claim is a provable claim". There is no dispute in this case that Peters' claim

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was a contingent one. A contingent claim is "a claim which may or may not ever ripen into a debt, according as some future event does or does not happen": ***Gardner v. Newton*** (1916), 29 D.L.R. 276 at 281, 10 W.W.R. 51 (Man. K.B.). At the time of the Proposal, Remington did not owe a debt to Peters unless and until Peters paid Met Trust part or of all of the debt owed under the guarantee.

[24] Also pursuant to s. 135(1.1), if the trustee determines that a contingent claim is a provable claim, "the trustee shall value it". A trustee is required to value the claim only if it previously determined that the claim was provable.

[25] In this instance, the Trustee did not value Peters' claim, implying that the Trustee determined the claim was not a provable claim, even though this finding was not expressly stated by the Trustee.

[26] Consistent with the Trustee finding that Peters did not have a provable claim, as described in further detail below, the Trustee maintained throughout the bankruptcy proposal proceedings that Peters had no status to participate.

[27] As a result, the Trustee determined the same question: i.e. whether Peters' claim was provable, and the three prerequisites for *res judicata* have been met. What remains is whether there is any reason to exercise the discretion to relieve against the effects of estoppel by *res judicata* in this case.

Discretion

[28] In exercising the discretion, as stated in ***Danyluk*** at 493 quoting the Ontario Court of Appeal in ***Schweneke v. Ontario*** (2000), 47 O.R. (3d) 97, "the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?"

[29] The circumstances relevant to this case are described below.

Peters' Conduct in Remington's Proposal

[30] The evidence in Remington's bankruptcy file shows that Peters made numerous and vigorous efforts to be included as a creditor and to obtain status in Remington's bankruptcy proposal proceedings. Peters believed that there was more money available for Remington's creditors and that Remington was fraudulently concealing assets. Peters consistently sought to advance his claim against Remington and to challenge the bankruptcy proposal proceedings.

[31] After the Trustee disallowed Peters' claim, Peters' counsel attended a creditors' meeting on May 24, 1996, and requested a vote be taken on the Proposal. The Trustee denied the request on the basis that Peters had no status because his claim had been disallowed. Peters was not allowed to participate in any voting on the Proposal. Peters also requested that the Trustee provide notice of the next meeting. Although given informal notice, the Trustee advised he was not obliged to give formal

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notice because Peters had no status. Peters' counsel attended a creditor's meeting on June 11, 1996 to consider Remington's amended Proposal. Peters also requested to examine Remington under oath as contemplated in s. 52(b) or s. 163(2) of the ***BIA*** or that Met Trust examine Remington. The Trustee denied the request.

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[32] Peters took steps to appeal the disallowance of his claim. The Bankruptcy Registrar dismissed the appeal on July 23, 1996 and the further appeal to Paperny, J. was dismissed on October 22, 1996. Both the Trustee and the successor to Met Trust, Hongkong Bank Trust Company, opposed each of Peters' appeal applications.

[33] Remington's amended Proposal was approved by the creditors and by order dated August 27, 1996, the Proposal was approved by the Bankruptcy Court. Peters filed an affidavit before the Bankruptcy Court, but as stated in the order, he had no status to speak to the application for approval of the Proposal as the Trustee had disallowed his claim and the disallowance had been upheld.

Peters' Actions

[34] After the A Certificate of Full Performance of Proposal was issued on November 5, 1996 and the Trustee was discharged, Peters brought an action based on the indemnity agreement and has continued to pursue his allegations impugning the bankruptcy proceedings. On September 18, 1997, he commenced this action seeking payment from Remington for one half of the damages in settling Met Trust's claim on the guarantees.

[35] The summary trial judge granted judgment against Remington on June 26, 2001. The enforcement of the judgment was stayed but Remington was ordered to produce copies of his income tax returns and bank statements for himself personally and any professional corporations in which he had an interest, and as well, he was examined on October 9, 2002.

[36] In the first hearing of this appeal on November 7, 2002, Peters sought to adduce fresh evidence based on Remington's bank statements, income tax returns and financial statements to demonstrate that Remington acted fraudulently when estimating his income at the time of filing his Proposal. The fresh evidence application was denied and this appeal was adjourned to allow Peters to apply to annul the Proposal, the approval of the Proposal and the discharge of Remington.

[37] Peters' application to annul the bankruptcy proposal proceedings was heard by a chambers judge on June 27, 2003. Remington opposed the application and applied for a declaration that Peters lacked status. Remington submitted that Peters had no status to interfere with the bankruptcy proposal because he did not have a provable claim. Remington argued that Peters' lack of status was extant through the bankruptcy proposal proceedings and remained to the present.

[38] The chambers judge adjourned the applications pending the adjudication of this appeal.

[39] In the circumstances of this case, I find no injustice would result from the usual operation of the doctrine of estoppel or estoppel by *res judicata*. Remington opposed Peters' participation in

the bankruptcy proposal proceedings throughout. Had Peters been included as a creditor, his claim would have been fully satisfied by reason of the Proposal and provisions of s. 178(2) the ***BIA***. Peters was not included as a creditor in Remington's bankruptcy proposal proceedings. That status was opposed by Remington.

[40] By this Court not relieving from the operation of estoppel by *res judicata*, Remington is now subject to the indemnity claims of Peters. That result is not inconsistent with the policy reasons for a bankruptcy. If Remington sought to be free of Peters' claim, Remington should have supported Peters' claim as provable in the bankruptcy proposal proceedings.

Relief

[41] Although the trial judge erred in failing to apply the doctrine of *res judicata* and in considering the issue afresh, I would not interfere with the result of the summary trial. Therefore, the appeal is dismissed.

Appeal heard on October 2, 2003

Reasons filed at Calgary, Alberta
this 13th day of January, 2004

_____
Wittmann J.A.

I concur:_____
Picard J.A.

I concur:_____
Ritter J.A.

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Appearances:

Michael J. McCabe, Q.C.
Quinn M. Kuefler
for the Appellant

Ariel Z. Breitman
for the Respondent

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TAB 55

In the Court of Appeal of Alberta

Citation: Precision Drilling Canada Limited Partnership v Yangarra Resources Ltd, 2017 ABCA 378

Date: 20171110
Docket: 1601-0197-AC
Registry: Calgary

Between:

Precision Drilling Canada Limited Partnership

Respondent
(Plaintiff)

- and -

Yangarra Resources Ltd.

Appellant
(Defendant)

- and -

Devon NEC Corporation

Not a Party to the Appeal
(Defendant)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall and the Honourable Madam Justice Veldhuis

Dissenting Memorandum of Judgment of The Honourable Madam Justice Paperny

Appeal from the Judgment by
The Honourable Mr. Justice E.C. Wilson
Dated the 29th day of June, 2016
(2016 ABQB 365, Docket: 1201 03487)

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Memorandum of Judgment

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The Majority:

[1] Yangarra Resources Ltd. (Yangarra) appeals the decision of a chambers judge who granted summary judgment in favour of the respondent, Precision Drilling Canada Limited Partnership (Precision). Precision brought a summary judgment application for unpaid fees for drilling three oil wells for the appellant. The appellant resisted payment on the basis of set-off and damages, alleging breach of contract, gross negligence, willful misconduct, fraudulent misrepresentation, and breach of duties of honesty and good faith. Precision was granted summary judgment. Yangarra's defence was summarily dismissed as was Yangarra's counterclaim.

Background

[2] In 2009, the parties entered into a standard form industry contract, characterized as a "knock for knock" or "no-fault" contract. Under such an agreement, each party generally bears the risk of damage to its own assets, rather than having risk allocated on the basis of fault. Provisions of the contract that purported to exclude or limit liability were put in issue as a result of the acts of Precision employees in carrying out work for Yangarra under the drilling contract.

[3] During the nightshift on December 2, 2011, a Precision employee mistakenly mixed sulfamic acid instead of caustic potash into drilling mud. For the rest of that shift and into the day shift on December 3, 2011 Precision advised Yangarra that the drilling mud was in order, when it knew or should have known it was not.

[4] On the afternoon of December 3, 2011, the drill string and bit became stuck in the hole and Precision could not extract it. It was assumed by the chambers judge, for the purpose of the summary judgment application, that the drill bit had become stuck because of the sulfamic acid in the mud. It was also conceded by Precision, for the purpose of the summary judgment application, that it failed to inform Yangarra of the mixing error until after the drill big had become stuck. Precision's attempt to extract Yangarra's equipment from the well was unsuccessful and the well was subsequently abandoned with $300,000 worth of Yangarra's equipment lost down the hole. In addition, a replacement well had to be drilled at a cost of roughly $2 million.

[5] In early 2012, Precision sued Yangerra for the work it had performed in drilling the abandoned well and for the equipment it had provided. Yangarra defended alleging that Precision breached its contractual commitment to drill the well in a good and workmanlike manner in accordance with good drilling practices. It also alleged negligence, gross negligence and that Precision's failure to warn Yangarra of the improper mixing constituted a fraudulent misrepresentation. In its prayer for relief Yangarra claimed a set-off and counterclaimed for the

loss of its equipment in the original well, for the costs of drilling the replacement well, and for other associated costs.

[6] In July 2012, Precision brought its application for summary judgment against Yangarra, including summary dismissal of Yangarra's counterclaim on the basis that there was no merit to Yangarra's defence or counterclaim and no genuine issue for trial. The focus of the application was the proper interpretation of the allocation of risk and liability provisions of the contract. The determinative provisions in this respect, at least according to the courts below, were Clauses 10.3, 10.4, and 10.13, the relevant portions of which read[1]:

> 10.3. Yangarra shall at all times assume all of the risk of and be solely liable for:
>
> (a) any loss, damage to or destruction of:
>
> …
>
> (ii) Yangarra's equipment; and
>
> (iii) the hole, reservoir or any underground formation…
>
> regardless of the negligence or other fault of Precision or howsoever arising, and Yangarra shall defend and indemnify Precision from and against any and all actions, claims, losses, costs, damages and expenses resulting therefrom and specifically releases Precision from any claims Yangarra may otherwise make in regard thereto.
>
> 10.4 Yangarra shall at all times during a drilling program assume all of the risk of and be solely liable for the cost of repairing and re-drilling a lost or damaged hole, including, without limitation, the cost of fishing operations, regardless of the negligence or other fault of Precision or howsoever arising, and Yangarra specifically releases Precision from any claims Yangarra may otherwise have in regard thereto;
>
> …
>
> 10.13 For greater clarity, Precision and Yangarra acknowledge and agree that:
>
> (a) the purpose of this Article X [ten] is to allocate contractually between Precision and Yangarra certain of the risks, responsibilities, and potential losses or liabilities associated with the operations and activities involved in drilling a well under a drilling program; and,

[1] For clarity, "Precision" has been inserted in the following provisions in place of "Contractor" or Contractor's Group" and "Yangarra" in place of "Operator" or "Operator's Group".

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> (b) such allocation shall prevail in the place and stead of any other allocation of risks, responsibilities, or potential losses or liabilities that might be made on the basis of the negligence or other fault of either party or howsoever arising or any other theory of legal liability and notwithstanding the breach or alleged breach by either party or any provision of the drilling program not included in this Article X [ten].

[7] The initial summary judgment application before the Master in late 2012 was adjourned at the request of Yangarra, who wished to gather more evidence to support its allegations that Precision had acted improperly following the initial mixing error. The proceedings did not resume until June 2015; but when they did, the Master granted Precision's summary judgment application, finding that Yangarra's set-off defence and counterclaim were barred by the exclusion of liability clauses in the contract (2015 ABQB 433). Despite the additional evidence Yangarra had collected during the two and a half years' adjournment, the Master found no evidence of conduct that would render the enforcement of exclusion of liability clauses in the contract contrary to public policy.

[8] Yangarra's appeal of that decision was unsuccessful (2016 ABQB 365). The chambers judge agreed with the Master that by its terms the contract excluded liability for the type of damage claimed by Yangarra. The chambers judge further agreed with the Master in rejecting Yangarra's argument that giving effect to the exclusion of liability clauses to relieve Precision of liability for its conduct in this case would render Precision's covenant to drill in a good and workmanlike manger meaningless. The chambers judge additionally found that gross negligence was properly excluded by the contract, but that fraud might not be excluded. In this latter respect, the chambers judge was of the view that public policy might intervene in circumstances like these to prevent parties from contracting out of fraud. But the chambers judge, like the Master, found no evidence to support Yangarra's claims of fraudulent misrepresentation. The chambers judge also determined that Yangarra's claim of dishonesty or bad faith was "simply another way of describing its complaint regarding fraudulent misrepresentation", and was consequently also without an evidentiary foundation.

[9] Yangarra appeals the decision of the chambers judge on the basis that he erred in not finding that Yangarra's claims for fraudulent misrepresentation required a trial and in applying the law regarding interpretation of exclusion clauses.

[10] For the reasons that follow, we disagree with the chambers judge that this was an appropriate case for summary judgment. In our view, there is a genuine issue requiring trial. That is, on the record before the court on the summary judgment application, it was palpable and overriding error to find that there was no evidence of fraud. We conclude that the chambers judge erred both in the conclusions he drew on the issue of fraudulent misrepresentation, and also by failing to identify and apply the proper test for fraud.

[11] We deliberately refrain from addressing the issue of contractual interpretation (i.e. – whether the contract excludes fraud) in allowing this appeal. In the event a trial judge were

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ultimately to determine Yangarra's allegations against Precision were excluded from the contract (which we pose merely as one possibility), we agree with the chambers judge's assessment that provisions having the effect of excluding liability for the claim in fraudulent misrepresentation *may* be contrary to public policy. A determination as to whether public policy would intervene in the circumstances would best be made by a trial judge on hearing evidence relevant to the issue.

Standard of Review

[12] A chambers judge's assessment of the facts based on the record before the chambers judge, the application of the law to those facts and the ultimate determination of whether summary judgment is appropriate are all reviewed for palpable and overriding error: *Amack v Wishewan*, 2015 ABCA 147 at para 27, 602 AR 62. Inferences drawn from the facts by a chambers judge are also assessed on the standard of palpable and overriding error: *Dow Chemical Canada Inc v Shell Chemicals Canada Ltd*, 2010 ABCA 126 at para 10, 477 AR 112, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[13] Where, however, an alleged error "can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness": *Mace v Dirk*, 2006 ABCA 106 at para 20, 412 AR 207, citing *Housen* at para 36.

Law on Summary Judgment

[14] Rule 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010 allows a party to apply for summary judgment when "there is no defence to a claim or part of it" or when "there is no merit to a claim or part of it". This rule must be considered in light of *Hryniak v Mauldin*, 2014 SCC 7, where the Supreme Court of Canada indicated that "[t]here 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": para 49.

[15] The so-called modern approach to summary judgment as laid out in *Hryniak* was confirmed by the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108. *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: para. 16; see also *WP v Alberta*, 2014 ABCA 404 at para 26, 378 DLR (4th) 629. 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": *Whitecourt Power Limited Partnership v Elliott Turbomachinery Canada Inc*, 2015 ABCA 252 at para. 9.

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[16] In *McDonald v Brookfield Asset Management Inc*, 2016 ABCA 375, this court provided the following useful summary as to evidential requirements in a summary dismissal application (being one form of summary judgment)[2] at paragraph 13:

> Rule 7.3 provides that an action can be summarily dismissed if there is "no merit to a claim or part of it". The onus is first on the defendant to bring forward evidence indicating an absence of merit. If that is done, the plaintiff must provide some evidence of "merit", which often involves demonstrating that there are difficult questions of fact or law that cannot fairly be resolved summarily. The plaintiff is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard.

Analysis

[17] In the first part of the analysis below, we address the finding of the chambers judge that there is no case of fraudulent misrepresentation associated with the drilling mishap. We do so by assessing the evidence in support of Yangarra's claim and by considering whether the chambers judge applied the proper test for fraud.

[18] In the second part we assume, for the purposes of the analysis, that Yangarra's claim in fraudulent misrepresentation is barred by the contract, and we consider the issue of whether public policy may require that the exclusionary provisions of the contract be given no effect if fraud were established at trial.

[19] The second part of the analysis is necessary because by overturning the summary judgment, we are allowing the matter to proceed to trial on all issues, including the issue of the interpretation of the contract's exclusionary provisions. Should the trial judge ultimately determine, as did the courts below, that the contract excludes Yangarra's claim in fraudulent misrepresentation, Yangarra may still be in a position to pursue that claim if the trial judge concludes that the exclusionary provisions of the contract are of no effect on the basis of public policy.

Fraudulent Misrepresentation

[20] The issue most strenuously argued by the appellant at the hearing of the appeal was that Precision's conduct amounted to fraudulent misrepresentation. The appellant contends that the chambers judge neither identified nor applied the proper test for fraud.

---

[2] See Rule 7.3; *Poliquin v Devon Canada Corp*, 2009 ABCA 216, at para. 9.

[21] The test for the tort of civil fraud, or fraudulent misrepresentation, was stated in the recent Supreme Court decision of *Bruno Appliance and Furniture Inc v Hryniak*, 2014 SCC 8 at para 21, [2014] SCR 126 and requires the plaintiff to prove:

> (a) a false representation made by the defendant;
> (b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness) ;
> (c) the false representation caused the plaintiff to act; and
> (d) the plaintiff's actions resulted in a loss.

[22] In this case, the chambers judge at paragraph 9 of his decision adopted the following overview of facts as found by the Master – some of which were yet to be proven, but nonetheless were properly assumed in Yangarra's favour for the purpose of the summary judgement application:

> **The factual record before the court**
>
> Here are the facts, which emerged from the evidence, with any conflict in evidence assumed to be as stated by Yangarra:
>
> (i) during the night shift on December 2nd and early December 3rd, 2011, a recently re-hired employee of Precision, Mr. Lewis, mistakenly mixed sulfamic acid into the drilling mud of the well, instead of caustic potash, notwithstanding that the packages containing these different products were clearly marked, and notwithstanding that the physical appearance of the two products was quite different;
>
> (ii) during the rest of the night shift, and part of the day shift on December 3rd , prior to the failure of the well, employees of Precision either neglected to test or carelessly tested the drilling mud, and wrongly advised Yangarra's supervisor that the drilling mud was in order;
>
> (iii) at the beginning of the day shift on December 3rd, one of Precision's day shift employees, Mr. Power, noted the empty packages of sulfamic acid and corrected the records to reflect that it had been added to the drilling mud and not caustic potash;
>
> (iv) Precision's employees at the rig site should have advised Yangarra of the addition of the acid to the mud but failed to do so, thus robbing Yangarra of the opportunity to temporarily shut the rig down while changing out the defective mud. This is conceded by Precision for the purposes of this application notwithstanding

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> that Precision will, if this matter proceeds to trial, attempt to prove that a warning was given to Yangarra;
>
> (v) On December 3rd at approximately 1:00 P.M. the drill string and bit being used by Precision became stuck in the hole, and could not be extracted. It is assumed that the rig became stuck as a result of sulfamic acid having been added to the drilling mud;
>
> (vi) Precision attempted to extract some of Yangarra's equipment from the well, but in the end approximately $300,000 worth of Yangarra equipment was lost and had to be left in the well, which was abandoned;
>
> (vii) It may be that Precision was not successful rescuing Yangarra's equipment from the well because the weight indicator on Precision's rig was not properly calibrated, and this resulted in Precision applying less tension or force to its rig attempting to complete the extraction than could have been applied if its weight indicator had been properly calibrated;
>
> (viii) Precision performed some work on the drilling of a relief well but another contractor in fact completed the relief well.

[23] Particularly relevant to this analysis is that, as of about 8:30 a.m. on December 3, Precision employees were aware both that a mixing error had occurred the night before, and that the error would affect the well's mud properties. Precision conceded for the purposes of the summary judgment application that it neglected to inform Yangarra about the error until after the drill bit had become stuck. Additionally, the record suggests that the results of a number of mud tests performed by Precision—on the morning of December 3 and into early afternoon—indicate suitability for drilling, but that the mud could not, based on the mixing error, have had the properties that were reported in those tests. Such results take on particular significance in light of the chambers judge's finding that "employees of Precision either neglected to test or carelessly tested the drilling mud, and wrongly advised Yangarra's supervisor that the drilling mud was in order".

[24] Taken together, these "facts" suggest not only a failure to disclose but also active steps to deceive, or at the very least, recklessness. In addition to not informing Yangarra of the error, Precision proceeded to convey to Yangarra false information about the properties of the drilling mud. In our view, the original error not having been conveyed to Yangarra suggests, at the very least, recklessness on the part of Precision. The communication of false information about the properties of the drilling mud suggests fraud unless rebutted by an explanation which, presumably, only Precision could provide and which apparently was not forthcoming on the summary dismissal application.

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[25] In sum, on the record before us, including the presumed facts as adopted by the chambers judge, our view is that it was a palpable and overriding error for the chambers judge to conclude that the allegation of fraud "was rooted only in speculation and conjecture with a mild dose of melodrama thrown in".

[26] In our view, a determination of this issue cannot suitably be made in a summary judgment application. This is a matter that requires a trial. Credibility will be a particularly important assessment, given the allegation of fraud and the various Precision witnesses who were involved in the events transpiring on the nightshift of December 2 and into the day shift of December 3 prior to the drill bit becoming stuck.

[27] With respect to the suggestion that the appellant did not put its "best foot forward" in advancing its position on the summary judgment application, we simply note that there is sufficient evidence on the record to establish that there are difficult questions of fact or law that cannot fairly be resolved summarily. We also note that this court held in *McDonald v Brookfield* that an application for summary dismissal can be resisted without proving the claim to the normal civil standard. This was not simply a summary judgment application. It was also an application to summarily dismiss a claim. But even on a summary judgment application there must be no merit to the defence to the claim. "No merit" means no defence which has a hope of being successful. On the record before the chambers judge, that was not the situation here.

[28] Quite apart from any error the chambers judge made with respect to his assessment of facts on the issue of fraudulent misrepresentation, his reasons also suggest he failed to consider the appropriate test for fraud. The chambers judge did not explicitly set out the test he was applying in considering the appellant's allegation of fraud, though his reasons suggest he must have had some standard in mind. In considering the fraud claim he stated that there was "no merit" to it and that there was an "absence of credible evidence to support" it. He quoted with approval the following submission from Precision's brief (at para 34 of his decision):

> Yangarra's fraud argument is based on an allegation that Precision employees "concealed" the Improper Mixing. However, **there is no evidentiary basis to suggest that there was any intentional concealment, never mind fraud** on the part of any Precision employee. Furthermore, while Yangarra argues that Precision employees Power and Dutkel failed to report the Improper Mixing to Yangarra and despite the obligation to "put its best foot forward", Yangarra elected not to question these witnesses. [emphasis added]

[29] The chambers judge's adoption of the word *intentional* suggests his understanding was that the representor (Precision) had to intend to conceal critical facts in order for the representation to be actionable. On its face, there is no such requirement in the test from *Bruno*, though the person making the false representation must have knowledge of its falsity or be reckless as to its truth. In fact, *Bruno* (para 18) references the oft-cited House of Lords decision in *Derry v Peek, [1889] UKHL 1, 14 App Cas 337*, where Lord Herschell states:

> [I]f fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[30] While recognizing there remains some uncertainty as to whether *intention to deceive* a representee is an element of fraud[3], the absence of a specific requirement to prove *intention to deceive* in the Supreme Court's most recent pronouncement of the test should give pause to a judge tasked with assessing the merit of a fraud claim on a summary judgment application.

[31] In this case, we acknowledge that the chambers judge used the word *intention* specifically to describe or qualify *concealment*. However, by using that word in the absence of an articulation of the test for fraud, the chambers judge appears to have been working on the understanding that *intention* was a required element of the test for fraud, in which case evidence of *intention* to deceive would be required to prove fraud. Any such understanding would likely have set the bar too high in terms of the test Yangarra needed to meet to defend Precision's summary judgment application.

[32] In the event that intention to deceive is a necessary element of the fraud alleged in this case, it should be noted that although intention can be proven directly with evidence, often it must be inferred. Sometimes it can be inferred from a lack of evidence of a credible explanation of the concealment or false representation of the actor. The chambers judge's reasons do not appear to have considered whether it was premature to conclude there was no fraud in the absence of evidence from Precision as to why it represented to Yangarra that the drilling mud was satisfactory when it wasn't, keeping in mind that it was assumed for the purposes of the summary judgment application that Precision provided false information about the properties of the drilling mud to Yangarra.

[33] Moreover, the chambers judge does not appear to have considered *recklessness* as a legitimate pathway to fraud. Recklessness is properly considered an alternative which satisfies the second element of the test for fraud. Either knowledge of the falsehood of the representation or recklessness as to the truth of the representation is required. With respect to recklessness, this court noted in *Motkoski Holdings Ltd* v *Yellowhead (County)*, 2010 ABCA 72 at para 58, [2010] 5 WWR 603 that:

> [I]t is sufficient if the defendant did not actually know the statement was false, so long as the statement was made recklessly. "Recklessly" in this context means that the statement was made "without caring whether it was true or false".

[34] Bruce MacDougall, *Misrepresentation* (Toronto: LexisNexis Canada, 2016) makes the following remark about recklessness at paragraph 5.28:

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[3] See *Singh v Trump*, 2016 ONCA 747 at para 141, [2016] OJ No 5285 as well as previous articulations of test for fraudulent misrepresentation from the Alberta Court of Appeal: *TWT Enterprises Ltd v Westgreen Developments (North) Ltd*, 1992 ABCA 211, [1992] 5 WWR 341; *Stack v Hildebrand*, 2010 ABCA 108 at para 13, 477 AR 359),

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> Recklessness typically involves a person's stating information in an authoritative way without having bothered at all to find out whether the information is accurate.

[35] In *Opron*, Feehan, J indicated that the absence of reasonable grounds for a representor's belief may provide some evidence of recklessness: para 639. The court in *Opron* referenced the following statement of Lord Herschell from *Derry* in this regard at paragraph 639:

> The ground upon which an alleged belief was founded is a most important test of its reality…[A]lthough means of knowledge are, as was pointed out by Lord Blackburn in Brownlie v. Campbell 5 App Cas at p 952, a very different thing from knowledge, **if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent**, and that he was just as fraudulent as if he had knowingly stated that which was false. [emphasis added]

[36] The court in *Opron* also indicated that proof of recklessness is most likely dependent upon inferences from circumstances: see paras 651, 633, and 647.

[37] A consideration of the facts adopted by the chambers judge begs the question as to whether the chambers judge was alive to recklessness being a possible pathway to the second element of the test for fraud. In this respect, reference may be made to the case of *Stack v Hildebrand*, 2010 ABCA 108, where this court held that a chambers judge, in granting a summary dismissal motion, erred by not considering that recklessness can amount fraudulent misrepresentation.

[38] Moreover, we note that a court is permitted to make inferences with respect to the recklessness aspect of fraud and we are of the view that there was a sufficient evidentiary basis to support an inference that Precision "shut its eyes" to the potential consequences of the mixing error by reporting questionable results which indicated that the mud was in order.

[39] Therefore, in addition to finding that the chambers judge made a palpable and overriding error in concluding there was no possible fraud on the evidence before him, we conclude that the chambers judge erred by failing to identify and apply the proper test for fraud. This error resulted from the combination of the chambers judge's (1) suggestion that *intention* was a necessary component of the test for fraud, and (2) failure to include the element of recklessness as a possible pathway to fraud.

Exclusion of Liability for Fraud

[40] According to the chambers judge (who agreed with the Master on this point), Yangarra's claims were specifically excluded in its contract with Precision. The contract purports to release Precision from any liability associated with drilling the well resulting from "negligence or other fault of either party or howsoever arising, or from any other theory of legal liability". But even if the contract effectively barred a fraudulent misrepresentation claim (which issue we specifically refrain from making a determination on), the issue would then become one of whether the court

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could intervene in the name of public policy to nullify that exclusion if a party had a legitimate claim of fraud.

[41] The chambers judge was of the view that even if the parties crafted their contract to explicitly release each other from a claim based in fraud, public policy requirements may intervene to give no effect to such language. On this issue, the chambers judge referred to *Roy v. Kretschmer*, 2014 BCCA 429, a case where fraud occurred "during the currency of the contract" and where the court held that the wrongdoer could not hide behind an exclusion clause.

[42] The respondent argues that there is no basis for a public policy intervention because there is no public policy reason or public interest which would induce a court not to give effect to what two sophisticated parties privately agreed to. Asserting that there is no public policy reason or public interest which would induce a court not to give effect to an exclusion of liability for fraud is not the same as proving it. Such an assertion would require evidence that others are not likely to be directly and adversely affected by the consequences of relieving liability for fraud.

[43] In making the argument that there is no basis for a public policy intervention, the respondent attempts to distinguish the instant matter from *Roy*. Precision points out that, unlike the facts in the case at bar, *Roy* did not involve a no-fault contract, nor were the parties sophisticated commercial entities (unlike the case at bar). The respondent also submits that while the court has the power to decline to enforce an agreement on the basis of public policy, it will rarely do so (*Tercon Contractors Ltd v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 117, [2010] 1 SCR 69).

[44] We tend to agree with the chambers judge that *Roy* is applicable here. As mentioned, the fraudulent conduct in *Roy*, as was alleged in this case, occurred after the contract had been entered into. This fact distinguishes *Roy* from many other cases in which fraudulent conduct induced a party to enter into a contract in the first place. In *Roy*, the court determined that the vendor could not hide behind an exclusion clause to avoid the effect of fraudulent conduct that caused injury to the plaintiff purchaser. In coming to its decision, the court in *Roy* considered the Supreme Court case of *Tercon*, which considered circumstances in which a court will deny a party the benefit of an exclusion of liability clause that the other party agreed to. The court in *Roy* indicated at paragraph 70:

> In my view, the judge erred in stating that the conduct must "approach criminal behaviour of egregious fraud". In fact, Binnie J. stated that the scenarios he outlined were "but examples" and that [in *Tercon* at para. 118]:
>
> > ... the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

[45] We note that Binnie, J. in *Tercon* (whose dissent with respect to the approach to assessing the validity of exclusion clauses was adopted by the majority) also stressed that "all of the circumstances should be examined very carefully by the court" in assessing any misconduct. Here,

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we have serious allegations of fraud against a sophisticated business entity that promised to conduct its risky and potentially dangerous work in a good and workmanlike manner. All we can say, without deciding the matter, is that if the appellant's allegations of fraud are substantiated, it is not clear to us that public policy would not be triggered to prevent Precision from the benefit of the contract's exclusion clauses.

[46] It is important to note that the determination as to whether public policy should intervene to render the exclusion clauses unenforceable should take place *after* the factual record is established, at which time the trial judge will be in a position to carefully examine whether there are public policy reasons to decline to enforce the liability exclusion clauses: *Tercon*, para. 119. As the British Columbia Court of Appeal stated in *Niedermeyer v Charlton*, 2014 BCCA 165 at para. 79: "the discussion of public policy in *Tercon* tends to focus on the conduct of the party who seeks to rely on the exclusion clause" [emphasis in original]. A proper understanding of Precision's conduct is not possible until the trier of fact has made findings of fact on the relevant issues. We would add that the discussion of public policy may also focus on the consequences of the conduct, for which liability is excluded, on third parties.

[47] We provide no further comment on this issue except to say that the trial judge would be in the best position to assess whether the evidence with respect to the allegations of fraud would warrant the intervention of public policy in this matter.

Conclusion

[48] We allow the appeal and set aside the summary judgment in favour of the respondent.

Appeal heard on June 13, 2017

Memorandum filed at Calgary, Alberta
this 10th day of November, 2017

O'Ferrall J.A.

Veldhuis J.A.

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Paperny J.A. (dissenting):

Background

[49] I have had the benefit of reading the decision of my colleagues. For the reasons that follow, I find myself unable to agree with their conclusion and I would dismiss Yangarra Resources Ltd.'s (Yangarra) appeal.

[50] The issue before us is whether the chambers judge erred in granting summary judgment in favour of the respondent, Precision Drilling Canada Limited Partnership (Precision). Precision, a drilling contractor, sought summary judgment for its unpaid fees, pursuant to an agreement between it and Yangarra. Yangarra resisted making payment, arguing that Precision's gross negligence, willful misconduct and fraudulent misrepresentation caused damage to Yangarra, and Yangarra should be entitled to set off and damages.

[51] The action arises out of a loss sustained in 2009, when a Precision employee mistakenly mixed sulfamic acid into drilling mud instead of caustic potash. Precision employees did not, or did not carefully, test the mud, and wrongly advised Yangarra that the drilling mud was in order. It was not. For the purpose of the summary judgment application, it was conceded that Precision failed to advise Yangarra of the problem, and that Yangarra was therefore denied the opportunity to temporarily shut down the rig while changing out the defective mud. The following day the drill string and bit became stuck in the hole and Precision could not extract it. The chambers judge assumed that the rig became stuck because of the sulfamic acid in the mud. Precision attempted to extract some of Yangarra's equipment from the well but was unsuccessful. The well was abandoned and $300,000 worth of Yangarra's equipment was lost. A replacement well had to be drilled at a cost of $2 million.

[52] In 2012, Precision sued Yangarra for the fees for its drilling work. Yangarra raised set-off as a defence, and counter-claimed for its losses.

[53] The agreement between Precision and Yangarra, entered into in 2009, is a standard industry contract known as a bilateral no-fault agreement or a "knock for knock" contract. The agreement allocates risks and liabilities between the drilling contractor (Precision) and the operator (Yangarra). The relevant terms of the agreement are set out later in these reasons, but the gist is that each party bears the risk of damage to its own assets, "regardless of the negligence or other fault of [the other party] or howsoever arising". Precision argues that, on the face of the agreement, its application to be paid its outstanding fees should be granted, notwithstanding any negligence on the part of Precision's employees. The agreement places the risk of damage to Yangarra's property squarely on Yangarra.

[54] Yangarra seeks to avoid that result by arguing, in the court below and before us on appeal, that the agreement does not exclude liability for gross negligence, willful misconduct or fraud. Further, if the terms of the agreement do purport to exclude liability on those grounds, such

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exclusion would be contrary to public policy.

[55] Precision brought its initial application for summary judgment before a Master of the Court of Queen's Bench in 2012. The Master adjourned the application at Yangarra's request, to give Yangarra an opportunity to gather evidence that it believed would establish conduct on the part of Precision that would amount to gross negligence, willful misconduct or fraud. The hearing before the Master continued in 2015, and the Master granted Precision's application for summary judgment (2015 ABQB 433). Yangarra's appeal to a Queen's Bench chambers justice was dismissed (2015 ABQB 649).

[56] A focus at the hearings before the Master and the chambers judge was the proper interpretation of clauses 10.3, 10.4 and 10.13 of the agreement. For convenience, I set out the relevant parts of those clauses below:

> 10.3. [Yangarra] shall at all times assume all of the risk of and be solely liable for:
>
> (a) any loss of, damage to or destruction of:
>
> …
>
> (ii) [Yangarra]'s equipment; and,
>
> (iii) the hole, reservoir or any underground formation ...
>
> … regardless of the negligence or other fault of [Precision] or howsoever arising, and [Yangarra] shall defend and indemnify [Precision] from any claims [Yangarra] may otherwise make in regard thereto.
>
> 10.4. [Yangarra] shall at all times during a Drilling Program assume all of the risk of and be solely liable for the cost of repairing and re-drilling a lost or damaged hole, including, without limitation, the cost of fishing operations, regardless of the negligence or other fault of [Precision] or howsoever arising, and [Yangarra] specifically releases [Precision] from any claims [Yangarra] may otherwise have in regard thereto; …
>
> 10.13 For greater clarity, [Precision and Yangarra] acknowledge and agree that:
>
> (a) the purpose of this Article X [ten] is to allocate contractually between [Precision and Yangarra] certain of the risks, responsibilities and potential losses or liabilities associated with the operations and

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activities involved in drilling a Well under a Drilling Program; and,

(b) such allocation shall prevail in the place and stead of any other allocation of risks, responsibilities, or potential losses or liabilities that might be made on the basis of the negligence or other fault of either party or howsoever arising or any other theory of legal liability and notwithstanding the breach or alleged breach by either party or any provision of the Drilling Program not included in this Article X [ten].

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[57] Neither the Master nor the chambers judge found any ambiguity in the terms of the agreement. Both decided that the exclusion clauses do not create an absurdity, nor do they defeat or contradict the primary purpose of the agreement, which is for Precision to drill wells in a good and workmanlike manner.

[58] Both the Master and the chambers judge concluded that negligence and gross negligence are specifically encompassed in the exclusion clauses, with gross negligence being included in the phrase "other fault ... howsoever arising" in clause 10.3. This conclusion was bolstered by clause 10.13, which expanded the release to include "any other theory of legal liability".

[59] The Master would also have interpreted the agreement to exclude liability for fraudulent misrepresentation. The chambers judge expressed doubt that the agreement would exclude liability for fraud. He relied on *Roy v 1216393 Ontario Inc*, 2014 BCCA 429, 378 DLR (4th) 702 to conclude that, as a matter of public policy, a court might decline to give effect to an exclusionary clause in the case of fraud during the currency of the contract.

[60] That public policy consideration was not determinative of the chambers judge's decision, however. He noted that Yangarra had not satisfied the Master on the evidence that there was a case for fraud or fraudulent misrepresentation. Upon reviewing the evidentiary record presented on the application, the chambers judge came to the same conclusion. He reviewed the evidence presented by Yangarra, said to support the claim that Precision employees had fraudulently concealed the mixing error from Yangarra. The chambers judge held that there was insufficient evidence to support that assertion, and that the claim of fraud or fraudulent misrepresentation was speculative and unsupported by the evidence. In that regard, he agreed with Precision's submission that there was "no evidentiary basis to suggest that there was any intentional concealment". The chambers judge also specifically noted Precision's submission that, although Yangarra argues that certain Precision employees failed to report the improper mixing, Yangarra elected not to question those very witnesses.

[61] The chambers judge rejected Yangarra's assertion of some type of cover up, finding that the suggestion that Precision's senior managers were "in on it" was rooted only in speculation and conjecture. He dismissed Yangarra's appeal and upheld the Master's decision to grant summary judgment to Precision.

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Standard of review

[62] Errors of law are reviewable for correctness. The interpretation of standard form industry contracts can be such a question: *Ledcor Construction v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 34, [2016] 2 SCR 23.

[63] The standard of review for findings of mixed law and fact is highly deferential, requiring a palpable and overriding error before an appellate court will intervene. An assessment of whether the evidentiary record can support a finding of fraud attracts that deferential standard. Moreover, whether to grant summary judgment is a discretionary matter. The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination of whether summary judgment is appropriate are entitled to deference: *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at paras 81-84; *Windsor v Canadian Pacific Railway Ltd*, 2014 ABCA 108 at para 10, 371 DLR (4th) 339.

Summary judgment

[64] Rule 7.3 (1) of the Alberta *Rules of Court* provides that a party may apply for summary judgment in respect of all or part of a claim if there is no defence or merit to a claim or part of it. Summary judgment plays an important role in the justice system by providing a process to avoid the heavy burdens of time and cost associated with lengthy litigation, when a claim or defence has no reasonable prospect of success: *Windsor* at para 12.

[65] Courts have more recently been encouraged to embrace summary judgment purposively; to focus on whether it would be fair and just to both sides to determine an issue on the record before the court on the summary judgment application. Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial. This is the case when the summary judgment process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak* at para 49; *Windsor* at para 13.

[66] It is expected that a party faced with a summary judgment application will put its best foot forward, and marshal sufficient evidence to show that there is a genuine issue requiring a trial. Speculating that evidence might be available at trial is not sufficient to resist summary judgment: *Windsor* at para 21.

Did the chambers judge err in concluding the issue of fraud should not go to trial?

[67] The Supreme Court of Canada[4] recently reiterated the classic statement of the elements of civil fraud, as set out in the 1889 decision of the House of Lords in *Peek v Derry* (1889), 14 App Cas 337 (UKHL) at p 374:

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[4] *Bruno Appliance and Furniture, Inc v Hryniak* , 2014 SCC 8 at para 18, [2014] 1 SCR 126

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Second, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false…. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[68] In *Bruno*, the Supreme Court summarized the 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 loss: *Bruno* at para 21.

[69] This Court also reviewed the well-established legal definition of fraud from *Peek v Derry*, noting in its decision in *Motkoski Holdings Ltd v Yellowhead (County)*, 2010 ABCA 72, [2010] 5 WWR 603 at paras 57-58, that the tort has two branches. Under the first, fraud is established if the defendant "knew" that the statement was false, and made it with the knowledge or intention that the plaintiff would rely on it. Under the second branch, it is sufficient if the defendant did not actually know the statement was false, so long as the statement was made "recklessly", meaning "without caring whether it was true or false". The court in *Motkoski* pointed out that in this context, "recklessly" does not mean the statement was made with "very great negligence". It is not enough that the defendant should have been more careful, or made further inquiries; actual knowledge or actual indifference to the truth is required: *Motkoski* at para 58. As Lord Herschell said in *Peek v Derry* at p 375, "making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds".

[70] It is apparent that fraud does not equal negligence, nor gross negligence. A fraudulent statement may be made recklessly, in the sense of "with actual indifference to the truth", but this is not the same as a statement made without sufficient care.

[71] The chambers judge must be taken as knowing this law. We cannot assume, in reviewing his decision, that he did not understand the elements of fraud, or that he failed to assess the evidence in light of those elements (including that a fraudulent statement may be one that is recklessly made). Indeed, the matter was argued before him and the relevant law was referred to him. A reading of his reasons shows clearly that he concluded the evidence was insufficient to establish a fraudulent misrepresentation.

[72] The appellant points out that the chambers judge quoted with approval a submission that there is no evidence of "intentional concealment", which, the appellant says, shows that he did not consider the possibility that a fraudulent statement can be made recklessly. The impugned statement may be a reference to a distinction drawn in *Motkoski* in the real estate context between "active concealment" (a positive and intentional step to hide a defect) and "mere concealment" or

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non-disclosure (meaning a failure to volunteer information), the latter being generally un-actionable. I do not infer from his reference to intentional concealment that the chambers judge was unaware of the possibility that fraud could be made out if Precision's employees made a statement recklessly, with "actual indifference" to whether it was true. To the contrary, in my view, in concluding that there was no evidentiary support for Yangarra's contention of some type of cover up, and in finding that Yangarra's assertions were rooted "only in conjecture and speculation", the chambers judge inferentially dismissed the possibility that Precision's employees recklessly made false statements that were relied on by Yangarra.

[73] The chambers judge's assessment of the evidence and his conclusion that it was not sufficient to merit a trial on the issue of fraud is owed deference. In my view, both his assessment and his conclusion are eminently reasonable given the state of the evidence before him. Yangarra acknowledges that under the terms of the agreement it is responsible for damage to its own property, even if that damage was caused by Precision's negligence. Since the first hearing date in 2012, Yangarra has been given the opportunity to marshal evidence to support its contention that Precision's conduct was more than negligent; that the conduct of Precision's employees was fraudulent and amounted to a fraudulent misrepresentation to Yangarra about the state of the drilling mud. Yangarra has, during that time, made efforts to gather such evidence. As the chambers judge noted, to successfully resist the summary judgment application, it was incumbent on Yangarra to provide sufficient evidence to show that there is arguable merit to its case on fraud and a genuine issue that should go to trial.

[74] The chambers judge found that there was no evidence of fraud on the record, and inferentially found that there was no evidence of recklessness that would amount to fraud. Yangarra's allegations of misconduct are consistent with inadvertence, carelessness and negligence. The failure to report the mixing error to Yangarra, the indication that the drilling mud was in order, and the failure to test, or carefully test, the drilling mud, all amount to negligence. Ultimately, it was up to the chambers judge to assess the evidence presented and decide if there was an arguable case that Precision's actions, or failure to act, amounted not just to negligence, but to fraud. Despite having cross-examined many Precision employees in an effort to gather evidence of fraud, Yangarra chose not to cross-examine the employees directly involved in the allegedly fraudulent statement. I see no palpable or overriding error in the chambers judge's conclusion that no evidence had been presented that would support an inference of indifference as to the truth or fraudulent intent. In my view, this ends the matter.

[75] I would, therefore, dismiss the appeal.

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[76] Given my conclusion, it is not necessary for me to express an opinion as to whether the agreement would exclude liability for fraud or fraudulent misrepresentation, and I decline to do so.

Appeal heard on June 13, 2017

Memorandum filed at Calgary, Alberta
this 10th day of November, 2017

Authorized to sign for: Paperny J.A

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Appearances:

B.P. Reid
J.A. Buchanan
for the Respondent

T.R. McDonald
S. Black
for the Appellant

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TAB 56

Douglas J. Queen *Appellant*

v.

Cognos Incorporated *Respondent*

INDEXED AS: QUEEN *v.* COGNOS INC.

File No.: 22004.

1992: January 29; 1993: January 21.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Torts — Negligence — Negligent misrepresentation — Duty of care — Employer's representative allegedly making negligent misrepresentations to prospective employee during hiring interview — Whether employer or representative owed prospective employee a duty of care — If so, whether duty of care breached — Effect of subsequent employment agreement allowing termination without cause and reassignment.

Cognos is an Ottawa-based computer software company. The manager of product development for a particular line of accounting software, with the full knowledge of the company's senior management, advertised for an accountant to help with the development of the product. Appellant, a chartered accountant, applied and was interviewed for the position. He was living in Calgary with his wife and children at the time, where he occupied a relatively well paid and secure managerial position. He was actively seeking employment outside Calgary, because he wanted more challenging opportunities. During the job interview the manager told the appellant that the project in question was a major one which would be developed over a period of two years with enhancements and maintenance thereafter, and that the position being interviewed for would be needed throughout this period. It was represented that the staff required to develop the product modules would double. At no point during the interview was the appellant made aware of the fact that there was no guaranteed funding for the project as described to him, or that the position being applied for was subject to budgetary approval. Appellant was offered the job of manager, financial

*Stevenson J. took no part in the judgment.

Douglas J. Queen *Appelant*

c.

Cognos Incorporated *Intimée*

RÉPERTORIÉ: QUEEN *c.* COGNOS INC.

N° du greffe: 22004.

1992: 29 janvier; 1993: 21 janvier.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson*et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Responsabilité délictuelle — Négligence — Déclaration inexacte faite par négligence — Obligation de diligence — Le représentant d'un employeur aurait fait des déclarations inexactes par négligence à un employé éventuel au cours d'une entrevue — L'employeur ou son représentant avaient-ils envers l'employé éventuel une obligation de diligence? — Dans l'affirmative, cette obligation a-t-elle été violée? — Effet de la signature subséquente d'un contrat de travail permettant le congédiement sans motif et une réaffectation.

Cognos est une société établie à Ottawa qui exploite une entreprise de logiciels. Au su de la haute direction de la société, le directeur du développement des produits pour une ligne de produits composée de logiciels de comptabilité, a fait publié une annonce en vue de retenir les services d'un comptable qui aiderait au développement du produit. L'appelant, comptable agréé, s'est porté candidat et a été interviewé. Il habitait alors Calgary avec sa femme et ses enfants et occupait un poste de direction passablement rémunérateur et sûr. Il cherchait activement un emploi à l'extérieur de Calgary parce qu'il voulait des possibilités plus stimulantes. Au cours de l'entrevue, le directeur a dit à l'appelant qu'il s'agissait d'un projet majeur qui serait mis au point sur une période de deux ans, que les améliorations et la maintenance seraient assurées par la suite, et que le poste en question devait être comblé pendant toute cette période. Il a déclaré que le personnel requis pour mettre au point les modules du produit doublerait. Pendant l'entrevue, l'appelant n'a jamais été informé qu'il n'existait aucun financement garanti pour le projet comme on le lui décrivait, ou que le poste auquel il se portait candidat était assujetti à une approbation budgé-

*Le juge Stevenson n'a pas pris part au jugement.

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standards, and accepted immediately. He signed a written employment contract which permitted Cognos to terminate his employment at any time "without cause" upon one month's notice, or payment of one month's salary in lieu of notice, and to reassign him to another position within the company without reduction in salary, upon one month's notice. Appellant commenced employment in April 1983. In September he was advised that there would be a reassignment of personnel involved with the project owing to diminished research and development funding. The first notice of termination of employment he received was rescinded, but in July 1984 he received a second notice effective October 25, 1984. He worked until that day and was paid until November 15. The trial judge upheld the appellant's action against Cognos and awarded him damages for negligent misrepresentation. The Court of Appeal reversed the judgment and dismissed the action. The issues raised by this appeal are (1) whether Cognos or its representative owed the appellant a duty of care with respect to the representations made about Cognos and the nature and existence of the employment opportunity being offered; (2) whether Cognos or its representative breached this duty of care; and (3) what is the effect of the fact that the appellant signed an employment agreement after the negligent misrepresentations containing a termination "without cause" and a reassignment provision.

Held: The appeal should be allowed.

Per La Forest, L'Heureux-Dubé and Gonthier JJ.: Subject to what was said in *Checo*, issued concurrently, the reasons of Iacobucci and McLachlin JJ. were agreed with. This is not a case of concurrency. The tort here was independent of the contract and the liability was not limited by an exclusion clause in the contract.

Per Sopinka and Iacobucci JJ.: The tort of negligent misrepresentation is an established principle of Canadian tort law. There are five general requirements for a successful claim: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

taire. On a offert à l'appelant le poste de directeur, normes financières, qu'il a immédiatement accepté. Il a signé un contrat de travail, dont une clause permettait à Cognos de mettre fin à n'importe quel moment à l'emploi de l'appelant «sans motif» sur préavis d'un mois, ou sur paiement d'un mois de salaire, ou de le réaffecter à un autre poste au sein de la société sans diminution de salaire et sur préavis d'un mois. L'appelant a commencé à travailler en avril 1983. En septembre, il a été informé que le personnel prenant part au projet serait réaffecté, par suite des restrictions apportées au financement de la recherche et du développement. Le premier avis de cessation d'emploi qu'il a reçu a été annulé, mais en juillet 1984, il a reçu un second avis disant qu'il serait mis fin à son emploi le 25 octobre 1984. Il a travaillé jusqu'à cette date et a été rémunéré jusqu'au 15 novembre. Le juge de première instance a accueilli l'action de l'appelant contre Cognos et lui a accordé des dommages-intérêts pour déclaration inexacte faite par négligence. La Cour d'appel a infirmé le jugement et rejeté l'action. Les questions qui se posent en l'espèce sont les suivantes: (1) Cognos ou son représentant avaient-ils une obligation de diligence envers l'appelant relativement aux déclarations faites à ce dernier au sujet de Cognos ainsi que de la nature et de l'existence de l'emploi qui était offert? (2) Cognos ou son représentant ont-ils violé cette obligation de diligence? (3) Quel est l'effet de la signature par l'appelant, après les déclarations inexactes faites par négligence, d'un contrat de travail contenant une disposition au sujet du congédiement «sans motif» ainsi qu'une disposition concernant la réaffectation?

Arrêt: Le pourvoi est accueilli.

Les juges La Forest, L'Heureux-Dubé et Gonthier: Sous réserve de ce qui a été dit dans l'arrêt connexe *Checo*, les motifs des juges Iacobucci et McLachlin sont acceptés. Il ne s'agit pas ici de concomitance. Le délit en l'espèce était indépendant du contrat et la responsabilité n'était pas limitée par une clause d'exclusion dans le contrat.

Les juges Sopinka et Iacobucci: Le délit de déclaration inexacte faite par négligence est un principe reconnu dans le droit canadien de la responsabilité délictuelle. Il existe cinq conditions générales pour qu'il soit fait droit à une demande: (1) il doit y avoir une obligation de diligence fondée sur un «lien spécial» entre l'auteur et le destinataire de la déclaration; (2) la déclaration en question doit être fausse, inexacte ou trompeuse; (3) l'auteur doit avoir agi d'une manière négligente; (4) le destinataire doit s'être fié d'une manière raisonnable à la déclaration inexacte faite par négligence, et (5) le fait que le destinataire s'est fié à la déclaration

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(5) the reliance must have been detrimental to the representee in the sense that damages resulted.

An action in tort for negligent misrepresentation may lie even though the relevant parties to the action are in a contractual relationship. The fact that the alleged negligent misrepresentations are made in a pre-contractual setting, such as during negotiations or in the course of an employment hiring interview, and the fact that a contract is subsequently entered into by the parties do not, in themselves, bar an action in tort for damages caused by the misrepresentations. Depending on the circumstances, however, the subsequent contract may play a very important role in determining whether or not, and to what extent, a claim for negligent misrepresentation will succeed. Such a contract can have the effect of negating the action in tort and of confining the plaintiff to whatever remedies are available under the law of contract. Moreover, even if the tort claim is not barred altogether by the contract, the duty or liability of the defendant with respect to negligent misrepresentations may be limited or excluded by a term of the subsequent contract so as to diminish or extinguish the plaintiff's remedy in tort. Equally, however, there are cases where the subsequent contract will have no effect whatsoever on the plaintiff's claim for damages in tort.

The first and foremost question should be whether there is a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which the representee alleges the representor has breached. If the pre-contractual representation relied on by the plaintiff became an express term of the subsequent contract then absent any overriding considerations arising from the context in which the transaction occurred, the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is confined to whatever remedies are available under the law of contract. Here, there is no concurrency. The employment agreement signed by the appellant does not contain any express contractual obligation co-extensive with the duty of care Cognos is alleged to have breached. The appellant's claim was not that the manager negligently misrepresented the amount of time he would be working on the project in question or the conditions under which his employment could be terminated. Rather, the appellant argued that the manager negligently misrepresented the nature and existence of

doit lui être préjudiciable en ce sens qu'il doit avoir subi un préjudice.

Une action en responsabilité délictuelle fondée sur une déclaration inexacte faite par négligence peut être intentée malgré l'existence d'un lien contractuel entre les parties à l'action. Le fait que les déclarations inexactes alléguées soient faites avant la passation d'un contrat, par exemple au cours des négociations ou dans le cadre d'une entrevue d'embauchage, et le fait qu'un contrat soit par la suite passé par les parties n'excluent pas, en soi, une action en responsabilité délictuelle pour dommages-intérêts fondée sur les déclarations inexactes. Toutefois, selon les circonstances, le contrat subséquent peut avoir une très grande importance lorsqu'il s'agit de déterminer s'il doit être fait droit à une demande fondée sur une déclaration inexacte faite par négligence et dans quelle mesure. Pareil contrat peut avoir pour effet d'exclure l'action fondée sur la responsabilité délictuelle et de restreindre le demandeur à tout recours qu'il peut exercer en vertu du droit des contrats. Par ailleurs, même si le contrat n'exclut pas complètement la demande fondée sur la responsabilité délictuelle, l'obligation ou la responsabilité qui incombe au défendeur en ce qui concerne les déclarations inexactes faites par négligence peut être limitée ou exclue par une condition du contrat subséquent, de façon à restreindre ou à éteindre le recours de nature délictuelle du demandeur. Toutefois, il est également vrai que, dans certains cas, le contrat subséquent n'aura aucun effet sur l'action en dommages-intérêts intentée par le demandeur en vertu de la responsabilité délictuelle.

Il s'agit avant tout de savoir si une obligation contractuelle précise a été créée par une condition expresse du contrat qui coïncide avec l'obligation de diligence existant en common law, què, selon le destinataire, l'auteur de la déclaration aurait violée. Si la déclaration faite avant la signature du contrat à laquelle le demandeur s'est fié est devenue une condition expresse du contrat subséquent, alors faute d'une considération prépondérante découlant du contexte dans lequel l'affaire a été conclue, le demandeur ne peut pas intenter une action en responsabilité délictuelle concomitante fondée sur une déclaration inexacte faite par négligence, et doit se limiter aux recours prévus par le droit des contrats. En l'espèce, il n'existe aucune concomitance. Le contrat de travail que l'appelant a signé ne comporte aucune obligation contractuelle expresse qui coïncide avec l'obligation de diligence que Cognos aurait violée. L'appelant n'a pas allégué que le directeur avait par négligence fait une déclaration inexacte au sujet de la période pendant laquelle il travaillerait au projet en question ou au sujet des conditions en vertu desquelles il pouvait

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the employment opportunity being offered. It is the existence, or reality, of the job being interviewed for, not the extent of the appellant's involvement therein, which is at the heart of this tort action, and the employment agreement contains no express provisions dealing with Cognos's obligations with respect to the nature and existence of the project.

There existed a "special relationship" between the parties, and Cognos and its representative, the manager, accordingly owed a duty of care toward the appellant to exercise reasonable care and diligence in making representations as to the employer and the employment opportunity being offered. The misrepresentations by the manager during the interview were made negligently, and the duty of care was therefore breached. It is not sufficient that the manager was truthful during the interview and that he believed in what he was representing. The applicable standard of care should be the one used in every negligence case, namely the universally accepted "reasonable person". The standard of care required by a person making representations is an objective one: it is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading. The trial judge did not depart from the applicable standard of care in rendering his decision. He found that, "in all the circumstances", the misrepresentations made by the respondent's representative were negligently made. The trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment opportunity for which he had applied.

The specific employment agreement signed by the appellant is, in the circumstances of this case, irrelevant to his action for negligent misrepresentation. The common law duty of care invoked by the appellant is "independent" of the employment agreement, and neither Cognos's duty of care nor its liability is affected by the terms of the agreement. In particular, the agreement does not contain any valid disclaimer of responsibility for the representations made during the interview.

être mis fin à son emploi. L'appelant a plutôt soutenu que le directeur a par négligence fait une déclaration inexacte au sujet de la nature et de l'existence de l'emploi qui était offert. C'est l'existence, ou la réalité, de l'emploi en question, et non l'étendue de la participation de l'appelant, qui constitue le nœud de l'action en responsabilité délictuelle en l'espèce, et le contrat de travail ne comporte aucune disposition expresse au sujet des obligations de Cognos en ce qui concerne la nature et l'existence du projet.

Il existait un «lien spécial» entre les parties, et Cognos et son représentant, le directeur, avaient par conséquent une obligation de diligence envers l'appelant et ils étaient tenus de faire preuve d'une prudence et d'une diligence raisonnables en faisant des déclarations au sujet de l'employeur et de l'emploi offert. Les déclarations inexactes du directeur pendant l'entrevue ont été faites par négligence, et l'obligation de diligence a donc été violée. Il ne suffit pas que le directeur ait été sincère pendant l'entrevue et qu'il ait cru ce qu'il disait. La norme de diligence applicable devrait être celle qui est utilisée dans toute affaire de négligence, à savoir celle universellement reconnue de la «personne raisonnable». La norme de diligence requise d'une personne qui fait des déclarations est objective: il s'agit de l'obligation de faire preuve de la diligence raisonnable requise par les circonstances pour que les déclarations faites soient exactes et non trompeuses. Le juge de première instance ne s'est pas écarté de la norme de diligence applicable en rendant sa décision. Il a conclu que, «compte tenu de toutes les circonstances», le représentant de l'intimée a fait les déclarations inexactes par négligence. Le juge de première instance n'a pas imposé à l'intimée et à son représentant l'obligation de faire une divulgation complète. Il a simplement imposé une obligation de diligence qui, pour être respectée, exigeait en l'occurrence, entre autres choses, qu'on fournisse à l'appelant des renseignements très pertinents au sujet de la nature et de l'existence de l'emploi auquel il s'était porté candidat.

Le contrat de travail que l'appelant a signé n'a rien à voir, compte tenu des circonstances de l'espèce, avec l'action fondée sur une déclaration inexacte faite par négligence qu'il a intentée. L'obligation de diligence existant en common law que l'appelant a invoquée est «indépendante» du contrat de travail, et les clauses du contrat de travail n'influent ni sur l'obligation de diligence ni sur la responsabilité de Cognos. En particulier, le contrat ne comprend aucune dénégation valide de responsabilité relativement aux déclarations faites pendant l'entrevue.

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Per McLachlin J.: The fact that the parties in this case entered into a contract which contained a specific term governing termination does not preclude the appellant's action in tort for negligent misrepresentation as to the employment. The pre-contractual representation was different in scope and effect from the contractual obligation. The representation at issue in this case concerned the risk of termination coming about, and was not that Cognos would not have the discretion to terminate or transfer the appellant on one month's notice. The appellant relied on that representation in deciding to enter into the contract. It turned out to have been negligently made and false. It follows that the appellant is entitled to damages for the loss suffered as a result of that representation.

The trial judge held that the respondent had a duty not to hold out to applicants that the project was secure when it knew that funding was not approved and knew or should have known that the final approval was not a rubber stamp process and the secure funding was not a foregone conclusion. This is the appropriate standard and the duty of care with respect to representations made in a pre-employment situation is the same as that which applies generally.

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By Iacobucci J.

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Le juge McLachlin: Le fait que les parties en l'espèce ont conclu un contrat qui renfermait une condition portant expressément sur la cessation de l'emploi ne voue pas à l'échec l'action en responsabilité délictuelle de l'appelant pour déclaration inexacte faite par négligence relativement à l'emploi. La déclaration faite antérieurement à la passation du contrat différait, de par sa portée et son effet, de l'obligation contractuelle. La déclaration en cause en l'espèce concernait le risque de la cessation de l'emploi, et on n'a pas déclaré que Cognos ne détiendrait pas le pouvoir discrétionnaire de congédier ou de muter l'appelant sur préavis d'un mois. L'appelant s'est fondé sur cette déclaration pour décider de signer le contrat. Il s'est trouvé que la déclaration avait été faite par négligence et qu'elle était fausse. D'où il découle que l'appelant a droit aux dommages-intérêts pour la perte qu'il a subie par suite de cette déclaration.

Le juge de première instance a conclu que l'intimée avait l'obligation de ne pas faire croire aux candidats que le projet était assuré alors qu'elle savait que l'engagement des fonds n'avait pas été approuvé et qu'elle savait, ou aurait dû savoir, que l'approbation définitive n'était pas qu'une formalité et que l'engagement des fonds n'avait rien de certain. C'est là le critère qu'il convient d'appliquer et l'obligation de diligence en ce qui concerne les déclarations faites antérieurement à l'embauchage est identique à celle qui s'applique en général.

Jurisprudence

Citée par le juge La Forest

Arrêt mentionné: *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12.

Citée par le juge Iacobucci

Distinction d'avec l'arrêt: *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12, inf. en partie (1990), 44 B.C.L.R. (2d) 145; **arrêts mentionnés:** *Hedley Byrne & Co. c. Heller & Partners Ltd.*, [1964] A.C. 465; *Burrows c. Burke* (1984), 49 O.R. (2d) 76; *Carman Construction Ltd. c. Compagnie du chemin de fer canadien du Pacifique*, [1982] 1 R.C.S. 958, conf. (1981), 33 O.R. (2d) 472 (C.A. Ont.); *Welbridge Holdings Ltd. c. Metropolitan Corporation of Greater Winnipeg*, [1971] R.C.S. 957; *J. Nunes Diamonds Ltd. c. Dominion Electric Protection Co.*, [1972] R.C.S. 769; *Rivtow Marine Ltd. c. Washington Iron Works*, [1974] R.C.S. 1189; *Hodgins c.*

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APPEAL from a judgment of the Ontario Court of Appeal (1990), 74 O.R. (2d) 176, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 30 C.C.E.L. 1, 90 CCLC §14, 024, setting aside a judgment of White J. (1987), 63 O.R. (2d) 389, 18 C.C.E.L. 146, allowing the appellant's action for damages for negligent misrepresentation. Appeal allowed.

Peter J. Bishop and *Tom Brooker*, for the appellant.

Charles T. Hackland and *Mark Josselyn*, for the respondent.

The judgment of La Forest, L'Heureux-Dubé and Gonthier JJ. was delivered by

LA FOREST J.—Subject to what I have had to say in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, issued concurrently, I agree with Justices Iacobucci and McLachlin, and would dispose of the appeal in the manner proposed by them. Though Iacobucci J. repeats the essence of his analysis in *Checo*, the present case is not one of concurrency at all. It is sufficient for me to say that the tort here was independent of the contract and the liability was not limited by an exclusion clause in the contract.

The reasons of Sopinka and Iacobucci JJ. were delivered by

IACOBUCCI J.—This appeal involves the application of the tort of negligent misrepresentation to a pre-employment representation made by an employer to a prospective employee in the course of a hiring interview. Specifically, this Court is being asked to determine in what circumstances a

Doctrine citée

Fleming, John G. *The Law of Torts*, 7th ed. Sydney: Law Book, 1987.
Klar, Lewis N. *Tort Law*. Toronto: Thomson Professional Publishing Canada, 1991.
Linden, Allen M. *La responsabilité civile délictuelle*, 4e éd. Cowanswille, Qué.: Yvon Blais, 1988.

POURVOI contre un arrêt de la Cour d'appel de l'Ontatio (1990), 74 O.R. (2d) 176, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 30 C.C.E.L. 1, 90 CCLC §14, 024, qui a infirmé le jugement du juge White, (1987), 63 O.R. (2d) 389, 18 C.C.E.L. 146, qui accueillait l'action de l'appelant en dommages-intérêts fondée sur une déclaration inexacte faite par négligence. Pourvoi accueilli.

Peter J. Bishop et *Tom Brooker*, pour l'appelant.

Charles T. Hackland et *Mark Josselyn*, pour l'intimée.

Version française du jugement des juges La Forest, L'Heureux-Dubé et Gonthier rendu par

LE JUGE LA FOREST—Sous réserve de ce que j'ai dit dans l'arrêt connexe *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12, je suis d'accord avec les juges Iacobucci et McLachlin, et je suis d'avis de disposer du pourvoi de la manière qu'ils proposent. Bien que le juge Iacobucci répète, pour l'essentiel, l'analyse qu'il a faite dans *Checo*, il ne s'agit pas du tout ici de concomitance. Qu'il me suffise de dire que le délit en l'espèce était indépendant du contrat et que la responsabilité n'était pas limitée par une clause d'exclusion dans le contrat.

Version française des motifs des juges Sopinka et Iacobucci rendus par

LE JUGE IACOBUCCI—Il s'agit en l'espèce de déterminer si le délit de déclaration inexacte faite par négligence s'applique à une déclaration préalable à l'emploi qu'un employeur a faite à un employé éventuel pendant une entrevue d'embauchage. En particulier, on demande à notre Cour de

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representation made during a hiring interview becomes, in law, a "negligent misrepresentation". A subsidiary question deals with the effect of a subsequent employment agreement signed by the plaintiff, and its provisions allowing termination "without cause" and reassignment, on a claim for damages for negligent misrepresentation.

déterminer dans quelles circonstances une déclaration faite pendant une entrevue d'embauchage devient, en droit, une «déclaration inexacte faite par négligence». Une question subsidiaire concerne l'effet sur une action en dommages-intérêts découlant d'une déclaration inexacte faite par négligence d'un contrat de travail subséquent signé par le demandeur et des dispositions de ce contrat autorisant le congédiement «sans motif» et la réaffectation.

I. Facts

The trial judge conducted an extensive and thorough review of the facts in the course of his reasons for judgment. None of his findings of fact has been challenged in a direct manner by the respondent or altered by the Court of Appeal. As the facts are particularly important in the case at bar, I will review in some detail the trial judge's most relevant findings.

I. Les faits

Le juge de première instance a effectué un examen minutieux et approfondi des faits dans ses motifs. Aucune de ses conclusions de fait n'a été contestée d'une manière directe par l'intimée ou modifiée par la Cour d'appel. Étant donné que les faits en l'espèce sont particulièrement importants j'examinerai assez en détail les conclusions les plus pertinentes tirées par le juge de première instance.

The respondent, Cognos Incorporated (previously named Quasar Corporation and hereinafter referred to as "Cognos" or "respondent"), is an Ottawa-based company which carries on the business of designing, developing and marketing computer programmes and software. In December of 1982, the respondent's President (Mr. Mike Potter) instructed Mr. Sean Johnston, the recently appointed Manager of Product Development for a product line of accounting software known as "Multiview", that Cognos intended to develop Multiview to an equal standing with its main product line called "Power House". Mr. Johnston had also received instructions from the Vice-President of Research and Development of Cognos (Mr. Bob Minns), at the time of accepting the position of Manager of Product Development, that the respondent wished to see Multiview expand beyond the general ledger module (the software involved consists of various "modules") then developed and in circulation, and the accounts payable module then under development. In particular, he was told that the respondent wished to see the development of three additional modules, namely, accounts receivable, cash flow, and fixed assets. Mr. Johnston was instructed by Cognos's senior management to take

L'intimée, Cognos Incorporated (autrefois connue sous le nom de Quasar Corporation et ci-après appelée «Cognos» ou «l'intimée»), est une société établie à Ottawa qui exploite une entreprise de conception, d'élaboration et de mise en marché de programmes d'ordinateurs et de logiciels. En décembre 1982, le président de l'intimée (M. Mike Potter) a informé M. Sean Johnston, qui venait d'être nommé directeur, Développement des produits, pour une ligne de produits composée de logiciels de comptabilité et connue sous le nom de «Multiview», que Cognos avait l'intention de développer Multiview au même point que sa ligne de produits principale appelée «Power House». Le vice-président, Recherche et Développement, de Cognos (M. Bob Minns) a également informé M. Johnston, au moment où ce dernier a accepté le poste de directeur, Développement des produits, que l'intimée voulait voir Multiview s'étendre au-delà du module grand livre (le logiciel en cause est composé de divers «modules») alors mis au point et en circulation, et du module comptes créditeurs qu'on était en train de mettre au point. En particulier, il lui a dit que l'intimée envisageait la mise au point de trois modules additionnels, à savoir les comptes débiteurs, le flux de l'encaisse et les

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charge and to do whatever was necessary to make Multiview a marketable and profitable product.

A meeting was held on December 21, 1982, during which Mr. Johnston and several senior executives of Cognos reviewed plans for the development of the Multiview line of products according to the mandate that had just been given. Criticisms were voiced by Mr. Johnston about the development of Multiview currently under way. He filed a project schedule covering a period of time up to 1985 and contemplating the development of modules such as accounts payable, accounts receivable, and cash flow.

Mr. Johnston indicated that there was a need on the research and development team of Multiview for an accountant to assist in the writing and maintenance of the software. Mr. Johnston proceeded, with the full knowledge of the respondent's senior management, to advertise for (and later hire) an accountant to help with the development of Multiview. An advertisement was placed in *The Globe and Mail* in mid-January, 1983, and many responses were received. In February of that year, a short list of six chartered accountants were interviewed by Mr. Johnston and two other executives of Cognos. The appellant, Douglas J. Queen, was one of the persons interviewed.

At the time of his interview, the appellant had been qualified as a chartered accountant for some eight and a half years. Since May of 1975, he had been living in Calgary with his wife and children and had occupied positions with three different employers, whereby he gained experience in working with computer accounting systems. For the three and a half years prior to the interview, the appellant had been the Regional Controller for a Calgary-based corporation named Genstar Development Corporation, occupying a relatively well paying and secure managerial position. In the fall of 1982, the appellant was actively seeking employment outside Calgary and was interested in the high-tech industry in the Ottawa area. In the words of the trial judge, the appellant wanted more

immobilisations. La haute direction de Cognos a demandé à M. Johnston d'en assumer la responsabilité et de faire tout ce qu'il fallait pour que Multiview devienne un produit commercialisable et rentable.

Le 21 décembre 1982, a eu lieu une rencontre au cours de laquelle M. Johnston et plusieurs hauts dirigeants de Cognos ont examiné les plans de développement de la ligne de produits Multiview, conformément au mandat qui venait d'être conféré. Monsieur Johnston a formulé des critiques au sujet du développement de Multiview alors en cours. Il a produit un échéancier de projet pour une période allant jusqu'en 1985, lequel prévoyait la mise au point de modules comme les comptes créditeurs, les comptes débiteurs et le flux de l'encaisse.

Monsieur Johnston a fait savoir que l'équipe de recherche et développement de Multiview avait besoin d'un comptable qui l'aiderait à créer et à maintenir le logiciel. Au su de la haute direction de l'intimée, il a fait publier une annonce en vue de retenir les services d'un comptable qui aiderait au développement de Multiview (lequel a par la suite été embauché). Une annonce a été insérée dans le *Globe and Mail* à la mi-janvier 1983, à laquelle de nombreux candidats ont répondu. En février de la même année, M. Johnston et deux autres dirigeants de Cognos ont interviewé six comptables agréés. L'appelant, M. Douglas J. Queen, était l'un d'eux.

Au moment de son entrevue, l'appelant était comptable agréé depuis environ huit ans et demi. Depuis mai 1975, il habitait Calgary avec sa femme et ses enfants et avait occupé des postes auprès de trois employeurs différents, ce qui lui avait permis d'acquérir de l'expérience dans le domaine des systèmes de comptabilité informatisée. Pendant les trois années et demie qui ont précédé l'entrevue, l'appelant avait été contrôleur régional d'une société établie à Calgary, la Genstar Development Corporation, et avait occupé un poste de direction passablement rémunérateur et sûr. À l'automne 1982, l'appelant cherchait activement un emploi à l'extérieur de Calgary, et le secteur de la haute technologie de la région d'Ottawa l'intéressait. Comme l'a dit le juge de première

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challenging opportunities than were available for him in Calgary; he wanted a senior financial position that would make use of his expertise in management information computer systems.

On February 14, 1983, the appellant was interviewed for approximately an hour and a half. During this interview, Mr. Johnston made a number of representations (as he had to the other five candidates) about the Multiview project and about the successful candidate's role in its development. These representations are fully canvassed at pp. 396-98 of the reported reasons of the trial judge: (1987), 63 O.R. (2d) 389.

In sum, Mr. Johnston told the appellant that Multiview was a major project which would be developed over a period of two years (the "primary development period") with enhancements and maintenance thereafter, and that the position being interviewed for would be needed throughout this period. It was made clear that Cognos was committed to the development of additional modules of Multiview beyond general ledger (then developed), accounts payable (development under way), and accounts receivable (planned, but not yet under development). Those additional modules were cash flow, fixed assets, inventory, and order entry. Moreover, it was represented that the staff required to develop the Multiview modules would double, from 16 to 32, by August, 1983 (the appellant's evidence), or by the end of the two-year primary development period (Mr. Johnston's evidence). Throughout the interview, it was understood that the successful candidate would play an important role as a chartered accountant in the Multiview project, advising on accounting standards throughout the life of the project. In addition, the trial judge found, based on his assessment of all the evidence, that it was implicitly represented that there was a reasonable plan in existence for the additional modules and that Cognos had made a financ-

instance, l'appelant voulait des possibilités plus stimulantes que celles qui lui étaient offertes à Calgary; il voulait un poste de direction dans le domaine des finances qui ferait appel à son expertise en matière de systèmes automatiques de gestion.

Le 14 février 1983, l'appelant a eu une entrevue d'environ une heure et demie pendant laquelle M. Johnston a fait certaines déclarations (comme il l'avait fait dans le cas des cinq autres candidats) au sujet du projet Multiview et du rôle que jouerait le candidat retenu dans son développement. Ces déclarations sont examinées à fond aux pp. 396 à 398 des motifs du juge de première instance: (1987), 63 O.R. (2d) 389.

En somme, M. Johnston a dit à l'appelant que Multiview était un projet majeur qui serait mis au point sur une période de deux ans (la [TRADUCTION] «période de développement initial»), que les améliorations et la maintenance seraient assurées par la suite, et que le poste en question devait être comblé pendant toute cette période. Il a clairement fait savoir que Cognos était bien décidée à mettre au point des modules additionnels de Multiview, en plus du grand livre (qui existait déjà), des comptes créditeurs (qu'on était en train de mettre au point) et des comptes débiteurs (module envisagé, mais non encore mis au point). Ces modules additionnels étaient le flux de l'encaisse, les immobilisations, l'inventaire et l'enregistrement des commandes. En outre, il a déclaré que le personnel requis pour mettre au point les modules Multiview doublerait, le nombre d'employés devant passer de 16 à 32, avant le mois d'août 1983 (selon le témoignage de l'appelant), ou avant la fin de la période de développement initial de deux ans (selon le témoignage de M. Johnston). Pendant toute l'entrevue, il a laissé entendre que le candidat retenu jouerait, en sa qualité de comptable agréé, un rôle important dans le projet Multiview et qu'il agirait comme conseiller en ce qui concerne les normes comptables pendant toute la durée du projet. De plus, le juge de première instance a conclu, en se fondant sur son appréciation de l'ensemble de la preuve, qu'on avait implicitement déclaré qu'il existait un plan raisonnable à l'égard des modules

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cial commitment for such development in the way of budgetary provisions.

At the time of this interview, Mr. Johnston's knowledge as to the respondent's commitment to the development of Multiview was based on conversations and meetings with senior executives of Cognos. He was aware, however, that the funding needed for the full development of Multiview in accordance with his mandate had not yet been approved by the respondent's corporate management team. While this body had met in early February to discuss and formulate strategies and plans for the development of Multiview, it had not yet given any financial commitment commensurate with the mandate given to Mr. Johnston. Mr. Johnston was also aware that this body had the ultimate responsibility of deciding whether to allocate corporate funds for the research and development of Multiview. At no point during the interview was the appellant made aware of the fact that there was no guaranteed funding for the Multiview project as described to him, or that the position being applied for was subject, in any respect, to budgetary approval.

The appellant was offered the job of Manager, Financial Standards, by telephone early in the month of March, 1983. He accepted immediately and Mr. Johnston mailed to him a written contract of employment. It is undisputed that, prior to signing, the appellant read and understood the employment agreement. He knew that its purpose was to define the rights and obligations of the parties. One clause in the contract (clause 14) permitted the respondent to terminate at any time the appellant's employment "without cause" upon one month's notice, or payment of one month's salary in lieu of notice. Another clause (clause 13) enabled the respondent to reassign the appellant to another position within Cognos without reduction in salary and upon one month's notice. Much importance was given to these provisions by the Court of Appeal as well as by the respondent in argument before this Court.

additionnels et que Cognos s'était financièrement engagée à les mettre au point au moyen de dispositions budgétaires.

Au moment de l'entrevue, la connaissance de M. Johnston au sujet de l'engagement que l'intimée avait pris à l'égard du développement de Multiview était fondée sur des conversations et sur des rencontres avec des hauts dirigeants de Cognos. Toutefois, M. Johnston savait que l'équipe de gestion d'entreprise de l'intimée n'avait pas encore approuvé le financement nécessaire au plein développement de Multiview, conformément à son mandat. Cette équipe s'était réunie au début de février pour examiner et formuler des stratégies et des plans en vue du développement de Multiview, mais elle n'avait pas encore pris d'engagements financiers correspondant au mandat conféré à M. Johnston. Celui-ci savait également que cette équipe était en dernier ressort chargée de déterminer si la société devait affecter des fonds en recherche et développement pour Multiview. Pendant l'entrevue, l'appelant n'a jamais été informé qu'il n'existait aucun financement garanti pour le projet Multiview comme on le lui avait décrit, ou que le poste auquel il s'était porté candidat était assujetti, à quelques égards que ce soit, à une approbation budgétaire.

On a offert à l'appelant le poste de directeur, Normes financières, par téléphone au début de mars 1983. Il a immédiatement accepté et M. Johnston lui a envoyé, par la poste, un contrat de travail. Il n'est pas contesté qu'avant de signer le contrat de travail, l'appelant l'a lu et le comprenait. Il savait que l'objet du contrat était de définir les droits et obligations des parties. Une clause du contrat (la clause 14) permettait à l'intimée de mettre fin à n'importe quel moment à l'emploi de l'appelant «sans motif» sur préavis d'un mois, ou sur paiement d'un mois de salaire. Une autre (la clause 13) permettait à l'intimée de réaffecter l'appelant à un autre poste au sein de Cognos sans diminution de salaire et sur préavis d'un mois. La Cour d'appel a accordé beaucoup d'importance à ces dispositions, comme l'a également fait l'intimée dans son argumentation devant notre Cour.

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For convenience, I shall reproduce clauses 13 and 14 of the employment agreement:

TRANSFER

13. Quasar Systems reserves the right to reassign you to another position with the Company without reduction of your salary or benefits and upon one month's notice to you. Should such reassignment require your permanent relocation to another city, the Company will reimburse you for your expenses in accordance with the then current relocation policy.

TERMINATION NOTICE — ONE MONTH

14. This Agreement may be terminated at any time and without cause by Quasar Systems Ltd. or by you. In the event of termination, Quasar Systems Ltd. will give you one month's notice of termination plus any additional notice that may be required by any applicable legislation. Similarly, you shall give Quasar Systems Ltd. one month's notice if you voluntarily terminate this Agreement. Quasar Systems Ltd. may pay you one month's salary in lieu of the aforesaid notice in which event this Agreement and your employment will be terminated on the date such payment in lieu of notice is made.

The trial judge specifically accepted the appellant's evidence that he signed the contract of employment based on the representations made to him during the interview, and that were it not for those representations he would not have signed it. In order to accept employment with Cognos, the appellant was required to give up a relatively well paying and secure, albeit not as challenging, position in Calgary and to move himself and his family more than halfway across the country.

The appellant commenced employment with Cognos on April 11, 1983. Two weeks later, on April 25, 1983, the corporate management team of the respondent considered for the very first time the project cost estimates for the Multiview project. This body rejected Mr. Johnston's funding proposal which was in excess of $1,000,000. It decided to commit research and development funds to the Power House project in priority to Multiview. This decision was based on a number of market considerations, including the continuing

Pour plus de commodité, je reproduis les clauses 13 et 14 du contrat de travail:

[TRADUCTION]

MUTATION

13. Quasar Systems se réserve le droit de vous réaffecter à un autre poste au sein de la société, sans diminution de salaire ou perte d'avantages, sur préavis d'un mois. Advenant le cas où la réaffectation exige que vous vous réinstalliez en permanence dans une autre ville, la société vous dédommagera de vos frais conformément à la politique de réinstallation alors en vigueur.

AVIS DE CESSATION D'EMPLOI — UN MOIS

14. Le présent contrat peut être résilié à n'importe quel moment et sans motif par Quasar Systems Ltd. ou par vous. En cas de cessation d'emploi, Quasar Systems Ltd. vous donnera un préavis d'un mois en sus de tout avis additionnel prévu par une loi pertinente. De même, vous donnerez à Quasar Systems Ltd. un préavis d'un mois si vous résiliez volontairement ce contrat. Quasar Systems Ltd. peut vous verser un mois de salaire au lieu dudit avis, auquel cas ce contrat et votre emploi prendront fin à la date à laquelle cette somme vous sera versée.

Le juge de première instance a expressément accepté le témoignage de l'appelant, à savoir qu'il avait signé le contrat de travail en se fondant sur les déclarations qui lui avaient été faites pendant l'entrevue et que, n'eût été de ces déclarations, il ne l'aurait pas signé. Pour accepter l'emploi auprès de Cognos, l'appelant devait renoncer à un poste passablement rémunérateur et sûr, quoique moins stimulant, à Calgary et s'installer avec sa famille presque à l'autre bout du pays.

L'appelant a commencé à travailler pour Cognos le 11 avril 1983. Deux semaines plus tard, le 25 avril 1983, l'équipe de gestion d'entreprise de l'intimée a examiné pour la première fois l'estimation des coûts du projet Multiview, et a rejeté la proposition de financement de M. Johnston, laquelle s'élevait à plus de 1 000 000 $. Elle a décidé de consacrer en priorité des fonds de recherche et développement au projet Power House plutôt qu'au projet Multiview. Cette décision était fondée sur un certain nombre de considé-

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low sales of the then developed Multiview module (general ledger) and the continuing high sales of the various Power House modules. The corporate management team allotted a budget of only $200,000 to Multiview, thus making the development of additional modules beyond accounts receivable quite unrealistic. Further meetings of the management team took place in the following months at which time additional funding curtailment of the Multiview project occurred. On September 9, 1983, barely five months after his arrival in Ottawa, the appellant and others were advised that there would be a reassignment of personnel involved with Multiview owing to diminished research and development funding. The appellant was informed that, unless a position was available for him in the finance and administration department of the respondent, he would most likely be laid off.

rations commerciales, notamment sur le chiffre d'affaires constamment bas du module existant de Multiview (grand livre) et sur celui constamment élevé des divers modules de Power House. L'équipe de gestion d'entreprise a alloué une somme de 200 000 $ seulement à Multiview, de sorte que la mise au point de modules additionnels autres que celui des comptes débiteurs était tout à fait irréaliste. D'autres réunions de l'équipe de gestion ont eu lieu au cours des mois qui ont suivi, et des restrictions financières additionnelles ont alors été apportées au projet Multiview. Le 9 septembre 1983, cinq mois à peine après son arrivée à Ottawa, l'appelant et d'autres employés ont été informés que le personnel prenant part au projet Multiview serait réaffecté, par suite des restrictions apportées au financement de la recherche et du développement. L'appelant a été informé qu'il serait fort probablement licencié, à moins qu'il n'y ait un poste pour lui au sein du service des finances et de l'administration de l'intimée.

On October 28, 1983, the appellant was given his first written notice of termination of employment effective March 21, 1984. The appellant negotiated an amendment to his employment agreement in order to eliminate his obligation to repay $7,500 of moving expenses, otherwise repayable in the event that his position was terminated within the first year of employment. This notice was rescinded in November, 1983, and the appellant was assigned to quality control of one of the aspects of the Power House project. On May 1, 1984, after having been informed earlier in March that he would no longer be needed with quality control, the appellant secured the position of Manager of Finance in the finance department of the respondent. He performed various tasks while in this function. On July 31, 1984, he received his second written notice of termination effective October 25, 1984. He worked until that day and was paid until November 15, 1984. The trial judge found that the appellant was not dismissed as a result of an unsatisfactory assessment of his job performance.

Le 28 octobre 1983, l'appelant a reçu un premier avis écrit disant qu'il serait mis fin à son emploi le 21 mars 1984. Il a négocié une modification de son contrat de travail afin d'éliminer l'obligation qui lui incombait de rembourser les frais de déménagement s'élevant à 7 500 $, qu'il devait par ailleurs rembourser s'il était mis fin à son poste pendant la première année d'emploi. Cet avis a été annulé en novembre 1983, et l'appelant a été affecté au contrôle de la qualité d'un des aspects du projet Power House. Le 1er mai 1984, après avoir été informé plus tôt, en mars, qu'on n'aurait plus besoin de ses services pour le contrôle de la qualité, l'appelant a été nommé au poste de directeur des finances au sein du service des finances de l'intimée. Il a assumé diverses tâches à ce poste. Le 31 juillet 1984, il a reçu un second avis écrit disant qu'il serait mis fin à son emploi le 25 octobre 1984. Il a travaillé jusqu'à cette date et a été rémunéré jusqu'au 15 novembre 1984. Le juge de première instance a constaté que l'appelant n'avait pas été congédié par suite d'une évaluation insatisfaisante de son rendement professionnel.

On March 25, 1985, the appellant commenced an action against the respondent seeking damages

Le 25 mars 1985, l'appelant a intenté contre l'intimée une action dans laquelle il demandait des

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for negligent and fraudulent misrepresentation. He apparently discontinued his claim for fraudulent misrepresentation at some point after filing the statement of claim, and proceeded only in negligence. From the beginning, the appellant's cause of action has been founded wholly and solely in tort. At no time did he argue breach of contract, breach of collateral warranty or any other contractual cause of action against the respondent. He did not dispute the fact that some of the terms of his employment contract appeared to be inconsistent with the representations made by Mr. Johnston. However, it was his understanding from the interview that the Multiview project was a reality and that its existence was not contingent on the happening of some future event. He testified that were it not for the representations made during the interview as to the nature and existence of the employment opportunity, he would not have left his secure position in Calgary.

In a judgment rendered on December 31, 1987, White J. of the Ontario High Court of Justice upheld the appellant's claim and awarded him $67,224 in damages: (1987), 63 O.R. (2d) 389, 18 C.C.E.L. 146. On May 1, 1990, an appeal by the respondent to the Court of Appeal for Ontario was allowed; the trial judgment was set aside and replaced by a judgment dismissing the action with costs: (1990), 74 O.R. (2d) 176, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 30 C.C.E.L. 1, 90 CLLC §14, 024. The appellant was granted leave to appeal to this Court on January 17, 1991, [1991] 1 S.C.R. xii.

II. Judgments in the Courts Below

A. *Ontario High Court of Justice* (1987), 63 O.R. (2d) 389

The trial judge found, in all the circumstances, that there existed a "special relationship" between the respondent (via Mr. Johnston) and the appellant, within the meaning of *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.), so as to give rise to a duty of care with respect to the representations made during the hiring interview.

dommages-intérêts fondés sur une déclaration inexacte et frauduleuse et faite par négligence. Il a apparemment renoncé à invoquer la déclaration inexacte et frauduleuse à un moment donné, après le dépôt de sa demande, et a uniquement continué à invoquer la négligence. Depuis le début, la cause d'action de l'appelant est entièrement fondée sur la responsabilité délictuelle. L'appelant n'a jamais invoqué la violation du contrat, la violation d'une garantie accessoire ou une autre cause d'action contractuelle contre l'intimée. Il n'a pas contesté que certaines conditions de son contrat de travail semblaient incompatibles avec les déclarations que M. Johnston avait faites. Toutefois, il a cru comprendre, par suite de l'entrevue, que le projet Multiview était une réalité et que son existence ne dépendait pas de la réalisation d'un événement futur. Il a témoigné que n'eût été des déclarations faites pendant l'entrevue quant à la nature et à l'existence de l'emploi, il n'aurait pas quitté son poste sûr à Calgary.

Dans un jugement rendu le 31 décembre 1987, le juge White, de la Haute Cour de justice de l'Ontario, a accueilli la demande de l'appelant et lui a accordé la somme de 67 224 $ à titre de dommages-intérêts: (1987), 63 O.R. (2d) 389, 18 C.C.E.L. 146. Le 1er mai 1990, la Cour d'appel de l'Ontario a accueilli l'appel interjeté par l'intimé; le jugement de première instance a été infirmé et remplacé par un jugement rejetant l'action avec dépens: (1990), 74 O.R. (2d) 176, 38 O.A.C. 180, 69 D.L.R. (4th) 288, 30 C.C.E.L. 1, 90 CCLC §14, 024. L'appelant a obtenu l'autorisation de se pourvoir devant notre Cour le 17 janvier 1991, [1991] 1 R.C.S. xii.

II. Les jugements des cours d'instance inférieure

A. *Haute Cour de justice de l'Ontario* (1987), 63 O.R. (2d) 389

Le juge de première instance a conclu que, compte tenu de toutes les circonstances, il y avait un «lien spécial» entre l'intimée (par l'entremise de M. Johnston) et l'appelant, au sens de l'arrêt *Hedley Byrne & Co. c. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.), de façon à donner lieu à une obligation de diligence en ce qui concerne les

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The fact that this case involved pre-contractual or pre-employment negotiations did not alter this conclusion. Based on his assessment of all the evidence adduced at trial, White J. also found that certain representations made to the appellant during the interview were inaccurate or misleading (i.e., they were misrepresentations), and that these misrepresentations were made in a negligent manner (i.e., they were negligent misrepresentations). Some of his comments in this respect warrant repeating (at pp. 415-16):

I find that misrepresentations were made to the [appellant] by Sean Johnston in the hiring interview. The effect of these misrepresentations was that the [appellant] would have a position in the research and development of the product "Multiview"; that that position would be a significant one and would involve his expertise as an accountant; that he would perform the responsible role of seeing to proper accounting standards being implemented into the product; that beyond the three modules immediately in contemplation were a minimum of four other modules; and that the project of "Multiview", in connection with which [the appellant] would be hired would last a minimum of two years. I find further that Mr. Johnston implicitly represented that management had made a firm budgetary commitment to the development of four other modules in addition to those then presently under development.

I find further, in all the circumstances, that Sean Johnston made those misrepresentations negligently. Based upon his expertise in the field of computer development, he was aware, according to his evidence, that until there is a feasibility study in which cost estimates have been submitted to and have been considered and approved by senior management, one could not say that the [respondent] had made a firm commitment to the project as Mr. Johnston envisaged it and as he described it to [the appellant] in the interview.

Other circumstances which the trial judge took into consideration in concluding that the misrepresentations were negligently made include the following: (1) Mr. Johnston knew, or ought to have known, that the truth of his representations depended on the approval by the corporate management of the project; (2) Mr. Johnston knew that the appellant was relying on his representations; (3) Mr. Johnston knew that the appellant was relying on his representations to his detriment; and (4) Mr. Johnston knew that the appellant was relying on his representations to his detriment and he was reckless as to the consequences of his representations.

déclarations faites pendant l'entrevue d'embauchage. Le fait que cette affaire portait sur des négociations préalables au contrat ou à l'emploi ne changeait rien à cette conclusion. Le juge White a également conclu que, selon son appréciation de l'ensemble de la preuve présentée à l'audience, certaines déclarations faites à l'appelant pendant l'entrevue étaient erronées ou trompeuses (c'est-à-dire qu'il s'agissait de déclarations inexactes), et que ces déclarations inexactes avaient été faites d'une manière négligente (c'est-à-dire qu'il s'agissait de déclarations inexactes faites par négligence). Il vaut la peine de reproduire certaines remarques qu'il a faites à cet égard (aux pp. 415 et 416):

[TRADUCTION] Je conclus que, pendant l'entrevue d'embauchage, Sean Johnston a fait des déclarations inexactes à [l'appelant]. Selon ces déclarations inexactes, [l'appelant] occuperait un poste en recherche et développement pour le produit «Multiview»; ce poste serait un poste d'importance et ferait appel à son expertise à titre de comptable; [l'appelant] serait chargé de veiller à ce que les normes comptables pertinentes soient appliquées relativement au produit; en plus des trois modules immédiatement envisagés, il y aurait au moins quatre autres modules; le projet «Multiview» dans le cadre duquel [l'appelant] serait embauché durerait au moins deux ans. Je conclus en outre que M. Johnston a implicitement déclaré que la direction avait pris un engagement budgétaire ferme à l'égard de la mise au point de quatre autres modules, en plus de ceux qu'on était en train de mettre au point.

Je conclus en outre que, compte tenu de toutes les circonstances, Sean Johnston a fait ces déclarations inexactes par négligence. Vu son expertise dans le domaine de la création informatique, il savait, selon son témoignage, que tant que n'a pas été effectuée une étude de faisabilité dans laquelle l'estimation des coûts est soumise à la haute direction, et examinée et approuvée par celle-ci, il est impossible de dire que [l'intimée] a pris un engagement ferme à l'égard du projet, comme M. Johnston le prévoyait et comme il l'a décrit [à l'appelant] pendant l'entrevue.

Le juge de première instance a notamment tenu compte des circonstances suivantes lorsqu'il a conclu que les déclarations inexactes avaient été faites par négligence: (1) M. Johnston savait, ou aurait dû savoir, que l'exactitude de ses déclarations dépendait de l'approbation, par l'équipe de gestion

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agement team of the cost estimates he had prepared for the research and development of the Multiview project; (2) it is reasonable to infer that Mr. Johnston, at the time of the interview, contemplated that the budgetary needs for the Multiview project would be substantial and that approval was at best speculative; (3) Mr. Johnston must have been aware of the continued poor sales performance of the Multiview product line; (4) Mr. Johnston did not disclose to the appellant that senior management had not yet given the financial commitment required to make the plans for the Multiview project a probable reality; (5) Mr. Johnston's expertise in the computer development field should have made him aware that, notwithstanding his conversations with senior management and the meeting of December 21, 1982, there was still a considerable risk that senior management would not give budgetary approval to his plans; (6) Mr. Johnston knew that the appellant was relying on the information he was providing during the interview; (7) Mr. Johnston knew that the appellant had a secure, responsible, and well-paying employment as a chartered accountant in Calgary and that coming to Ottawa would involve moving himself and his family across the country; and (8) Mr. Johnston was aware that the appellant was relying on the position with Cognos to enhance his career significantly as an accountant.

d'entreprise, de l'estimation des coûts qu'il avait préparée en matière de recherche et développement pour le projet Multiview; (2) il est raisonnable de déduire que M. Johnston prévoyait, au moment de l'entrevue, que les besoins budgétaires pour le projet Multiview seraient importants, et que l'approbation était, au mieux, fondée sur des conjectures; (3) M. Johnston devait être au courant du piètre rendement constant des ventes de la ligne de produits Multiview; (4) M. Johnston n'a pas révélé à l'appelant que la haute direction n'avait pas encore pris l'engagement financier requis pour que les plans relatifs au projet Multiview deviennent une réalité probable; (5) l'expertise de M. Johnston dans le domaine de la création informatique aurait dû lui permettre de savoir que, malgré les conversations qu'il avait eues avec des hauts dirigeants et malgré la réunion du 21 décembre 1982, il était encore fort probable que la haute direction ne donne pas l'approbation budgétaire requise; (6) M. Johnston savait que l'appelant se fiait aux renseignements qu'il avait fournis pendant l'entrevue; (7) M. Johnston savait que l'appelant occupait, à Calgary, un poste de responsabilité, un emploi sûr et rémunérateur, à titre de comptable agréé et que, pour venir travailler à Ottawa, il devait s'installer avec sa famille à l'autre bout du pays et (8) M. Johnston savait que l'appelant comptait sur le poste qu'il occuperait auprès de Cognos pour enrichir énormément sa carrière de comptable.

The trial judge also found that, even if Mr. Johnston felt justified in making the representations that he did (based on his conversations with senior management and the meeting of December 21, 1982), and assuming that this deprived his misrepresentations of their negligent quality, then such misrepresentations, while not negligently made by Mr. Johnston, were negligently made by the senior management of the respondent "through Mr. Johnston as an innocent instrument of the [respondent] company" (p. 418).

Le juge de première instance a également conclu que, même si M. Johnston croyait pouvoir légitimement faire les déclarations qu'il a faites (compte tenu des conversations qu'il avait eues avec la haute direction et de la réunion du 21 décembre 1982), et à supposer que cela enlève à ses déclarations inexactes leur caractère de négligence, ces déclarations inexactes, bien que M. Johnston ne les ait pas faites par négligence, avaient été faites par négligence par la haute direction de l'intimée [TRADUCTION] «par l'entremise de M. Johnston qui avait innocemment servi d'instrument à la société [intimée]» (à la p. 418).

White J. further found that the appellant had relied upon the negligent misrepresentations, to his

Le juge White a en outre conclu que l'appelant s'était appuyé sur les déclarations inexactes faites

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detriment, and that he had sustained substantial damages (at p. 419):

The misrepresentations induced [the appellant] to quit his job as controller of the Calgary Division of Genstar Development Corporation and to accept employment with the [respondent]. Those representations induced him to sign the contract of employment. But for those representations he would have remained working for the Genstar Development Corporation for some further period of time and would not have become an employee of the [respondent].

Finally, the trial judge addressed a number of arguments raised by the respondent in defence. First, he rejected the proposition that the representations were truthful and that Mr. Johnston was simply giving an opinion as to future events. In his view, the representations were untruthful: "What was untruthful in the representations was the implied assurance in those representations that Mr. Johnston had made a sufficient study of the relevant facts, including the decision of senior management to make a financial commitment to the development of 'Multiview' beyond the accounts receivable module, to be able to make the unqualified representations that he made" (pp. 417-18). All Mr. Johnston had to say, in the trial judge's opinion, was that the feasibility study of the project had not yet been completed. Second, senior management of the respondent made no attempt to disclaim expressly any representations made to the appellant during the interview. Third, the trial judge rejected the defence put forward that the appellant, by his conduct subsequent to learning the situation of Multiview, had affirmed his contract of employment. In this respect, White J. distinguished the decision relied on by the respondent (*Burrows v. Burke* (1984), 49 O.R. (2d) 76 (C.A.)), and held that the appellant's conduct was not one of affirming the contract of employment but of a person in a difficult situation attempting to "minimize his damages" (p. 420). In any event, his conduct "did not amount to an explicit waiver of his right to claim damages in tort arising out of negligent misrepresentations made to him inducing the contract" (p. 421). In his view, whether the contract is affirmed or not, the cause of action in tort is preserved as it is external to the contract. And fourth, the trial judge rejected the respon-

par négligence, à son détriment, et qu'il avait subi un préjudice important (à la p. 419):

[TRADUCTION] Les déclarations inexactes ont poussé [l'appelant] à quitter son emploi de contrôleur de la division de Calgary de Genstar Development Corporation et à accepter un emploi auprès de [l'intimée]. Ces déclarations l'ont amené à signer le contrat de travail. N'eût été de ces déclarations, il aurait continué à travailler pour Genstar Development Corporation pendant un certain temps et ne serait pas devenu un employé de [l'intimée].

Enfin, le juge de première instance a examiné un certain nombre d'arguments que l'intimée a soulevés dans sa défense. Premièrement, il a rejeté la proposition selon laquelle les déclarations étaient véridiques, M. Johnston ayant simplement exprimé une opinion au sujet d'événements futurs. À son avis, les déclarations n'étaient pas véridiques: [TRADUCTION] «Ce qui n'était pas véridique dans les déclarations était la garantie implicite qui y était donnée, à savoir que M. Johnston avait fait une étude suffisante des faits pertinents, et notamment de la décision de la haute direction de prendre un engagement financier à l'égard du développement de «Multiview» au-delà du module comptes débiteurs, pour être en mesure de faire les déclarations catégoriques qu'il a faites» (aux pp. 417 et 418). De l'avis du juge de première instance, il suffisait que M. Johnston dise que l'étude de faisabilité du projet n'était pas encore terminée. Deuxièmement, la haute direction de l'intimée n'a aucunement tenté de nier expressément les déclarations faites à l'appelant pendant l'entrevue. Troisièmement, le juge de première instance a rejeté le moyen de défense selon lequel l'appelant, par la manière dont il a agi après avoir pris connaissance de la situation de Multiview, avait confirmé son contrat de travail. À cet égard, le juge White a fait une distinction en ce qui concerne la décision sur laquelle l'intimée s'appuyait (*Burrows c. Burke* (1984), 49 O.R. (2d) 76 (C.A.)), et a jugé que, par sa conduite, l'appelant n'avait pas confirmé le contrat de travail, mais qu'il avait agi comme une personne qui se trouve dans une situation difficile et qui tente de [TRADUCTION] «minimiser ses dommages» (à la p. 420). Quoi qu'il en soit, sa conduite [TRADUCTION] «n'équivalait pas à une renonciation explicite de son droit de demander des

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dent's defence of business necessity on the basis that there was no evidence of any such necessity which would exonerate the respondent from the negligent misrepresentations in issue.

Thus, White J. allowed the appellant's claim for negligent misrepresentation. He assessed the damages payable to the appellant at $67,224. This amount represented what was necessary, according to White J., "to put the [appellant] in the same position as he would have been if the negligent misrepresentation had not been made" (p. 414). It consists of $50,000 for loss of income, $252 for costs of obtaining a new employment, $11,972 for the loss on the purchase and sale of his home in the Ottawa area, and $5,000 in general damages for emotional stress.

B. *Ontario Court of Appeal* (1990), 74 O.R. (2d) 176

Finlayson J.A. (Griffiths and Arbour JJ.A. concurring) held that the trial judge made two errors in allowing the appellant's claim to succeed. Finlayson J.A. accepted that there was a "special relationship" between the appellant and the respondent so as to give rise to a duty of care of the sort described in *Hedley Byrne, supra,* and subsequent cases. However, he was of the view that, in the circumstances of the present case, White J. had erred in the manner in which he dealt with the issues of contractual disclaimer and of negligence.

With respect to disclaimer, Finlayson J.A. felt the trial judge had erred in requiring an express

dommages-intérêts fondés sur la responsabilité délictuelle par suite des déclarations inexactes qui lui avaient été faites par négligence et qui l'avaient poussé à signer le contrat» (à la p. 421). À son avis, que le contrat soit confirmé ou non, la cause d'action en responsabilité délictuelle est maintenue car elle est indépendante du contrat. Et quatrièmement, le juge de première instance a rejeté le moyen de défense fondé sur la nécessité commerciale que l'intimée a invoqué, pour le motif que la preuve n'était pas faite de l'existence d'une nécessité de ce genre qui exonérerait cette dernière des déclarations inexactes faites par négligence.

Ainsi, le juge White a fait droit à la demande de l'appelant en ce qui concerne la déclaration inexacte faite par négligence. Il a évalué à 67 224 $ le montant des dommages-intérêts payables à ce dernier. Ce montant représentait ce qu'il fallait, selon le juge White, [TRADUCTION] «pour mettre [l'appelant] dans la même situation que celle dans laquelle il aurait été s'il n'y avait pas eu de déclaration inexacte faite par négligence» (à la p. 414). Ce montant se compose de 50 000 $ pour la perte de revenu, de 252 $ pour les frais d'obtention d'un nouvel emploi, de 11 972 $ pour la perte subie par suite de l'achat et de la vente de sa maison dans la région d'Ottawa, et de 5 000 $ représentant des dommages-intérêts généraux par suite du stress émotionnel subi.

B. *Cour d'appel de l'Ontario* (1990), 74 O.R. (2d) 176

Le juge Finlayson (avec l'appui des juges Griffiths et Arbour) a conclu que le juge de première instance a commis deux erreurs en permettant à l'appelant d'avoir gain de cause. Il a reconnu qu'il y a un «lien spécial» entre l'appelant et l'intimée, de sorte qu'il existe une obligation de diligence du genre décrit dans l'arrêt *Hedley Byrne*, précité, et dans des arrêts subséquents. Toutefois, il estime que, compte tenu des circonstances de l'espèce, le juge White a commis une erreur en examinant les questions de dénégation contractuelle et de négligence.

Le juge Finlayson estime que le juge de première instance a commis une erreur en exigeant un

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disavowal of any representations that may have been made during the pre-contractual negotiations in order for a disclaimer argument to succeed, as it had in *Hedley Byrne*, *supra*, and in *Carman Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958. In Finlayson J.A.'s opinion, something less than an express disclaimer could suffice (at p. 183): "it is a sufficient disclaimer if the contract contains terms which contradict or are inconsistent with the representations relied upon." He noted that the contract of employment, which the appellant read and understood, contained provisions relating to the possibility of reassignment and, more importantly, to the termination of employment on one month's notice. He found that such provisions were sufficient to constitute a valid disclaimer (at pp. 183 and 185):

> In the case on appeal, the [appellant] stated that he would not have given up his secure position in Calgary for a move to Ottawa that was without permanence, and yet he signed a contract which provided him with no assurances respecting his place of employment or its tenure. To rely on *Hedley Byrne*, the negligent misrepresentation must have amounted to a warranty of job security and yet the contract of employment was surely a disclaimer of just that. No representations as to job security, whether based on performance or on job availability, could have survived the one-month termination notice "without cause" contained in the contract.

. . .

The pre-employment discussions in this case merged in the contract of employment. There is no separate tort, even accepting the trial judge's findings of innocent misrepresentation, because the terms of the contract amounted to a disclaimer within the meaning of *Hedley Byrne*. The references to the Multiview project did not amount to warranties or representations that were independent of the contract of employment and they cannot survive the written agreement.

According to Finlayson J.A., this disclaimer was fatal to the appellant's claim as it had the effect of

désaveu exprès de toute déclaration qui pouvait avoir été faite pendant les négociations préalables à la signature du contrat, pour que l'argument fondé sur la dénégation puisse être retenu, comme il l'a été dans l'arrêt *Hedley Byrne*, précité, et dans l'arrêt *Carman Construction Ltd. c. Compagnie du chemin de fer canadien du Pacifique*, [1982] 1 R.C.S. 958. De l'avis du juge Finlayson, quelque chose de moins qu'une dénégation expresse peut suffire (à la p. 183): [TRADUCTION] «il y a une dénégation suffisante si le contrat contient des clauses qui contredisent les déclarations auxquelles on s'est fié ou qui sont incompatibles avec ces déclarations.» Il fait remarquer que le contrat de travail, que l'appelant a lu et compris, contenait des dispositions concernant la possibilité d'une réaffectation et, fait encore plus important, concernant la cessation d'emploi sur préavis d'un mois. Il a conclu que ces dispositions sont suffisantes pour constituer une dénégation valide (aux pp. 183 et 185):

> [TRADUCTION] En l'espèce, [l'appelant] a déclaré qu'il n'aurait pas renoncé à son poste sûr à Calgary pour occuper à Ottawa un poste qui n'était pas permanent, et pourtant il a signé un contrat qui ne lui fournissait aucune garantie au sujet de son lieu de travail ou de sa permanence. Pour que l'arrêt *Hedley Byrne* puisse être invoqué, la déclaration inexacte faite par négligence doit équivaloir à une garantie de sécurité d'emploi, et pourtant le contrat de travail contenait certainement une dénégation à ce sujet. Aucune déclaration relative à la sécurité d'emploi, qu'elle soit fondée sur le rendement ou sur la disponibilité d'un emploi, n'aurait pu l'emporter sur la disposition concernant le préavis d'un mois de congédiement «sans motif» figurant dans le contrat.

. . .

En l'espèce, les discussions préalables à l'emploi ont abouti au contrat de travail. Il n'existe aucun délit distinct, même si l'on accepte les conclusions tirées par le juge de première instance au sujet d'une déclaration inexacte faite de bonne foi, parce que les conditions du contrat équivalaient à une dénégation au sens de l'arrêt *Hedley Byrne*. Les mentions du projet Multiview n'équivalaient pas à des garanties ou à des déclarations indépendantes du contrat de travail et elles ne peuvent pas l'emporter sur l'entente écrite.

Selon le juge Finlayson, cette dénégation porte un coup fatal à la demande de l'appelant car elle a

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negating any assumption of duty of care on the part of the respondent; a conclusion similar to the one reached in *Hedley Byrne* and *Carman Construction*, *supra*.

In any event, Finlayson J.A. was of the view that the trial judge had erred in his finding of negligent misrepresentation because he imposed a "higher duty of care" on the respondent than was required in the circumstances. According to Finlayson J.A., the duty in the case at bar is no more than a duty to take care that the representations made were "responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p. 186). He observed that the same representations were made to all the six candidates, that the purpose of the interview was to make the position sound attractive enough that the successful candidate would accept it, and that Mr. Johnston believed in the veracity of what he was saying during the interview. Moreover, he noted that the trial judge criticized more what was not said by Mr. Johnston, than what was actually said by him. In his view, any duty of care had been fully discharged in the circumstances of this case—there had been no negligent misrepresentation (at pp. 187-88):

Johnston was hired to oversee the Multiview project. Counsel for [the appellant] conceded that Johnston was as surprised as anyone at the corporate decision not to concentrate on it. Johnston believed in what he said to the job applicants about Multiview. The trial judge found that he had a duty to go further and to point out the details of the internal decision-making process at Cognos and stress that that process had not been completed. In other words, his own *bona fide* belief as a knowledgeable executive that the program was going forward was not sufficient. He had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment of the viability of the project.

In my opinion, this casts the duty too high. It suggests that at least a quasi-fiduciary relationship existed

pour effet de nier toute présomption d'obligation de diligence de la part de l'intimée, conclusion semblable à celle qui a été tirée dans les arrêts *Hedley Byrne* et *Carman Construction*, précités.

Quoi qu'il en soit, le juge Finlayson estime que le juge de première instance a commis une erreur en concluant qu'il y a eu déclaration inexacte faite par négligence parce qu'il a imposé à l'intimée une [TRADUCTION] «obligation de diligence plus lourde» que celle qui était requise compte tenu des circonstances. Selon lui, l'obligation, en l'espèce, consiste simplement à veiller à ce que les déclarations soient [TRADUCTION] «réfléchies et exactes, à la connaissance de M. Johnston et de son commettant, Cognos» (à la p. 186). Le juge Finlayson fait remarquer que les mêmes déclarations ont été faites aux six candidats, que l'objet de l'entrevue était de rendre le poste suffisamment alléchant pour que le candidat retenu l'accepte, et que M. Johnston croyait à la véracité de ce qu'il disait pendant l'entrevue. En outre, il fait remarquer que le juge de première instance a davantage critiqué ce que M. Johnston n'a pas dit que ce qu'il a, en fait, réellement dit. À son avis, toute obligation de diligence a été pleinement respectée, compte tenu des circonstances de l'espèce—il n'y a pas eu de déclaration inexacte faite par négligence (aux pp. 187 et 188):

[TRADUCTION] Monsieur Johnston a été embauché pour superviser le projet Multiview. L'avocat de [l'appelant] a reconnu que la décision de la société de ne pas concentrer son énergie sur ce projet a surpris M. Johnston autant que n'importe qui. Ce dernier croyait ce qu'il disait aux candidats au sujet de Multiview. Le juge de première instance a conclu qu'il était tenu de faire davantage, de signaler les particularités de la procédure interne de prise de décision au sein de Cognos et de souligner que cette procédure n'était pas terminée. En d'autres termes, le fait que, en sa qualité de dirigeant bien informé, il croyait réellement que le programme serait mis en œuvre n'était pas suffisant. Il devait informer tous les candidats qu'il rencontrait de la situation exacte relativement à l'engagement pris par la société à l'égard du développement du nouveau produit, de façon que ceux-ci puissent évaluer eux-mêmes la viabilité du projet.

À mon avis, il en résulte une obligation trop lourde. Cela laisse entendre qu'une relation quasi fiduciaire au

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between corporation and job applicant, giving rise to a duty to make full disclosure. Such a duty can exist in a given "special relationship" required by *Hedley Byrne* . . . but it does not exist in this one. The trial judge was in error in extending to this situation the narrow class of contract cases where *uberrima fides* is the standard.

. . .

In my opinion, while a "special relationship" existed between [the respondent] and the six applicants, any duty of care that arose from it was discharged. I say this without reference to the disclaimer in [the appellant's] contract. Johnston was not obliged to go farther than he did in describing the job prospects. What he said was truthful, he believed in it, that was enough.

There was an appeal and cross-appeal as to damages. Finlayson J.A. held that if, contrary to his view, the appellant's action was successful, he would not have interfered with the assessment of damages made by the trial judge.

III. Issues

I would characterize the issues raised by this appeal as follows:

(1) Disregarding for now the employment agreement signed by the appellant in March of 1983, did the respondent or its representative Mr. Johnston owe a duty of care to the appellant during the pre-employment interview of February 14, 1983, with respect to the representations made to the appellant about the respondent and the nature and existence of the employment opportunity being offered?

(2) If so, again disregarding for now the contract between the parties, did the respondent or its representative Mr. Johnston breach this duty of care in all the circumstances of this case?

(3) If so, should the answers given to questions 1 and 2, or the result that would normally follow from such conclusions (i.e. liability of the respondent for the damages caused to the appellant, fixed by the trial judge at $67,224, upheld by the Court

moins existait entre la société et le candidat, d'où l'obligation de faire une divulgation complète. Cette obligation peut exister lorsqu'il y a un «lien spécial» donné au sens de l'arrêt *Hedley Byrne* [. . .] mais en l'espèce, elle n'existe pas. Le juge de première instance a commis une erreur en rangeant la présente affaire dans la catégorie restreinte des affaires contractuelles dans lesquelles *uberrima fides* est la norme.

. . .

À mon avis, il existait un «lien spécial» entre [l'intimée] et les six candidats, mais toute obligation de diligence en découlant a été respectée. Je dis ceci sans tenir compte de la dénégation figurant dans le contrat [de l'appelant]. Monsieur Johnston n'était pas tenu de faire davantage que ce qu'il a fait en décrivant les perspectives d'emploi. Ce qu'il a dit était vrai, il y croyait, et cela suffisait.

Un appel et un contre-appel ont été interjetés à l'égard des dommages-intérêts. Le juge Finlayson a conclu que si, contrairement à son avis, l'action intentée par l'appelant était accueillie, il ne modifierait pas l'évaluation des dommages-intérêts faite par le juge de première instance.

III. Les questions en litige

Je définirais comme suit les questions qui se posent en l'espèce:

(1) Abstraction faite pour le moment du contrat de travail signé par l'appelant en mars 1983, l'intimée ou son représentant, M. Johnston, avaient-ils une obligation de diligence envers l'appelant pendant l'entrevue de sélection du 14 février 1983, relativement aux déclarations faites à ce dernier au sujet de l'intimée ainsi que de la nature et de l'existence de l'emploi qui était offert?

(2) Dans l'affirmative, abstraction faite pour le moment du contrat entre les parties, l'intimée ou son représentant, M. Johnston, ont-ils violé cette obligation de diligence, compte tenu des circonstances de l'espèce?

(3) Dans l'affirmative, les réponses données aux questions 1 et 2, ou le résultat qu'entraîneraient normalement ces conclusions (à savoir, la responsabilité de l'intimée, pour le préjudice causé à l'appelant, le montant des dommages-intérêts ayant été

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of Appeal, and unchallenged before this Court), be different in any way in view of the fact that the appellant signed an employment agreement after the negligent misrepresentations containing, *inter alia*, a termination "without cause" provision (clause 14) as well as a reassignment provision (clause 13)?

For reasons that follow, I am of the opinion that questions 1 and 2 should be answered in the affirmative and that question 3 should be answered in the negative. The appeal should therefore be allowed and the judgment of White J. in favour of the appellant and granting him damages in the amount of $67,224 should be restored.

IV. Analysis

A. *Introduction*

This appeal involves an action in tort to recover damages caused by alleged negligent misrepresentations made in the course of a hiring interview by an employer (the respondent), through its representative, to a prospective employee (the appellant) with respect to the employer and the nature and existence of the employment opportunity. Though a relatively recent feature of the common law, the tort of negligent misrepresentation relied on by the appellant and first recognized by the House of Lords in *Hedley Byrne*, *supra*, is now an established principle of Canadian tort law. This Court has confirmed on many occasions, sometimes tacitly, that an action in tort may lie, in appropriate circumstances, for damages caused by a misrepresentation made in a negligent manner: see *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg*, [1971] S.C.R. 957; *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189; *Hodgins v. Hydro-Electric Commission of the Township of Nepean*, [1976] 2 S.C.R. 501; *The Pas (Town of) v. Porky Packers Ltd.*, [1977] 1 S.C.R. 51; *Haig v. Bamford*, [1977] 1 S.C.R. 466; *Carman Construction*, *supra*; *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271;

fixé à 67 224 $ par le juge de première instance et confirmé par la Cour d'appel et n'ayant pas été contesté devant notre Cour), devraient-ils être, de quelque façon que ce soit, différents vu que, après les déclarations inexactes faites par négligence, l'appelant a signé un contrat de travail contenant notamment une disposition au sujet du congédiement «sans motif» (clause 14) ainsi qu'une disposition concernant la réaffectation (clause 13)?

Pour les motifs qui suivent, j'estime qu'il y a lieu de répondre aux questions 1 et 2 par l'affirmative et à la question 3 par la négative. Le pourvoi devrait donc être accueilli et le jugement que le juge White a rendu en faveur de l'appelant, dans lequel il accordait à ce dernier des dommages-intérêts de 67 224 $, devrait être rétabli.

IV. Analyse

A. *Introduction*

Le présent pourvoi concerne une action en responsabilité délictuelle pour dommages-intérêts fondée sur des déclarations inexactes qu'aurait faites par négligence à un employé éventuel (l'appelant) un employeur (l'intimée), par l'entremise de son représentant, dans le cadre d'une entrevue d'embauchage, au sujet de l'employeur ainsi que de la nature et de l'existence de l'emploi. Bien qu'il s'agisse d'un élément relativement récent de la common law, le délit de déclaration inexacte faite par négligence sur lequel s'appuie l'appelant et qui a pour la première fois été reconnu par la Chambre des lords dans l'arrêt *Hedley Byrne*, précité, est maintenant reconnu dans le droit canadien de la responsabilité délictuelle. Notre Cour a confirmé à maintes reprises, et parfois tacitement, qu'une action en responsabilité délictuelle peut être intentée, dans les cas appropriés, pour un préjudice découlant d'une déclaration inexacte faite d'une manière négligente: voir *Welbridge Holdings Ltd. c. Metropolitan Corporation of Greater Winnipeg*, [1971] R.C.S. 957; *J. Nunes Diamonds Ltd. c. Dominion Electric Protection Co.*, [1972] R.C.S. 769; *Rivtow Marine Ltd. c. Washington Iron Works*, [1974] R.C.S. 1189; *Hodgins c. Hydro-Electric Commission of the Township of Nepean*, [1976] 2 R.C.S. 501; *Le Pas (Ville de) c. Porky*

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and *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3.

While the doctrine of *Hedley Byrne*, *supra*, is well established in Canada, the exact breadth of its applicability is, like any common law principle, subject to debate and to continuous development. At the time this appeal was heard, there have only been a handful of cases where the tort of negligent misrepresentation was used in a pre-employment context such as the one involved here: see *Steer v. Aerovox Inc.* (1984), 65 N.S.R. (2d) 91 (S.C.T.D.); *H.B. Nickerson & Sons Ltd. v. Wooldridge* (1980), 115 D.L.R. (3d) 97 (N.S.S.C.A.D.); *Williams v. School District No. 63 (Saanich)* (1986), 11 C.C.E.L. 233 (B.C.S.C.), aff'd on other grounds (1987), 17 C.C.E.L. 257 (B.C.C.A.); *Grenier v. Timmins Board of Education*, Ont. H.C., No. 1250/82, May 31, 1984, 26 A.C.W.S. (2d) 285; *Pettit v. Prince George & District Credit Union* (1991), 35 C.C.E.L. 140 (B.C.S.C.); and *Roy v. B.N.P.P. Regional Police Commission* (1986), 15 C.C.E.L. 167 (N.B.Q.B.). Without question, the present factual situation is a novel one for this Court.

Some have suggested that it is inappropriate to extend the application of *Hedley Byrne*, *supra*, to representations made by an employer to a prospective employee in the course of an interview because it places a heavy burden on employers. As will be apparent from my reasons herein, I disagree in principle with this view. However, I find it unnecessary for the purposes of this appeal to engage in a general and abstract discussion on the applicability of the tort of negligent misrepresentation to pre-employment representations. The thrust of the respondent's argument before this Court is not that the appellant's action is unfounded in law. Rather, the respondent argues that the appellant has not made out a case for compensation based on negligent misrepresentation. Accordingly, this appeal may be disposed of simply by considering

Packers Ltd., [1977] 1 R.C.S. 51; *Haig c. Bamford*, [1977] 1 R.C.S. 466; *Carman Construction*, précité; *V.K. Mason Construction Ltd. c. Banque de Nouvelle-Écosse*, [1985] 1 R.C.S. 271; et *Rainbow Industrial Caterers Ltd. c. Compagnie des chemins de fer nationaux du Canada*, [1991] 3 R.C.S. 3.

La doctrine énoncée dans l'arrêt *Hedley Byrne*, précité, est bien établie au Canada, mais l'étendue exacte de son application est, comme tout principe de common law, sujette à controverse et en évolution constante. Au moment où le pourvoi a été entendu, il n'y avait eu que quelques affaires dans lesquelles le délit de déclaration inexacte faite par négligence était utilisé dans un contexte préalable à l'emploi comme celui en l'espèce: voir *Steer c. Aerovox Inc.* (1984), 65 N.S.R. (2d) 91 (C.S.D.P.I.); *H.B. Nickerson & Sons Ltd. c. Wooldridge* (1980), 115 D.L.R. (3d) 97 (C.S.N.-É. Div. app.); *Williams c. School District No. 63 (Saanich)* (1986), 11 C.C.E.L. 233 (C.S.C.-B.) conf. pour d'autres motifs par (1987), 17 C.C.E.L. 257 (C.A.C.B.); *Grenier c. Timmins Board of Education*, H.C. Ont., nº 1250/82, 31 mai 1984, 26 A.C.W.S. (2d) 285; *Pettit c. Prince George & District Credit Union* (1991), 35 C.C.E.L. 140 (C.S.C.-B.); et *Roy c. B.N.P.P. Regional Police Commission* (1986), 15 C.C.E.L. 167 (B.R.N.-B.). La situation de fait ici en cause est indubitablement une situation nouvelle pour notre Cour.

On a laissé entendre qu'il ne convient pas d'étendre l'application de l'arrêt *Hedley Byrne*, précité, aux déclarations qu'un employeur fait à un employé éventuel dans le cadre d'une entrevue, parce que cela impose un lourd fardeau aux employeurs. Mes motifs montreront que je ne souscris pas, en principe, à cet avis. Toutefois, j'estime qu'il est inutile, aux fins du présent pourvoi, d'entamer une discussion générale et abstraite au sujet de l'application du délit de déclaration inexacte faite par négligence aux déclarations préalables à l'emploi. L'essence de l'argument invoqué par l'intimée devant notre Cour n'est pas que l'action intentée par l'appelant n'est pas fondée en droit. L'intimée soutient plutôt que ce dernier n'a pas présenté de preuve à l'appui d'un dédommagement fondé sur une déclaration inexacte faite par

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whether or not the required elements under the *Hedley Byrne* doctrine are established in the facts of this case. In my view, they are.

The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

In particular, White J. found, as a fact, that the respondent's representative, Mr. Johnston, had misrepresented the nature and existence of the employment opportunity for which the appellant had applied, and that the appellant had relied to his detriment on those misrepresentations. These findings of fact were undisturbed by the Court of Appeal and, except for a few passing remarks, the respondent does not challenge them before this Court. Thus, the second, fourth, and fifth requirements are not in question here.

The only issues before this Court deal with the duty of care owed to the appellant in the circumstances of this case and the alleged breach of this duty (i.e., the alleged negligence). The respondent concedes that a "special relationship" existed between itself (through its representative) and the appellant so as to give rise to a duty of care. However, it argues that this duty is negated by a disclaimer contained in the employment contract signed by the appellant more than two weeks after the interview. Furthermore, the respondent argues

négligence. Par conséquent, on pourrait trancher le pourvoi simplement en déterminant si l'existence des éléments requis en vertu de la doctrine énoncée dans l'arrêt *Hedley Byrne* est établie selon les faits de l'espèce. À mon avis, cette existence est établie.

Les éléments requis, pour qu'il soit fait droit à une demande fondée sur l'arrêt *Hedley Byrne* ont été énoncés dans de nombreux arrêts, parfois sous diverses formes. Les arrêts précités de notre Cour donnent à penser qu'il existe cinq conditions générales: (1) il doit y avoir une obligation de diligence fondée sur un «lien spécial» entre l'auteur et le destinataire de la déclaration; (2) la déclaration en question doit être fausse, inexacte ou trompeuse; (3) l'auteur doit avoir agi d'une manière négligente; (4) le destinataire doit s'être fié d'une manière raisonnable à la déclaration inexacte faite par négligence, et (5) le fait que le destinataire s'est fié à la déclaration doit lui être préjudiciable en ce sens qu'il doit avoir subi un préjudice. En l'espèce, le juge de première instance a conclu que tous les éléments étaient présents et a fait droit à la demande de l'appelant.

En particulier, le juge White a tenu pour avéré, que le représentant de l'intimée, M. Johnston, avait fait des déclarations inexactes au sujet de la nature et de l'existence de l'emploi auquel l'appelant s'était porté candidat, et que ce dernier s'était appuyé à son détriment sur ces déclarations inexactes. La Cour d'appel n'a pas modifié ces conclusions de fait et, à l'exception de quelques remarques faites en passant, l'intimée ne les conteste pas devant notre Cour. Par conséquent, les deuxième, quatrième et cinquième conditions n'entrent pas ici en ligne de compte.

Les seules questions qui se posent devant notre Cour portent sur l'obligation de diligence qui existe envers l'appelant compte tenu des circonstances de l'espèce, et sur la violation alléguée de cette obligation (c.-à-d. l'allégation de négligence). L'intimée reconnaît qu'il y avait entre elle (par l'entremise de son représentant) et l'appelant, un «lien spécial» qui donnait lieu à une obligation de diligence. Toutefois, elle soutient que cette obligation est éteinte en raison de la dénégation contenue dans le contrat de travail signé par l'appelant plus

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that any misrepresentations made during the hiring interview were not made in a negligent manner. For reasons that follow, it is my view that both submissions fail.

However, before turning to these issues, I intend to deal with a preliminary matter not directly raised in argument. This appeal was argued before this Court in close proximity to the case *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12. That case involved circumstances somewhat similar to those in the present appeal in that it also dealt with a claim for damages based on an alleged negligent misrepresentation stemming from pre-contractual negotiations. Generally speaking, in *BG Checo* as in the case at bar, it was argued that certain representations made in a pre-contractual setting did not correspond with the post-agreement reality and were made in a negligent manner. In both cases, the defendants relied on the contract signed by the parties subsequent to the alleged negligent misrepresentation in order to bar the plaintiffs' claim in tort. As my conclusion in *BG Checo* is opposite from the one I take herein, I believe it is useful at the outset to explain why this case is clearly distinguishable from *BG Checo*. In doing so, my hope is to clarify some of the confusion which currently exists with respect to pre-contractual negligent misrepresentations.

B. *Preliminary Observations on the Effect of the Employment Agreement on this Appeal*

As I stated in *BG Checo*, it is now clear that an action in tort for negligent misrepresentation may lie even though the relevant parties to the action (i.e., the representee/plaintiff and the representor/defendant) are in a contractual relationship: see *Esso Petroleum Co. v. Mardon*, [1976] 2 All E.R. 5 (C.A.); *Sodd Corporation Inc.*

de deux semaines après l'entrevue. En outre, l'intimée soutient qu'aucune déclaration inexacte faite pendant l'entrevue d'embauchage n'a été faite par négligence. Pour les motifs qui suivent, les deux arguments doivent, à mon avis, être rejetés.

Toutefois, avant d'examiner ces questions, j'ai l'intention de me pencher sur une question préliminaire qui n'a pas directement été soulevée dans l'argumentation. Notre Cour a entendu le présent pourvoi presque en même temps que le pourvoi *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12. Les circonstances de cette affaire sont à peu près semblables à celles de l'espèce, en ce sens qu'il s'agit également d'une action en dommages-intérêts fondée sur une déclaration inexacte qui aurait été faite par négligence dans le cadre de négociations préalables à la passation d'un contrat. De manière générale, dans le pourvoi *BG Checo* comme en l'espèce, on a soutenu que certaines déclarations préalables à la passation du contrat ne correspondaient pas à la réalité, après la passation du contrat, et avaient été faites d'une manière négligente. Dans les deux cas, les défendeurs se sont fondés sur le contrat signé par les parties après les déclarations inexactes qui auraient été faites par négligence pour contester la demande fondée sur la responsabilité délictuelle présentée par les demandeurs. Étant donné que la conclusion que j'ai tirée dans l'arrêt *BG Checo* est contraire à celle que je tire en l'espèce, je crois utile d'expliquer dès le début pourquoi une distinction peut clairement être faite entre les deux affaires. Ce faisant, j'espère dissiper quelque peu la confusion qui existe actuellement en ce qui concerne les déclarations inexactes faites par négligence avant la passation d'un contrat.

B. *Observations préliminaires au sujet de l'effet du contrat de travail sur le présent pourvoi*

Comme je l'ai dit dans l'arrêt *BG Checo*, il est maintenant clair qu'une action en responsabilité délictuelle fondée sur une déclaration inexacte faite par négligence peut être intentée malgré l'existence d'un lien contractuel entre les parties à l'action (à savoir le destinataire de la déclaration ou demandeur et l'auteur de la déclaration ou

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v. Tessis (1977), 17 O.R. (2d) 158 (C.A.); *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 (B.C.C.A.); *Carman Construction, supra*; *V.K. Mason Construction, supra*; *Rainbow Industrial Caterers, supra*; and L. N. Klar, *Tort Law* (1991), at p. 162, n. 89. More particularly, the fact that the alleged negligent misrepresentations are made in a pre-contractual setting, such as during negotiations or in the course of an employment hiring interview, and the fact that a contract is subsequently entered into by the parties do not, in themselves, bar an action in tort for damages caused by said misrepresentations: see, for example, *Esso Petroleum, supra*, and the cases cited above dealing specifically with pre-employment misrepresentation.

This is not to say that the contract in such a case is irrelevant and that a court should dispose of the plaintiff's tort claim independently of the contractual arrangement. On the contrary, depending on the circumstances, the subsequent contract may play a very important role in determining whether or not, and to what extent, a claim for negligent misrepresentation shall succeed. Indeed, as evidenced by my conclusion in *BG Checo*, such a contract can have the effect of negating the action in tort and of confining the plaintiff to whatever remedies are available under the law of contract. On the other hand, even if the tort claim is not barred altogether by the contract, the duty or liability of the defendant with respect to negligent misrepresentations may be limited or excluded by a term of the subsequent contract so as to diminish or extinguish the plaintiff's remedy in tort: see, for example, *Hedley Byrne* (although this case did not involve a contract) and *Carman Construction* (although this case involved mostly post-contractual representations), *supra*. Equally true, however, is that there are cases where the subsequent contract will have no effect whatsoever on the plaintiff's claim for damages in tort. As will be apparent from these reasons, it is my view that the

défendeur): voir *Esso Petroleum Co. c. Mardon*, [1976] 2 All E.R. 5 (C.A.); *Sodd Corporation Inc. c. Tessis* (1977), 17 O.R. (2d) 158 (C.A.); *Kingu c. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 (C.A.C.-B.); *Carman Construction*, précité; *V.K. Mason Construction*, précité; *Rainbow Industrial Caterers*, précité; et L. N. Klar, *Tort Law* (1991), à la p. 162, n. 89. En particulier, le fait que les déclarations inexactes alléguées soient faites avant la passation d'un contrat, par exemple au cours des négociations ou dans le cadre d'une entrevue d'embauchage, et le fait qu'un contrat soit par la suite passé par les parties n'excluent pas, en soi, une action en responsabilité délictuelle pour dommages-intérêts fondée sur lesdites déclarations inexactes: voir, par exemple, l'arrêt *Esso Petroleum*, précité, et les arrêts susmentionnés qui portent expressément sur les déclarations inexactes préalables à l'emploi.

Cela ne veut pas dire qu'en pareil cas le contrat n'est pas pertinent et qu'un tribunal devrait trancher la demande fondée sur la responsabilité délictuelle présentée par le demandeur indépendamment des dispositions contractuelles. Au contraire, selon les circonstances, le contrat subséquent peut avoir une très grande importance lorsqu'il s'agit de déterminer s'il doit être fait droit à une demande fondée sur une déclaration inexacte faite par négligence et dans quelle mesure. De fait, comme en fait foi la conclusion que j'ai tirée dans l'arrêt *BG Checo*, pareil contrat peut avoir pour effet d'exclure l'action fondée sur la responsabilité délictuelle et de restreindre le demandeur à tout recours qu'il peut exercer en vertu du droit des contrats. Par ailleurs, même si le contrat n'exclut pas complètement la demande fondée sur la responsabilité délictuelle, l'obligation ou la responsabilité qui incombe au défendeur en ce qui concerne les déclarations inexactes faites par négligence peut être limitée ou exclue par une condition du contrat subséquent, de façon à restreindre ou à éteindre le recours de nature délictuelle: voir, par exemple, l'arrêt *Hedley Byrne* (bien que, dans cette affaire, il n'était pas question de contrat) et l'arrêt *Carman Construction* (bien que cette affaire se rapporte surtout à des déclarations faites après la passation du contrat), précités. Toutefois, il est également

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employment agreement signed by the appellant in March of 1983 is governed by this last proposition.

When considering the effect of the subsequent contract on the representee's tort action, everything revolves around the nature of the contractual obligations assumed by the parties and the nature of the alleged negligent misrepresentation. The first and foremost question should be whether there is a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which the representee alleges the representor has breached. Put another way, did the pre-contractual representation relied on by the plaintiff become an express term of the subsequent contract? If so, absent any overriding considerations arising from the context in which the transaction occurred, the plaintiff cannot bring a concurrent action in tort for negligent misrepresentation and is confined to whatever remedies are available under the law of contract. The authorities supporting this proposition, including the decision of this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, are fully canvassed in my reasons in *BG Checo*. As alluded to in *BG Checo*, this principle is an exception to the general rule of concurrency espoused by this Court in *Central Trust v. Rafuse*, *supra*.

There lies, in my view, the fundamental difference between the present appeal and *BG Checo*, *supra*. In the latter case, the alleged pre-contractual misrepresentation had been incorporated verbatim as an express term of the subsequent contract. As such, the common law duty of care relied on by the plaintiff in its tort action was co-extensive with a duty imposed on the defendant in contract by an express term of their agreement. Thus, it was my

vrai que, dans certains cas, le contrat subséquent n'aura aucun effet sur l'action en dommages-intérêts intentée par le demandeur en vertu de la responsabilité délictuelle. Comme mes motifs le montreront, j'estime que le contrat de travail signé par l'appelant en mars 1983 est régi par cette dernière proposition.

Dans l'examen de l'effet du contrat subséquent sur l'action en responsabilité délictuelle intentée par le destinataire de la déclaration, tout tourne autour de la nature des obligations contractuelles assumées par les parties et de la nature de la déclaration inexacte qui aurait été faite par négligence. Il s'agit avant tout de savoir si une obligation contractuelle précise a été créée par une condition expresse du contrat qui coïncide avec l'obligation de diligence existant en common law, que, selon le destinataire, l'auteur de la déclaration aurait violée. Autrement dit, la déclaration faite avant la signature du contrat à laquelle le demandeur s'est fié, est-elle devenue une condition expresse du contrat subséquent? Dans l'affirmative, faute d'une considération prépondérante découlant du contexte dans lequel l'affaire a été conclue, le demandeur ne peut pas intenter une action en responsabilité délictuelle concomitante (aussi appelée concurrente) fondée sur une déclaration inexacte faite par négligence, et doit se limiter aux recours prévus par le droit des contrats. Dans mes motifs de l'arrêt *BG Checo*, précité, j'ai fait un examen complet des arrêts à l'appui de cette proposition, et notamment de l'arrêt de notre Cour *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147. Comme je le donne à entendre dans l'arrêt *BG Checo*, il s'agit d'une exception à la règle générale de la concomitance que notre Cour a adoptée dans l'arrêt *Central Trust c. Rafuse*, précité.

À mon avis, c'est là la différence fondamentale entre le présent pourvoi et le pourvoi *BG Checo*, précité. Dans cette dernière affaire, la déclaration inexacte alléguée avait été intégralement incorporée à titre de condition expresse du contrat subséquent. En tant que telle, l'obligation de diligence existant en common law, invoquée par le demandeur dans son action en responsabilité délictuelle, coïncidait avec l'obligation incombant au défen-

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view that the plaintiff was barred from exercising a concurrent action in tort for the alleged breach of said duty, and this view was reinforced by the commercial context in which the transaction occurred. In the case at bar, however, there is no such concurrency. The employment agreement signed by the appellant in March of 1983 does not contain any express contractual obligation co-extensive with the duty of care the respondent is alleged to have breached. The provisions most relevant to this appeal (clauses 13 and 14) contain contractual duties clearly different from, not co-extensive with, the common law duty invoked by the appellant in his tort action.

Had the appellant's action been based on pre-contractual representations concerning the length of his involvement on the Multiview project or his "job security", as characterized by the Court of Appeal, the concurrency question might be resolved differently in light of the termination and reassignment provisions of the contract. However, it is clear that the appellant's claim was not that Mr. Johnston negligently misrepresented the amount of time he would be working on Multiview or the conditions under which his employment could be terminated. In other words, he did not argue that the respondent, through its representative, breached a common law duty of care by negligently misrepresenting his security of employment with Cognos. Rather, the appellant argued that Mr. Johnston negligently misrepresented the nature and existence of the employment opportunity being offered. It is the existence, or reality, of the job being interviewed for, not the extent of the appellant's involvement therein, which is at the heart of this tort action. A close reading of the employment agreement reveals that it contains no express provisions dealing with the respondent's obligations with respect to the nature and existence of the Multiview project. Accordingly, the *ratio decidendi* of my reasons in *BG Checo* is inapplicable to the present appeal. While both cases involve pre-contractual negligent misrepresentations, only

deur en vertu d'une condition expresse du contrat. J'ai donc estimé que le demandeur ne pouvait pas intenter une action en responsabilité délictuelle concomitante par suite de la violation alléguée de ladite obligation, opinion qui était renforcée par le contexte commercial dans lequel l'opération avait été effectuée. Toutefois, en l'espèce, il n'existe aucune concomitance de ce genre. Le contrat de travail que l'appelant a signé en mars 1983 ne comporte aucune obligation contractuelle expresse qui coïncide avec l'obligation de diligence que l'intimée aurait violée. Les dispositions les plus pertinentes en l'espèce (les clauses 13 et 14) prévoient des obligations contractuelles qui sont clairement distinctes de l'obligation de common law invoquée par l'appelant dans l'action en responsabilité délictuelle et qui ne coïncident pas avec ladite obligation.

Si l'action intentée par l'appelant avait été fondée sur des déclarations faites avant la signature du contrat au sujet de la durée de sa participation au projet Multiview ou de la «sécurité d'emploi», pour reprendre l'expression utilisée par la Cour d'appel, la question de la concomitance pourrait bien être réglée différemment compte tenu des dispositions du contrat concernant la cessation d'emploi et la réaffectation. Toutefois, il est clair que l'appelant n'a pas allégué que M. Johnston avait par négligence fait une déclaration inexacte au sujet de la période pendant laquelle il travaillerait au projet Multiview ou au sujet des conditions en vertu desquelles il pouvait être mis fin à son emploi. En d'autres termes, il n'a pas soutenu que, par l'entremise de son représentant, l'intimée a violé une obligation de diligence existant en common law en faisant par négligence une déclaration inexacte au sujet de sa sécurité d'emploi auprès de Cognos. L'appelant a plutôt soutenu que M. Johnston a par négligence fait une déclaration inexacte au sujet de la nature et de l'existence de l'emploi qui était offert. C'est l'existence, ou la réalité, de l'emploi en question, et non l'étendue de la participation de l'appelant, qui constitue le nœud de l'action en responsabilité délictuelle en l'espèce. La lecture minutieuse du contrat de travail révèle que celui-ci ne comporte aucune disposition expresse au sujet des obligations de l'intimée en ce

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BG Checo involved an impermissible concurrent liability in tort and contract, an exception to the general rule of concurrency set out in *Central Trust v. Rafuse*, *supra*. The case at bar does not involve concurrency at all, let alone an exception thereto.

Having said this, it does not follow that the employment agreement is irrelevant to the disposition of this appeal. As I mentioned earlier, even if the tort claim is not barred altogether by the contract as in *BG Checo*, the duty or liability of the representor in tort may be limited or excluded by a term of the subsequent contract. In this respect, the respondent submits that the Court of Appeal was correct in finding that clauses 13 and 14 of the employment agreement represent a valid disclaimer for the misrepresentations allegedly made during the hiring interview, thereby negating any duty of care. I shall return to this issue in the last part of my reasons. I prefer to deal next with the questions of whether the respondent or its representative owed a duty of care to the appellant during the pre-employment interview and, if so, whether there was a breach of this duty in all the circumstances of this case.

C. *The Duty of Care Owed to the Appellant*

The respondent concedes that it itself and its representative, Mr. Johnston, owed a duty of care towards the six job applicants being interviewed, including the appellant, not to make negligent misrepresentations as to Cognos and the nature and permanence of the job being offered. In so doing, it accepts as correct the findings of both the trial judge and the Court of Appeal that there existed between the parties a "special relationship" within the meaning of *Hedley Byrne*, *supra*.

qui concerne la nature et l'existence du projet Multiview. Par conséquent, la *ratio decidendi* de mes motifs dans l'arrêt *BG Checo* ne s'applique pas en l'espèce. Les deux affaires portent sur des déclarations inexactes faites par négligence avant la passation d'un contrat, mais seule l'affaire *BG Checo* concerne une responsabilité concomitante prohibée en droit de la responsabilité délictuelle et en droit des contrats, une exception à la règle générale de la concomitance établie dans l'arrêt *Central Trust c. Rafuse*, précité. En l'espèce, il n'est pas du tout question de la concomitance, et encore moins d'une exception y afférente.

Cela dit, il ne s'ensuit pas que le contrat de travail n'est pas pertinent dans le présent pourvoi. Comme je l'ai déjà mentionné, même si le contrat n'exclut pas la demande fondée sur la responsabilité délictuelle, comme c'était le cas dans le pourvoi *BG Checo*, le devoir ou l'obligation de l'auteur de la déclaration sur le plan délictuel peut être limité ou exclu par une condition du contrat subséquent. À cet égard, l'intimée soutient que la Cour d'appel a eu raison de conclure que les clauses 13 et 14 du contrat de travail constituent une dénégation valide des déclarations inexactes qui auraient été faites pendant l'entrevue d'embauchage, de sorte que l'obligation de diligence est annulée. Je reviendrai sur la question dans la dernière partie de mes motifs. Je préfère examiner maintenant la question de savoir si, pendant l'entrevue de sélection, l'intimée ou son représentant avaient une obligation de diligence envers l'appelant et, dans l'affirmative, si cette obligation a été violée compte tenu des circonstances de l'espèce.

C. *L'obligation de diligence envers l'appelant*

L'intimée concède qu'elle et son représentant, M. Johnston, avaient une obligation de diligence envers les six candidats qui subissaient une entrevue, dont l'appelant, à savoir qu'elle ne devait pas faire par négligence des déclarations inexactes au sujet de Cognos ou de la nature et de la permanence de l'emploi offert. Ce faisant, elle reconnaît l'exactitude des conclusions tirées par le juge de première instance et par la Cour d'appel, selon lesquelles il existait entre les parties un «lien spécial» au sens de l'arrêt *Hedley Byrne*, précité.

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In my view, this concession is a sensible one. Without a doubt, when all the circumstances of this case are taken into account, the respondent and Mr. Johnston were under an obligation to exercise due diligence throughout the hiring interview with respect to the representations made to the appellant about Cognos and the nature and existence of the employment opportunity.

There is some debate in academic circles, fuelled by various judicial pronouncements, about the proper test that should be applied to determine when a "special relationship" exists between the representor and the representee which will give rise to a duty of care. Some have suggested that "foreseeable and reasonable reliance" on the representations is the key element to the analysis, while others speak of "voluntary assumption of responsibility" on the part of the representor. Recently, in *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (H.L.), a case unlike the present one in that there the whole issue revolved around the existence of a duty of care, the House of Lords suggested that three criteria determine the imposition of a duty of care: foreseeability of damage, proximity of relationship, and the reasonableness or otherwise of imposing a duty.

For my part, I find it unnecessary—and unwise in view of the respondent's concession—to take part in this debate. Regardless of the test applied, the result which the circumstances of this case dictate would be the same. It was foreseeable that the appellant would be relying on the information given during the hiring interview in order to make his career decision. It was reasonable for the appellant to rely on said representations. There is nothing before this Court that suggests that the respondent was not, at the time of the interview or shortly thereafter, assuming responsibility for what was being represented to the appellant by Mr. Johnston. As noted by the trial judge, Mr. Johnston discussed the Multiview project in an unqualified manner, without making any relevant *caveats*. The alleged disclaimers of responsibility are provisions of a

À mon avis, cette concession est sensée. Sans doute, si l'on tient compte des circonstances de l'espèce, l'intimée et M. Johnston étaient obligés de faire preuve de diligence raisonnable pendant toute l'entrevue d'embauchage en ce qui concerne les déclarations qui étaient faites à l'appelant au sujet de Cognos ou de la nature et de l'existence de l'emploi.

Dans les milieux universitaires, il existe une certaine controverse, alimentée par divers prononcés judiciaires, quant au critère qu'il convient d'appliquer pour déterminer dans quelles circonstances il existe entre l'auteur d'une déclaration et son destinataire un «lien spécial» qui donne lieu à une obligation de diligence. Certains ont laissé entendre que l'élément fondamental de l'examen est qu'il est [TRADUCTION] «prévisible et raisonnable qu'on se fiera» aux déclarations, mais d'autres parlent du fait que l'auteur de la déclaration [TRADUCTION] «engage volontairement sa responsabilité». Récemment, dans l'arrêt *Caparo Industries plc c. Dickman*, [1990] 1 All E.R. 568 (H.L.), une affaire différente à ceux de l'espèce en ce sens que tout le litige concernait l'existence d'une obligation de diligence, la Chambre des lords a laissé entendre que l'obligation de diligence est fonction de trois critères: la prévisibilité du préjudice, l'étroitesse des liens entre les intéressés et le fait qu'il soit raisonnable ou non d'imposer une obligation.

Pour ma part, j'estime qu'il est inutile—et peu sage, compte tenu de la concession faite par l'intimée—d'intervenir dans cette controverse. Indépendamment du critère appliqué, le résultat dicté par les circonstances de l'espèce serait le même. Il était prévisible que l'appelant se fierait aux renseignements donnés pendant l'entrevue d'embauchage pour prendre une décision au sujet de sa carrière. Il était raisonnable qu'il se fie à ces déclarations. Rien de ce qui a été présenté devant notre Cour ne semble indiquer qu'au moment de l'entrevue ou peu de temps après, l'intimée n'assumait pas la responsabilité de ce que M. Johnston disait à l'appelant. Comme le juge de première instance l'a fait remarquer, M. Johnston a parlé du projet Multiview en termes catégoriques, sans faire quelque mise en garde que ce soit à ce sujet. Les

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contract signed more than two weeks after the interview. For reasons that I give in the last part of this analysis, these provisions are not valid disclaimers. They do not negate the duty of care owed to the appellant or prevent it from arising as in *Hedley Byrne* and *Carman Construction*, *supra*. It was foreseeable to the respondent and its representative that the appellant would sustain damages should the representations relied on prove to be false and negligently made. There was, undoubtedly, a relationship of proximity between the parties at all material times. Finally, it is not unreasonable to impose a duty of care in all the circumstances of this case; quite the contrary, it would be unreasonable not to impose such a duty. In short, therefore, there existed between the parties a "special relationship" at the time of the interview. The respondent and its representative Mr. Johnston were under a duty of care during the pre-employment interview to exercise reasonable care and diligence in making representations as to the employer and the employment opportunity being offered.

Although it was not argued before this Court, I wish to add what is implicit in my acceptance of the respondent's concession, namely, that I reject the so-called restrictive approach as to who can owe a *Hedley Byrne* duty of care, often associated with the majority judgment in *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt*, [1971] A.C. 793 (P.C.). In my opinion, confining this duty of care to "professionals" who are in the business of providing information and advice, such as doctors, lawyers, bankers, architects, and engineers, reflects an overly simplistic view of the analysis required in cases such as the present one. The question of whether a duty of care with respect to representations exists depends on a number of considerations including, but not limited to, the representor's profession. While this factor may provide a good indication as to whether a "special relationship" exists between the parties, it should not be treated in all cases as a threshold requirement. There may be sit-

dénégations de responsabilité alléguées sont des dispositions d'un contrat signé plus de deux semaines après l'entrevue. Pour les raisons que j'énoncerai à la fin de cette analyse, ces dispositions ne constituent pas des dénégations valides. Elles n'annulent pas l'obligation de diligence qui existe envers l'appelant ni n'empêchent cette obligation d'être soulevée, comme c'était le cas dans les arrêts *Hedley Byrne* et *Carman Construction*, précités. L'intimée et son représentant pouvaient prévoir que l'appelant subirait un préjudice si les déclarations sur lesquelles ce dernier s'était appuyé se révélaient fausses et faites par négligence. Sans aucun doute, il existait, à tout moment pertinent, des liens suffisamment étroits entre les parties. Enfin, il n'est pas déraisonnable d'imposer une obligation de diligence, compte tenu des circonstances de l'espèce; bien au contraire, il serait déraisonnable de ne pas imposer pareille obligation. Bref, il existait donc un «lien spécial» entre les parties au moment de l'entrevue. L'intimée et son représentant, M. Johnston, avaient une obligation de diligence pendant l'entrevue de sélection et ils étaient tenus de faire preuve d'une prudence et d'une diligence raisonnables en faisant des déclarations au sujet de l'employeur et de l'emploi offert.

La chose n'a pas été débattue devant notre Cour, mais je veux ajouter ce qui est implicite lorsque je retiens la concession faite par l'intimée, à savoir que je rejette ce qu'on appelle la méthode restrictive lorsqu'il s'agit de déterminer qui peut avoir une obligation de diligence au sens de l'arrêt *Hedley Byrne*, qui est souvent associé au jugement rendu par la majorité dans l'arrêt *Mutual Life and Citizens' Assurance Co. Ltd. c. Evatt*, [1971] A.C. 793 (C.P.). À mon avis, limiter cette obligation de diligence aux «professionnels» dont la tâche consiste à fournir des renseignements et des conseils, comme les médecins, les avocats, les banquiers, les architectes et les ingénieurs, est adopter une vue trop simpliste au sujet de l'examen requis dans des affaires comme la présente espèce. La question de savoir si une obligation de diligence existe à l'égard des déclarations dépend d'un certain nombre de considérations, notamment de la profession de l'auteur. Ce facteur peut constituer une bonne

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uations where the surrounding circumstances provide sufficient indicia of a duty of care, notwithstanding the representor's profession. Indeed, the case at bar is a good example. I find support for a more flexible approach on this question in a number of authorities: see, for example, the dissenting reasons of Lord Reid and Lord Morris in *Mutual Life*, *supra*; *Esso Petroleum*, *supra*; *Howard Marine and Dredging Co. v. A. Ogden & Sons (Excavations) Ltd.*, [1978] Q.B. 574 (C.A.); *Shaddock & Associates Pty. Ltd. v. Parramatta City Council* (1981), 150 C.L.R. 225 (H.C. Aust.); *Blair v. Canada Trust Co.* (1986), 38 C.C.L.T. 300 (B.C.S.C.); *Nelson Lumber Co. v. Koch* (1980), 13 C.C.L.T. 201 (Sask. C.A.); and A. M. Linden, *Canadian Tort Law* (4th ed. 1988), at pp. 400-404.

D. *The Breach of the Duty of Care*

(1) Introduction

The next issue deals with whether the above duty of care was breached during the course of the pre-employment interview of February 14, 1983. The main question to be addressed here is whether the misrepresentations of Mr. Johnston during the interview were negligently made, as found by the trial judge.

In order to answer this question, it will be necessary to determine the nature and extent of the duty of care owed to the appellant in the circumstances of this case or, as I prefer to characterize it, the standard of care imposed by law on the respondent and its representative. Specifically, we must ask ourselves whether it is sufficient, in law, that Mr. Johnston was truthful during the interview and that he believed in what he was representing, as found by the Court of Appeal, or whether something more was required of him.

I will also deal under this heading with a subissue raised by the respondent, namely, the nature of the misrepresentations made in the case at bar. As

indication lorsqu'il s'agit de savoir s'il existe un «lien spécial» entre les parties, mais il ne devrait pas toujours être considéré comme une condition préliminaire. Il peut y avoir des cas dans lesquels les circonstances indiquent suffisamment l'existence d'une obligation de diligence, quelle que soit la profession de l'auteur de la déclaration. De fait, la présente espèce en est un bon exemple. Je me fonde sur un certain nombre d'arrêts pour préconiser une méthode plus souple à cet égard: voir, par exemple, les motifs de dissidence de lord Reid et lord Morris dans l'arrêt *Mutual Life*, précité; *Esso Petroleum*, précité; *Howard Marine and Dredging Co. c. A. Ogden & Sons (Excavations) Ltd.*, [1978] Q.B. 574 (C.A.); *Shaddock & Associates Pty. Ltd. c. Parramatta City Council* (1981), 150 C.L.R. 225 (H.C. Austr.); *Blair c. Canada Trust Co.* (1986), 38 C.C.L.T. 300 (C.S.C.-B.); *Nelson Lumber Co. c. Koch* (1980), 13 C.C.L.T. 201 (C.A. Sask.); et A. M. Linden, *La responsabilité civile délictuelle*, (4e éd. 1988), aux pp. 483 à 488.

D. *La violation de l'obligation de diligence*

(1) Introduction

Il s'agit maintenant de savoir si ladite obligation de diligence a été violée pendant l'entrevue de sélection qui a eu lieu le 14 février 1983. Il faut principalement déterminer si les déclarations inexactes de M. Johnston pendant l'entrevue ont été faites par négligence, comme l'a conclu le juge de première instance.

Pour répondre à cette question, il y a lieu de déterminer la nature et l'étendue de l'obligation de diligence existant envers l'appelant, compte tenu des circonstances de l'espèce, ou comme je préfère l'appeler, de la norme de diligence que la loi impose à l'intimée et à son représentant. En particulier, nous devons nous demander s'il suffit, en droit, que M. Johnston ait été sincère pendant l'entrevue et qu'il ait cru ce qu'il disait, comme la Cour d'appel l'a conclu, ou s'il était tenu de faire davantage.

J'examinerai également sous cette rubrique une question accessoire que l'intimée a soulevée, au sujet de la nature des déclarations inexactes qui ont

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previously noted, the trial judge found as a fact that some of the representations made to the appellant in the course of the pre-employment interview were misrepresentations in the sense that they were inaccurate or misleading. This finding, made on the basis of White J.'s assessment of all the evidence, was not disturbed in any way by the Court of Appeal. The respondent is not challenging—at least not directly—this finding of fact before this Court. However, it is arguing that regardless of any negligence these misrepresentations are not actionable at law under the *Hedley Byrne* principle because they depend on inferences or implications rather than on direct and express statements, and because they relate to a future expectation. I shall address this submission following my review of the relevant standard of care and of its application to the facts of this case.

(2) The Standard of Care Imposed on the Respondent

According to Finlayson J.A., the duty imposed on the respondent and its representative is "no more than a duty to take care that the representations made were responsible and accurate to the knowledge of Johnston and of his principal, Cognos" (p. 186). In his view, Mr. Johnston was not obliged to go further than he did in describing the employment opportunity to the appellant: "What he said was truthful, he believed in it, that was enough" (p. 188).

Before this Court, the respondent adopts the position of Finlayson J.A. with respect to the applicable standard of care. It also adopts his finding that the trial judge erred in imposing a higher standard than was required in the circumstances, namely, a standard of disclosure to the appellant concerning the extent of the respondent's financial commitment to the Multiview project. It is submitted that the trial judge's approach is an unwarranted extension to the law of master/servant of a quasi-fiduciary duty of *uberrima fides*. Finally, the respondent adopts the finding of Finlayson J.A. that the duty of care imposed on the respondent and its representative was fully discharged. In this

été faites en l'espèce. Comme je l'ai déjà fait remarquer, le juge de première instance a tenu pour avéré que certaines déclarations faites à l'appelant dans le cadre de l'entrevue de sélection étaient inexactes en ce sens qu'elles étaient erronées ou trompeuses. La Cour d'appel n'a aucunement modifiée cette conclusion fondée sur l'appréciation de la preuve dans son ensemble faite par le juge White. L'intimée ne conteste pas—du moins pas directement—cette conclusion de fait devant notre Cour. Toutefois, elle soutient qu'indépendamment de toute négligence, ces déclarations inexactes n'ouvrent pas droit à une poursuite en vertu du principe énoncé dans l'arrêt *Hedley Byrne*, parce qu'elles dépendent de déductions ou de suppositions plutôt que de déclarations directes et expresses, et parce qu'elles se rapportent à une attente future. Je me pencherai sur cet argument après avoir examiné la norme de diligence pertinente et son application aux faits de l'espèce.

(2) La norme de diligence imposée à l'intimée

Selon le juge Finlayson, l'obligation qui incombe à l'intimée et à son représentant est [TRADUCTION] «tout au plus une obligation de veiller à ce que les déclarations faites soient réfléchies et exactes, à la connaissance de M. Johnston et de son commettant, Cognos» (à la p. 186). À son avis, M. Johnston n'était pas tenu de faire plus que ce qu'il a fait en décrivant la perspective d'emploi à l'appelant: [TRADUCTION] «Ce qu'il a dit était vrai, il y croyait, et cela suffisait» (à la p. 188).

Devant notre Cour, l'intimée adopte la position du juge Finlayson, en ce qui concerne la norme de diligence applicable. Elle adopte également la conclusion, tirée par ce dernier, que le juge de première instance a commis une erreur en imposant une norme plus élevée que celle qui est requise compte tenu des circonstances, à savoir, une norme selon laquelle il fallait divulguer à l'appelant l'étendue de l'engagement financier pris par l'intimée à l'égard du projet Multiview. On soutient que la position que le juge de première instance a prise constitue une application injustifiée au droit relatif aux employeurs et employés de l'obligation quasi fiduciaire d'*uberrima fides*. Enfin, l'intimée fait

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respect, the respondent emphasizes the fact that the recruitment process for the position in question had been commenced by Mr. Johnston with full knowledge and support of a number of senior executives of the respondent, and that there was in fact a "commitment" of the respondent to develop Multiview in the way outlined by Mr. Johnston during the interview.

The appellant characterizes the applicable standard of care in a somewhat different manner. He submits that the respondent's duty of care required that both it itself and Mr. Johnston take reasonable steps to avoid conveying information to the appellant about his prospective employment that was materially inaccurate or misleading. According to him, this duty also required them to put themselves "in the appellant's shoes" in assessing the possible impact of their representations on his career choices. In particular, it is argued that they had a duty to consider what inferences the appellant would probably make from the pre-employment statements. The appellant concedes that this standard appears to be high; however, he submits that it is justified in a pre-employment situation based on a number of "policy considerations". Finally, the appellant argues that the applicable standard requires not only that an employer provide accurate information regarding the employment opportunity, but it also requires that he or she provide complete information, viz. full disclosure. In the case at bar, the appellant submits that the duty of care was not discharged since the information provided by Mr. Johnston was incomplete; there was no mention of the absence of a financial commitment. In any event, it is submitted that there was negligence even under a lower standard of care because the respondent and its representative did not ensure that the information provided, both expressly and impliedly, was accurate.

In my view, the relevant standard of care is neither the one advanced by the respondent and the Court of Appeal nor the one proposed by the appellant. The former is too low as it equates, in

sienne la conclusion du juge Finlayson qu'elle et son représentant se sont pleinement acquittés de l'obligation de diligence qui leur incombait. À cet égard, l'intimée met l'accent sur le fait que la procédure de recrutement pour le poste en question avait été engagée par M. Johnston au su et avec l'appui d'un certain nombre de ses hauts dirigeants et qu'il existait en fait un «engagement» à mettre au point Multiview de la façon décrite par M. Johnston pendant l'entrevue.

L'appelant décrit la norme de diligence applicable d'une manière assez différente. Il soutient que l'obligation de diligence qui incombait à l'intimée obligeait cette dernière ainsi que M. Johnston à prendre des mesures raisonnables pour éviter de lui fournir des renseignements erronés ou trompeurs sur des points importants quant à son emploi éventuel. Selon lui, cette obligation les obligeait également à se mettre à sa place en évaluant l'effet que pourraient avoir leurs déclarations sur son choix de carrière. En particulier, il soutient qu'ils étaient obligés de tenir compte des déductions que l'appelant ferait probablement à partir de leurs déclarations. L'appelant convient que cette norme semble élevée, mais, soutient-il, la chose est justifiée dans une situation de préembauchage compte tenu d'un certain nombre de «considérations de principe». Enfin, l'appelant prétend que, selon la norme applicable, non seulement l'employeur doit fournir des renseignements exacts au sujet de la perspective d'emploi, mais il doit également fournir des renseignements complets, c'est-à-dire faire une divulgation complète. En l'espèce, l'appelant soutient que l'obligation de diligence n'a pas été respectée, étant donné que les renseignements fournis par M. Johnston étaient incomplets; il n'a pas été question de l'absence d'engagement financier. Quoi qu'il en soit, il affirme qu'il y a eu négligence même selon une norme de diligence moins élevée, parce que l'intimée et son représentant ne se sont pas assurés de l'exactitude des renseignements expressément ou implicitement fournis.

À mon avis, la norme de diligence pertinente n'est ni celle que l'intimée et la Cour d'appel ont avancée ni celle que l'appelant propose. La première est trop souple car elle assimile essentielle-

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essence, a duty of care with a duty of common honesty. On the other hand, the standard of care proposed by the appellant is too onerous as it is tantamount to requiring full disclosure from employers during pre-employment interviews. This Court has been presented with no compelling reasons to treat representations made in an employment context differently from representations made in any other context. It is unfortunate that the appellant has spent considerable time in his argument trying to convince this Court to recognize a fundamentally new standard of care, specific to the employment context. Clearly, the standard of care normally required by law is sufficient to dispose of this appeal in the appellant's favour. Upholding the trial judge's finding of negligence does not require an expansion of tort law into previously uncharted and hence unknown waters. Rather, it simply requires an application of well established principles of the law of negligence.

The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading: see *Hedley Byrne*, *supra*, at p. 486, *per* Lord Reid; *Hodgins v. Hydro-Electric Commission*, *supra*, at pp. 506-9, *per* Ritchie J. for the majority of this Court; *H.B. Nickerson & Sons v. Wooldridge*, *supra*, at pp. 135-36; J. G. Fleming, *The Law of Torts* (7th ed. 1987), at pp. 96-104 and 614; Linden, *supra*, at pp. 105-19; and Klar, *supra*, at pp. 159-60. Professor Klar provides some useful insight on this issue (at p. 160):

> An advisor does not guarantee the accuracy of the statement made, but is only required to exercise reasonable care with respect to it. As with the issue of standard of care in negligence in general, this is a question of fact which must be determined according to the circum-

ment l'obligation de diligence à une obligation d'honnêteté ordinaire. Par contre, la norme de diligence proposée par l'appelant est trop lourde car elle équivaut à exiger de l'employeur la divulgation complète pendant les entrevues de préembauchage. On n'a présenté à notre Cour aucun motif impérieux permettant de considérer les déclarations faites dans le contexte d'un emploi d'une manière différente de celles qui sont faites dans un autre contexte. Il est malheureux que l'appelant ait passé beaucoup de temps, dans son argumentation, à tenter de convaincre notre Cour de reconnaître une norme de diligence fondamentalement nouvelle, propre au contexte de l'emploi. De toute évidence, la norme de diligence normalement requise par la loi est suffisante pour trancher le présent pourvoi en faveur de l'appelant. Confirmer la conclusion de négligence tirée par le juge de première instance n'exige pas qu'on étende le droit de la responsabilité délictuelle à un domaine non encore exploré et par conséquent inconnu. Cela exige plutôt simplement une application de principes bien établis du droit en matière de négligence.

La norme de diligence applicable devrait être celle qui est utilisée dans toute affaire de négligence, à savoir celle universellement reconnue, quoique hypothétique, de la «personne raisonnable». La norme de diligence requise d'une personne qui fait des déclarations est objective. Il s'agit de l'obligation de faire preuve de la diligence raisonnable requise par les circonstances pour que les déclarations faites soient exactes et non trompeuses: voir *Hedley Byrne*, précité, à la p. 486, lord Reid; *Hodgins c. Hydro-Electric Commission*, précité, aux pp. 506 à 509, le juge Ritchie au nom de notre Cour à la majorité; *H.B. Nickerson & Sons c. Wooldridge*, précité, aux pp. 135 et 136; J. G. Fleming, *The Law of Torts* (7e éd. 1987), aux pp. 96 à 104 et 614; Linden, *op. cit.*, aux pp. 129 à 146; et Klar, *op. cit.*, aux pp. 159 et 160. Le professeur Klar donne un aperçu utile de la question (à la p. 160):

> [TRADUCTION] Un conseiller ne garantit pas l'exactitude de la déclaration qui est faite, mais il est uniquement tenu de faire preuve d'une diligence raisonnable à cet égard. Comme c'est le cas pour la norme de diligence applicable en matière de négligence en général, il

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stances of the case. Taking into account the nature of the occasion, the purpose for which the statement was made, the foreseeable use of the statement, the probable damage which will result from an inaccurate statement, the status of the advisor and the level of competence generally observed by others similarly placed, the trier of fact will determine whether the advisor was negligent.

In my opinion, the trial judge did not depart from the applicable standard of care in rendering his decision. He found that, "in all the circumstances", the misrepresentations made by the respondent's representative were negligently made. Unlike the Court of Appeal, I find no reason to interfere with his careful and considered finding on this point.

As I see it, the Court of Appeal erred in two important respects when it interfered with White J.'s finding of negligence. First, it mischaracterized his reasons on the negligence issue. Finlayson J.A. said the following (at p. 187):

The trial judge found that [Mr. Johnston] had a duty to go further and to point out the details of the internal decision-making process at Cognos and stress that that process had not been completed. In other words, his own *bona fide* belief as a knowledgeable executive that the program was going forward was not sufficient. He had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment of the viability of the project.

In my opinion, this casts the duty too high. It suggests that at least a quasi-fiduciary relationship existed between corporation and job applicant, giving rise to a duty to make full disclosure.

Unlike Finlayson J.A., I do not read the trial judge's reasons as suggesting that the respondent and its representative had a duty to make "full disclosure" in the sense described above, and that the respondent was liable for a failure to meet this duty. Rather, I read his reasons as suggesting that, in all the circumstances of this case, Mr. Johnston

s'agit d'une question de fait qui dépend des circonstances de l'affaire. Compte tenu de la nature de l'occasion, du but dans lequel la déclaration a été faite, de l'utilisation prévisible de la déclaration, du préjudice probable qu'occasionnera une déclaration inexacte, du statut du conseiller et du degré de compétence dont font généralement preuve les autres personnes dans une situation similaire, le juge des faits déterminera si le conseiller a été négligent.

À mon avis, le juge de première instance ne s'est pas écarté de la norme de diligence applicable en rendant sa décision. Il a conclu que [TRADUCTION] «compte tenu de toutes les circonstances», le représentant de l'intimée a fait les déclarations inexactes par négligence. Contrairement à la Cour d'appel, je ne vois rien qui me permette de modifier la conclusion minutieuse et réfléchie qu'il a tirée sur ce point.

À mon avis, la Cour d'appel a commis deux erreurs importantes lorsqu'elle a modifié la conclusion de négligence tirée par le juge White. En premier lieu, elle a mal décrit ses motifs en ce qui concerne la question de la négligence. Le juge Finlayson a dit (à la p. 187):

[TRADUCTION] Le juge de première instance a conclu que [M. Johnston] était tenu de faire davantage, de signaler les particularités de la procédure interne de prise de décision au sein de Cognos et de souligner que cette procédure n'était pas terminée. En d'autres termes, le fait que, en sa qualité de dirigeant bien informé, il croyait réellement que le programme serait mis en œuvre n'était pas suffisant. Il devait informer tous les candidats qu'il rencontrait de la situation exacte relativement à l'engagement pris par la société à l'égard du développement du nouveau produit, de façon que ceux-ci puissent évaluer eux-mêmes la viabilité du projet.

À mon avis, il en résulte une obligation trop lourde. Cela laisse entendre qu'une relation quasi fiduciaire au moins existait entre la société et le candidat, d'où l'obligation de faire une divulgation complète.

Contrairement au juge Finlayson, je n'interprète pas les motifs du juge de première instance comme laissant entendre que l'intimée et son représentant étaient tenus de faire une «divulgation complète» au sens décrit ci-dessus, et que l'intimée devait répondre de l'omission de respecter cette obligation. J'interprète plutôt ses motifs comme donnant

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breached a duty to exercise reasonable care by, *inter alia*, representing the employment opportunity in the way he did without, at the same time, informing the appellant about the precarious nature of the respondent's financial commitment to the development of Multiview. In reality, the trial judge did not impose a duty to make full disclosure on the respondent and its representative. He simply imposed a duty of care, the respect of which required, among other things and in the circumstances of this case, that the appellant be given highly relevant information about the nature and existence of the employment opportunity for which he had applied.

There are many reported cases in which a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made: see, for example, *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.), at p. 147, aff'd (1977), 17 O.R. (2d) 529 (C.A.); *Grenier v. Timmins Board of Education*, *supra*; *H.B. Nickerson & Sons v. Wooldridge*, *supra*; *Hendrick v. De Marsh* (1984), 45 O.R. (2d) 463 (H.C.), aff'd on other grounds (1986), 54 O.R. (2d) 185 (C.A.); *Steer v. Aerovox*, *supra*; *W. B. Anderson & Sons Ltd. v. Rhodes (Liverpool), Ltd.*, [1967] 2 All E.R. 850 (Liverpool Assizes); and *V.K. Mason Construction*, *supra*. In the last case, Wilson J. said the following speaking for this Court (at p. 284):

> The statement was negligent because it was made without revealing that the Bank was giving an assurance based solely on a loan arrangement which Mason had already said was insufficient assurance to it of the existence of adequate financing.

In so doing, these cases and the trial judgment in the case at bar are not applying a standard of *uberrima fides* to the transactions involved therein. Quite frankly, this notion is irrelevant to a determination of whether the representor has breached a common law duty of care in tort. These decisions simply reflect the applicable law by taking into account all relevant circumstances in deciding

à entendre que, compte tenu de toutes les circonstances de l'espèce, M. Johnston a violé l'obligation de faire preuve d'une diligence raisonnable, notamment en décrivant la perspective d'emploi comme il l'a fait, sans en même temps informer l'appelant de la nature précaire de l'engagement financier pris par l'intimée à l'égard du développement de Multiview. En réalité, le juge de première instance n'a pas imposé à l'intimée et à son représentant l'obligation de faire une divulgation complète. Il a simplement imposé une obligation de diligence qui, pour être respectée, exigeait en l'occurrence, entre autres choses, qu'on fournisse à l'appelant des renseignements très pertinents au sujet de la nature et de l'existence de l'emploi auquel il s'était porté candidat.

Il existe de nombreux arrêts dans lesquels l'omission de divulguer des renseignements très pertinents a été prise en considération lorsqu'il s'est agi de déterminer si une déclaration inexacte avait été faite par négligence: voir, par exemple, *Fine's Flowers Ltd. c. General Accident Assurance Co.* (1974), 5 O.R. (2d) 137 (H.C.), à la p. 147, conf. par (1977), 17 O.R. (2d) 529 (C.A.); *Grenier c. Timmins Board of Education*, précité; *H.B. Nickerson & Sons c. Wooldridge*, précité; *Hendrick c. De Marsh* (1984), 45 O.R. (2d) 463 (H.C.) conf. pour d'autres motifs par (1986), 54 O.R. (2d) 185 (C.A.); *Steer c. Aerovox*, précité; *W. B. Anderson & Sons Ltd. c. Rhodes (Liverpool), Ltd.*, [1967] 2 All E.R. 850 (Liverpool Assizes); et *V.K. Mason Construction*, précité. Dans ce dernier arrêt, le juge Wilson, qui parlait au nom de notre Cour, a dit (à la p. 284):

> La déclaration a été faite avec négligence parce que la Banque n'a pas révélé qu'elle donnait cette assurance en fonction des seules conditions du prêt que Mason avait déjà considérées comme une garantie insuffisante de l'existence d'un financement adéquat.

Ce faisant, ces arrêts et le jugement rendu en première instance en l'espèce n'appliquent pas la norme de l'*uberrima fides* aux opérations en cause. À vrai dire, cette notion n'est pas pertinente lorsqu'il s'agit de déterminer si l'auteur de la déclaration a violé l'obligation de diligence en matière délictuelle qui existe en common law. Ces décisions traduisent simplement le droit applicable en

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whether the representor's conduct was negligent. In some cases, this includes the failure to divulge highly pertinent information.

The second error made by the Court of Appeal is that it substituted for the "higher" standard of care allegedly imposed by the trial judge, a standard well below the one required by law. Once again, it is worth repeating the final words of Finlayson J.A. on the negligence issue: "Johnston was not obliged to go farther than he did in describing the job prospects. What he said was truthful, he believed in it, that was enough" (p. 188). In essence, the Court of Appeal reduced a common law duty of care to a duty of common honesty. Undoubtedly, the latter duty existed in the case at bar, as it exists during any pre-contractual negotiations.

However, the duty of care owed by a representor to a representee, when there exists a "special relationship" within the meaning of *Hedley Byrne, supra*, is distinct in nature and scope from a duty to be honest and truthful. As was stated in *Hedley Byrne* by Lord Morris (at pp. 502-3):

> Independently of contract, there may be circumstances where information is given or where advice is given which establishes a relationship which creates a duty not only to be honest but also to be careful.
>
> . . .
>
> In these circumstances, I think some duty towards the unnamed person, whoever it was, was owed by the bank. There was a duty of honesty. The great question, however, is whether there was a duty of care.

and by Lord Pearce (at p. 539):

> There is also, in my opinion, a duty of care created by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded.

tenant compte de toutes les circonstances pertinentes lorsqu'il s'agit de déterminer si l'auteur de la déclaration a agi d'une manière négligente. Dans certains cas, cela comprend l'omission de divulguer des renseignements très pertinents.

En second lieu, la Cour d'appel a commis une erreur en remplaçant la norme de diligence «plus élevée» que le juge de première instance avait apparemment imposée par une norme bien inférieure à celle requise par la loi. Ici encore, il vaut la peine de répéter les remarques finales que le juge Finlayson a faites au sujet de la question de la négligence: [TRADUCTION] «M. Johnston n'était pas tenu de faire davantage que ce qu'il a fait en décrivant les perspectives d'emploi. Ce qu'il a dit était vrai, il y croyait, et cela suffisait» (à la p. 188). Essentiellement, la Cour d'appel a assimilé l'obligation de diligence existant en common law à une obligation d'honnêteté ordinaire. Cette dernière obligation existait sans aucun doute en l'espèce, comme elle existe dans le cadre de toute négociation préalable à la passation d'un contrat.

Toutefois, l'obligation de diligence que l'auteur de la déclaration a envers le destinataire lorsqu'il existe un «lien spécial» au sens de l'arrêt *Hedley Byrne*, précité, est distincte, quant à sa nature et à son étendue, de l'obligation d'être honnête et sincère. Comme lord Morris l'a déclaré dans l'arrêt *Hedley Byrne* (aux pp. 502 et 503):

> [TRADUCTION] Indépendamment du contrat, il peut y avoir des cas dans lesquels on fournit des renseignements ou des conseils qui établissent un lien créant l'obligation d'être non seulement honnête, mais également diligent.
>
> . . .
>
> En pareil cas, je crois que la banque avait une certaine obligation envers la personne non désignée, quelle qu'elle soit. Elle était tenue de faire preuve d'honnêteté. Toutefois, il s'agit principalement de savoir s'il existait une obligation de diligence.

De son côté, lord Pearce a dit (à la p. 539):

> [TRADUCTION] À mon avis, une obligation de diligence est également créée par des liens spéciaux qui, bien que de nature non fiduciaire, laissent supposer qu'il faut faire preuve aussi bien de diligence que d'honnêteté.

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See also *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (C.A.), and *Carman Construction*, *supra*, at p. 973.

A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representations. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.

Although the representor's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, are highly relevant when considering whether or not a misrepresentation was fraudulently made, they serve little, if any, purpose in an inquiry into negligence. As noted above, the applicable standard of care is that of the objective reasonable person. The representor's belief in the truth of his or her representations is irrelevant to that standard of care. The position adopted by the Court of Appeal seems to absolve those who make negligent misrepresentations from liability if they believe that their representations are true. Such a position would virtually eliminate liability for negligent misrepresentation as liability would result only where there is actual knowledge that the representation made is not true; the basis of fraudulent misrepresentation. In essence, the Court of Appeal has returned to the pre-*Hedley Byrne* state of law where a misrepresentation had to be accompanied by moral blameworthiness in order to support an action in tort for damages: see, in this respect, my discussion in *BG Checo*, *supra*, of the context in which *Hedley Byrne* was decided. The question facing the trial judge on the negligence issue was not whether Mr. Johnston was truthful or believed in what he was representing to the appellant. The question was whether he exercised such reasonable care as

Voir également l'arrêt *Hayward c. Mellick* (1984), 45 O.R. (2d) 110 (C.A.), et l'arrêt *Carman Construction*, précité, à la p. 973.

L'obligation de diligence qui s'applique aux déclarations faites pendant les négociations préalables à la passation d'un contrat est plus lourde que l'obligation selon laquelle il faut se montrer honnête en faisant ces déclarations. L'auteur de la déclaration doit non seulement être sincère et honnête, mais il doit également faire preuve de la diligence raisonnable requise par les circonstances, de façon à ce que ses déclarations soient exactes et non trompeuses.

La croyance subjective de l'auteur quant à l'exactitude de ses déclarations et le fait de savoir s'il est moralement responsable ou non sont fort pertinents lorsqu'il s'agit de déterminer si une déclaration inexacte a été faite d'une manière frauduleuse, mais cela ne sert pas à grand-chose, pour ne pas dire à rien, lorsqu'il est question de négligence. Comme je l'ai fait remarquer précédemment, la norme de diligence applicable est celle de la personne raisonnable objective. Le fait que l'auteur croit à la véracité de ses déclarations n'entre pas en ligne de compte en ce qui concerne la norme de diligence. La Cour d'appel semble vouloir libérer de toute responsabilité les personnes qui font des déclarations inexactes par négligence si ces dernières croient que leurs déclarations sont véridiques. Cette position éliminerait presque toute responsabilité dans le cas d'une déclaration inexacte faite par négligence, puisqu'il n'y aurait responsabilité que lorsque l'auteur sait pertinemment que sa déclaration n'est pas véridique, ce qui est le fondement de la déclaration inexacte et frauduleuse. Essentiellement, la Cour d'appel est revenue au droit, tel qu'il existait avant l'arrêt *Hedley Byrne*, selon lequel la responsabilité morale devait s'ajouter à la déclaration inexacte pour qu'une action en responsabilité délictuelle pour dommages-intérêts ait gain de cause: voir, à cet égard, l'examen que j'ai fait dans l'arrêt *BG Checo*, précité, au sujet du contexte dans lequel l'affaire *Hedley Byrne* a été tranchée. La question qui se posait devant le juge de première instance, en ce qui concerne la négligence, n'était pas de savoir si

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the circumstances required so as to ensure the accuracy of his representations.

The trial judge found that the respondent's representative had acted negligently in making the misrepresentations to the appellant about the nature and existence of the employment opportunity and, in particular, the extent of the respondent's commitment to the Multiview project. He found that Mr. Johnston was aware, based upon his expertise in the field of computer development, that until there was a feasibility study in which cost estimates had been submitted, considered, and approved by senior management, one could not say that the respondent had made a firm commitment to the project as Mr. Johnston envisaged it and as he described it to the appellant in the interview.

As noted above, the trial judge also made the following important findings: Mr. Johnston knew, or ought to have known, that the truth of his representations depended on the approval by the corporate management team of the cost estimates he had prepared for the research and development of the Multiview project; it is reasonable to infer that Mr. Johnston, at the time of the interview, contemplated that the budgetary needs for the Multiview project would be substantial and that approval was at best speculative; Mr. Johnston must have been aware of the continued poor sales performance of the Multiview product line; Mr. Johnston did not disclose to the appellant that senior management had not yet given the financial commitment required to make the plans for the Multiview project a probable reality; Mr. Johnston's expertise in the computer development field should have made him aware that, notwithstanding his conversations with senior management and the meeting of December 21, 1982, there was still a considerable risk that senior management would not give budgetary approval to his plans; Mr. Johnston knew that the appellant was relying on the information he was providing during the interview; Mr. Johnston knew that the appellant had a secure, responsible,

M. Johnston était sincère ou s'il croyait en ce qu'il disait à l'appelant. Il s'agissait de savoir s'il avait fait preuve de la diligence raisonnable requise par les circonstances, de façon à s'assurer de l'exactitude de ses déclarations.

Le juge de première instance a conclu que le représentant de l'intimée a agi d'une manière négligente en faisant à l'appelant des déclarations inexactes au sujet de la nature et de l'existence de l'emploi et, en particulier, de l'étendue de l'engagement pris par l'intimée à l'égard du projet Multiview. Il a conclu que M. Johnston savait, vu son expertise dans le domaine de la création informatique, que tant qu'il n'y avait pas eu d'étude de faisabilité dans laquelle l'estimation des coûts a été soumise à la haute direction et examinée et approuvée par celle-ci, il était impossible de dire que l'intimée a pris un engagement ferme à l'égard du projet, tel que M. Johnston l'envisageait et tel qu'il l'a décrit à l'appelant pendant l'entrevue.

Comme je l'ai déjà fait remarquer, le juge de première instance a également tiré ces conclusions importantes: M. Johnston savait, ou aurait dû savoir, que l'exactitude de ses déclarations dépendait de l'approbation, par l'équipe de gestion d'entreprise, de l'estimation des coûts qu'il avait préparée en matière de recherche et développement pour le projet Multiview; il est raisonnable de déduire que M. Johnston prévoyait, au moment de l'entrevue, que les besoins budgétaires pour le projet Multiview seraient importants, et que l'approbation était, au mieux, fondée sur des conjectures; M. Johnston devait être au courant du piètre rendement constant des ventes de la ligne de produits Multiview; M. Johnston n'a pas révélé à l'appelant que la haute direction n'avait pas encore pris l'engagement financier requis pour que les plans relatifs au projet Multiview deviennent une réalité probable; l'expertise de M. Johnston dans le domaine de la création informatique aurait dû lui permettre de savoir que, malgré les conversations qu'il avait eues avec des hauts dirigeants et malgré la réunion du 21 décembre 1982, il était encore fort probable que la haute direction ne donne pas l'approbation budgétaire requise; M. Johnston savait que l'appelant se fiait aux renseignements qu'il avait fournis

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and well-paying position as a chartered accountant in Calgary and that coming to Ottawa would involve moving himself and his family across the country; and Mr. Johnston was aware that the appellant was relying on the position with Cognos to enhance significantly his career as an accountant.

These findings are fully supported by the evidence adduced at trial. I see no reason to interfere with the trial judge's conclusion that the misrepresentations made to the appellant were, in all the circumstances, "negligent misrepresentations". Under the standard of care described above, Mr. Johnston failed to exercise such reasonable care as the circumstances required him to in making the representations he did during the interview. Particularly, he should not have led the appellant to believe that the Multiview project as described during the interview was a reality when, in fact, he knew very well that the most important factor to the existence of the project, as he was describing it, was financial support by the respondent.

Before this Court, the respondent made extensive reference to the evidence adduced at trial to indicate that it did, in reality, plan to develop Multiview and to make it a profitable project. While it seems to be true that Cognos was "committed" to the project at the end of 1982 and in early 1983, it was not committed in the most crucial respect, namely funding. As found by the trial judge, the impression given during the interview was not consistent with the fundamental reality that funding for the project was not yet approved.

In the end, I am unable to find any ground for interfering with White J.'s finding of negligence. There was, in the circumstances of this case, a breach of the duty of care owed to the appellant. In light of this conclusion, it is unnecessary to determine whether, as argued by the appellant, other members of the respondent such as senior manage-

pendant l'entrevue; M. Johnston savait que l'appelant occupait, à Calgary, un poste de responsabilité, un emploi sûr et rémunérateur, à titre de comptable agréé et que, pour venir travailler à Ottawa, il devait s'installer avec sa famille à l'autre bout du pays; et M. Johnston savait que l'appelant comptait sur le poste qu'il occuperait auprès de Cognos pour enrichir énormément sa carrière de comptable.

Ces conclusions sont pleinement étayées par la preuve présentée en première instance. Je ne vois aucune raison de modifier la conclusion du juge de première instance, à savoir que les déclarations inexactes faites à l'appelant avaient, compte tenu de toutes les circonstances, été faites «par négligence». Selon la norme de diligence décrite précédemment, M. Johnston a omis de faire preuve de la diligence raisonnable requise par les circonstances en faisant les déclarations qu'il a faites pendant l'entrevue. En particulier, il n'aurait pas dû faire croire à l'appelant que le projet Multiview, tel que décrit pendant l'entrevue, était une réalité alors que, en fait, il savait fort bien que l'élément le plus important en vue de la réalisation du projet, tel qu'il le décrivait, était l'appui financier de l'intimée.

Devant notre Cour, l'intimée a longuement fait mention de la preuve présentée en première instance pour indiquer qu'en réalité elle envisageait de développer Multiview et d'en faire un projet rentable. Il semble vrai que Cognos avait «pris un engagement» à l'égard du projet à la fin de 1982 et au début de 1983, mais elle n'avait pas pris d'engagement à l'égard du point le plus crucial, c'est-à-dire le financement. Comme le juge de première instance l'a conclu, l'impression donnée pendant l'entrevue n'était pas compatible avec la réalité fondamentale que le financement du projet n'avait pas encore été approuvé.

En fin de compte, je ne puis trouver aucun motif me permettant de modifier la conclusion de négligence tirée par le juge White. Compte tenu des circonstances de l'espèce, il y a eu violation de l'obligation de diligence qui existait envers l'appelant. Cela étant, il est inutile de déterminer si, comme le soutient l'appelant, d'autres membres de l'intimée,

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ment were negligent on the facts of this case. Mr. Johnston's conduct during the interview is sufficient to support a finding of liability against the respondent.

(3) The Nature of the Misrepresentations

The respondent takes the alternate position that, even accepting the trial judge's findings of misrepresentations and of negligence, the appellant's action must fail because the representations relied on are not actionable under the *Hedley Byrne* doctrine. In this respect, the respondent argues that the representations depend on inferences or implications, rather than on direct statements, and also relate to a future expectation. The appellant makes no submissions on this point. It is unclear whether this submission of the respondent was advanced prior to the appeal to this Court. If so, it has received very little attention by the courts below. There is only a brief discussion, and rejection, of the "future expectation" aspect of the argument in the trial judge's reasons and the Court of Appeal makes no reference whatsoever to this submission.

In my view, the respondent's alternate position cannot succeed in the circumstances of this case. First of all, I reject as incorrect the suggestion that the representations in question relate solely to future events or expectations. I reproduce again, for convenience, a passage from White J.'s judgment in which he finds, as a fact, that misrepresentations were made to the appellant in the hiring interview (at pp. 415-16):

The effect of these misrepresentations was that the [appellant] would have a position in the research and development of the product "Multiview"; that that position would be a significant one and would involve his expertise as an accountant; that he would perform the responsible role of seeing to proper accounting standards being implemented into the product; that beyond the three modules immediately in contemplation were a minimum of four other modules; and that the project of

comme les hauts dirigeants, ont été négligents selon les faits de l'espèce. La conduite de M. Johnston pendant l'entrevue suffit pour appuyer une conclusion de responsabilité de l'intimée.

(3) La nature des déclarations inexactes

L'intimée soutient subsidiairement que, même si l'on retient les conclusions du juge de première instance à l'égard des déclarations inexactes et de la négligence, l'action intentée par l'appelant doit être rejetée parce que les déclarations auxquelles il s'est fié ne donnent pas droit à une poursuite en vertu de la doctrine énoncée dans l'arrêt *Hedley Byrne*. À cet égard, l'intimée fait valoir qu'il s'agit de déductions ou de suppositions plutôt que de déclarations directes, lesquelles se rapportent en outre à une attente future. L'appelant n'invoque aucun argument sur ce point. D'autre part, il n'est pas clair que cet argument de l'intimée ait été avancé avant l'appel devant notre Cour. Si c'est le cas, les tribunaux d'instance inférieure y ont accordé très peu d'importance. Dans ses motifs, le juge de première instance s'est contenté d'examiner brièvement, et de rejeter, la partie de l'argument concernant l'«attente future»; de son côté, la Cour d'appel ne fait absolument pas mention de cet argument.

À mon avis, l'argument subsidiaire de l'intimée ne peut pas être retenu compte tenu des circonstances de l'espèce. Premièrement, je rejette comme inexacte la prétention selon laquelle les déclarations en question visent uniquement des attentes ou des événements futurs. Pour plus de commodité, je reproduis ici encore un passage du jugement dans lequel le juge White tient pour avéré que des déclarations inexactes ont été faites à l'appelant pendant l'entrevue d'embauchage (aux pp. 415 et 416)

[TRADUCTION] Selon ces déclarations inexactes, [l'appelant] occuperait un poste en recherche et développement pour le produit «Multiview»; ce poste serait un poste d'importance et ferait appel à son expertise à titre de comptable; [l'appelant] serait chargé de veiller à ce que les normes comptables pertinentes soient appliquées relativement au produit; en plus des trois modules immédiatement envisagés, il y aurait au moins quatre autres modules; le projet «Multiview» dans le cadre

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"Multiview", in connection with which [the appellant] would be hired would last a minimum of two years. I find further that Mr. Johnston implicitly represented that management had made a firm budgetary commitment to the development of four other modules in addition to those then presently under development.

Obviously, some aspects of the misrepresentations made to the appellant about the employment opportunity were, by their very nature, matters *in futuro*. Statements about the appellant's involvement with the respondent and his responsibilities should he be offered a position are representations that relate to future conduct and events. There are authorities supporting the view that only representations of existing facts, and not those relating to future occurrences, can give rise to actionable negligence: see, for example, *Williams v. School District No. 63 (Saanich)* (B.C.S.C.), *supra*; *Datile Financial Corp. v. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Gen. Div.); *Foster Advertising Ltd. v. Keenberg* (1987), 38 C.C.L.T. 309 (Man. C.A.); and *Andronyk v. Williams* (1985), 35 C.C.L.T. 38 (Man. C.A.).

However, assuming without deciding that this view of the law is correct, the representations most relevant to the appellant's action are not those relating to his future involvement and responsibilities with Cognos, but those relating to the very existence of the job for which he had applied. That is a matter of existing fact. It was implicitly represented that the job applied for did in fact, at the time of the interview, exist in the manner described by Mr. Johnston. As found by the trial judge, however, such was not the case. The employment opportunity described to the appellant was not, at the time of the interview, a *fait accompli* for the respondent. Clearly, this misrepresentation relates to facts presumed to have existed at the time of the interview: the respondent's financial commitment to the development of Multiview and the existence of the employment opportunity offered. It is not a "remark by a defendant concerning the outcome of a future event" (*Williams v. School District No. 63 (Saanich)* (B.C.S.C.), *supra*, at p. 240), a "representation . . . as to future

duquel [l'appelant] serait embauché durerait au moins deux ans. Je conclus en outre que M. Johnston a implicitement déclaré que la direction avait pris un engagement budgétaire ferme à l'égard de la mise au point de quatre autres modules, en plus de ceux qu'on était en train de mettre au point.

De toute évidence, certains aspects des déclarations inexactes faites à l'appelant au sujet de l'emploi se rapportaient, par leur nature même, à l'avenir. Les déclarations relatives à la participation de l'appelant à l'entreprise de l'intimée et à ses responsabilités, si jamais on lui offrait un poste, se rapportent à une conduite et à des événements futurs. Certains arrêts appuient le point de vue voulant que seules des déclarations concernant des faits existants, par opposition à des événements futurs, puissent donner lieu à une négligence donnant droit à une poursuite: voir, par exemple, *Williams c. School District No. 63 (Saanich)* (C.S.C.-B.), précité; *Datile Financial Corp. c. Royal Trust Corp. of Canada* (1991), 5 O.R. (3d) 358 (Div. gén.); *Foster Advertising Ltd. c. Keenberg* (1987), 38 C.C.L.T. 309 (C.A. Man.); et *Andronyk c. Williams* (1985), 35 C.C.L.T. 38 (C.A. Man.).

Toutefois, à supposer, sans en décider, que cette conception du droit soit exacte, les déclarations les plus pertinentes en l'espèce ne sont pas celles qui ont trait à la participation et aux responsabilités futures de l'appelant au sein de Cognos, mais celles qui ont trait à l'existence même de l'emploi auquel il s'est porté candidat. Il s'agit d'une question se rapportant à un fait existant. Il a implicitement été déclaré que l'emploi en question existait réellement au moment de l'entrevue, et ce, de la manière décrite par M. Johnston. Toutefois, comme le juge de première instance l'a conclu, tel n'était pas le cas. La perspective d'emploi décrite à l'appelant n'était pas, au moment de l'entrevue, un fait accompli pour l'intimée. De toute évidence, la déclaration inexacte se rapporte à des faits qui sont réputés avoir existé au moment de l'entrevue, soit l'engagement financier de l'intimée à l'égard du développement de Multiview et l'existence de la perspective d'emploi offerte. Il ne s'agit pas d'une [TRADUCTION] «remarque faite par un défendeur au sujet de l'aboutissement d'un événement futur»

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occurrences" (*Datile Financial Corp. v. Royal Trust*, *supra*, at p. 379), a "statement of intention or forecast of the future" (*Foster Advertising Ltd. v. Keenberg*, *supra*, at p. 325), or "forecasting" (*Andronyk v. Williams*, *supra*, at p. 57).

The other aspect of the respondent's argument is that representations which depend on implications or inferences cannot give rise to actionable negligence under the *Hedley Byrne* doctrine. Again, I reject this submission. However, on this issue, I prefer, for obvious reasons, to challenge the principle advanced by the respondent rather than simply reject its application to the facts of this case.

In my view, there is no compelling reason in principle, authority, or policy for the proposition that, as a general rule, an implied representation cannot under any circumstance give rise to actionable negligence. The only authority offered by the respondent is the decision of the New South Wales Court of Appeal in *Minister Administering the Environmental Planning and Assessment Act, 1979 v. San Sebastian Pty. Ltd.*, [1983] 2 N.S.W.L.R. 268, aff'd on other grounds (1986), 68 A.L.R. 161 (H.C.), applied by Southin J.A. of the British Columbia Court of Appeal, in dissent, in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1990), 44 B.C.L.R. (2d) 145. The reasons of Mahoney and Hutley JJ.A. in the former case appear indeed to support the proposition that nothing less than an express, or tantamount to an express, representation can suffice under the *Hedley Byrne* doctrine. It is not without significance, however, that the High Court of Australia in dismissing a subsequent appeal on different grounds expressly refrained from making any comments on this issue. Rather, the majority of the Court preferred to base its judgment, *inter alia*, on the fact that no misrepresentations, whether "express or implied", had been made. In other words, the High Court found nothing mis-

(Williams c. School District No. 63 (Saanich) (C.S.C.-B.), précité, à la p. 240), d'une [TRADUCTION] «déclaration au sujet d'événements futurs» (*Datile Financial Corp. c. Royal Trust*, précité, à la p. 379), d'une [TRADUCTION] «déclaration d'intention ou d'une prévision de l'avenir» (*Foster Advertising Ltd. c. Keenberg*, précité, à la p. 325), ou d'une [TRADUCTION] «prévision» (*Andronyk c. Williams*, précité, à la p. 57).

L'autre aspect de l'argument de l'intimée est que les déclarations qui dépendent de déductions ou de suppositions ne peuvent pas donner lieu à une négligence donnant droit à une poursuite, en vertu de la doctrine énoncée dans l'arrêt *Hedley Byrne*. Ici encore, je rejette cet argument. Toutefois, à cet égard, je préfère, pour des motifs évidents, contester le principe avancé par l'intimée plutôt que simplement refuser de l'appliquer aux faits de l'espèce.

À mon avis, il n'existe aucun motif impérieux fondé sur un principe, un arrêt ou une politique à l'appui de la proposition selon laquelle, en règle générale, une déclaration implicite ne peut en aucun cas donner lieu à une négligence ouvrant droit à une poursuite. L'intimée a uniquement cité l'arrêt de la Cour d'appel de la Nouvelle-Galles du Sud *Minister Administering the Environmental Planning and Assessment Act, 1979 c. San Sebastian Pty. Ltd.*, [1983] 2 N.S.W.L.R. 268, conf. pour d'autres motifs par (1986), 68 A.L.R. 161 (H.C.), appliqué en dissidence par le juge Southin de la Cour d'appel de la Colombie-Britannique, dans l'arrêt *BG Checo International Ltd. c. British Columbia Hydro and Power Authority* (1990), 44 B.C.L.R. (2d) 145. Les motifs prononcés par les juges Mahoney et Hutley dans la première affaire semblent de fait étayer la proposition selon laquelle il faut au moins qu'une déclaration expresse, ou qu'une déclaration équivalant à une déclaration expresse, ait été faite, selon la doctrine énoncée dans l'arrêt *Hedley Byrne*. Toutefois, il importe de noter qu'en rejetant un appel subséquent pour des motifs différents, la High Court d'Australie s'est expressément abstenue de faire quelque remarque que ce soit sur ce point. La cour à la majorité a préféré fonder son jugement, entre

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leading or inaccurate in what was represented, regardless of how the representation was characterized.

On the other hand, there is considerable authority for the more flexible view that, in appropriate circumstances, implied misrepresentations can, and often do, give rise to actionable negligence: see, for example, *Banque Financière de la Cité SA v. Westgate Insurance Co.*, [1989] 2 All E.R. 952 (C.A.), at p. 1000, aff'd on other grounds [1990] 2 All E.R. 947 (H.L.); *Datile Financial Corp. v. Royal Trust*, *supra*, at p. 379; *Hendrick v. De Marsh* (Ont. H.C.), *supra*; *Steer v. Aerovox*, *supra*; and *Doherty v. Allen* (1988), 55 D.L.R. (4th) 746 (N.B.C.A.).

In my opinion, a flexible approach to this issue is preferable. It is arbitrary and premature to declare as a general rule that nothing less than express or direct representations can succeed under the *Hedley Byrne* doctrine. Undoubtedly, there will be cases such as the present one where the surrounding circumstances are such that it makes little difference, if any, how one characterizes the manner in which the representation is made, and where it would be unjust to deny recovery simply because the representation relied on is said to be implied rather than express. It is unnecessary for me to set out in detail the circumstances in which so-called implied representations can be enough to sustain an action in tort for negligent misrepresentation. I prefer leaving this task to trial judges dealing with specific factual situations. Suffice it to say that the case at bar falls well within this category.

There was a considerable number of express representations made by Mr. Johnston during the interview which point directly towards the existence of the Multiview project and the nature of the respondent's commitment thereto. The implied misrepresentation found by the trial judge is not only reasonable in the surrounding circumstances, but it is also perhaps the only inference that could

autres, sur le fait qu'aucune déclaration inexacte, [TRADUCTION] «expresse ou implicite», n'avait été faite. En d'autres termes, la High Court n'a rien constaté de trompeur ou d'inexact dans la déclaration, quelle que soit la manière dont elle a été qualifiée.

Par ailleurs, de nombreux arrêts viennent appuyer l'opinion plus large selon laquelle, dans des circonstances appropriées, des déclarations inexactes implicites peuvent donner lieu à une négligence donnant droit à une poursuite et y donnent souvent lieu: voir, par exemple, *Banque Financière de la Cité SA c. Westgate Insurance Co.*, [1989] 2 All E.R. 952 (C.A.), à la p. 1000, conf. pour d'autres motifs par [1990] 2 All E.R. 947 (H.L.); *Datile Financial Corp. c. Royal Trust*, précité, à la p. 379; *Hendrick c. De Marsh* (H.C. Ont.), précité; *Steer c. Aerovox*, précité; et *Doherty c. Allen* (1988), 55 D.L.R. (4th) 746 (C.A.N.-B.).

À mon avis, il est préférable d'adopter une attitude plus souple à cet égard. Il est arbitraire et prématuré de déclarer qu'en règle générale il faut au moins une déclaration expresse ou directe, selon la doctrine énoncée dans l'arrêt *Hedley Byrne*. Il y a sans doute des cas comme celui-ci où les circonstances sont telles que la façon de qualifier la déclaration importe peu, ou n'importe pas du tout, et où il serait injuste de refuser un redressement simplement parce que la déclaration sur laquelle on s'appuie est jugée implicite plutôt qu'expresse. Il est inutile d'énoncer en détail les circonstances dans lesquelles des déclarations dites implicites peuvent suffire pour soutenir une action en responsabilité délictuelle fondée sur une déclaration inexacte faite par négligence. Je préfère laisser cette tâche au juge des faits, qui examine des situations de fait précises. Il suffit de dire que l'affaire qui nous occupe fait partie de cette catégorie.

Pendant l'entrevue, M. Johnston a fait un nombre considérable de déclarations expresses qui établissent directement l'existence du projet Multiview et la nature de l'engagement pris par l'intimée à cet égard. La conclusion d'existence d'une déclaration inexacte implicite tirée par le juge de première instance est non seulement raisonnable, selon les circonstances, mais il s'agit

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be drawn from the direct representations made to the appellant during the interview. A reasonable person placed in the appellant's position would, without a doubt, have drawn the same inference from what was being said that the appellant and trial judge did.

This is not a situation where many different and conflicting interpretations may reasonably be drawn from a series of direct representations and where the representee advances the implied meaning most favourable to recovery. This is a case where everything said and represented during the interview points to the same conclusion: the Multiview project as described by Mr. Johnston was a reality in that the respondent had given its financial support to its development. The appellant had a relatively secure and well paying job in Calgary and, as found by the trial judge, he would not have chosen to move across the country if he thought there was a substantial risk that the employment opportunity described to him would no longer exist, after his arrival in Ottawa. To a large extent, this risk was alleviated by the representations made during the interview. For these reasons, the fact that the representation in question falls short of being express should not, in the circumstances of this case, preclude the appellant from relying on the *Hedley Byrne* doctrine and from obtaining a remedy for the damages he suffered.

E. *The Employment Agreement Signed Subsequent to the Negligent Misrepresentations*

Thus far, I have stated that the courts below were correct in finding a "special relationship" between the parties as to give rise to a duty of care during the interview, and that the misrepresentations found by the trial judge were indeed made in a negligent manner in all the circumstances of the case. Again, there is no question in this appeal that the appellant reasonably relied, to his detriment, on these negligent misrepresentations. The only remaining issue is whether the employment agreement signed by the appellant more than two weeks after the interview affects, in any way, the above findings or the consequence that would normally

peut-être également de la seule déduction possible par suite des déclarations directes faites à l'appelant pendant l'entrevue. Une personne raisonnable se trouvant dans la situation de l'appelant aurait sans doute fait les mêmes déductions que ce dernier et le juge de première instance.

Il ne s'agit pas d'un cas dans lequel de nombreuses interprétations différentes et contradictoires peuvent raisonnablement être données à partir d'une série de déclarations directes, le destinataire de la déclaration préconisant le sens implicite le plus favorable au redressement. Il s'agit d'un cas où tout ce qui a été dit et déclaré pendant l'entrevue mène à la même conclusion: le projet Multiview décrit par M. Johnston était une réalité, en ce sens que l'intimée avait financièrement appuyé sa mise en œuvre. L'appelant exerçait un emploi relativement sûr et rémunérateur à Calgary et, comme le juge de première instance l'a conclu, il n'aurait pas choisi de s'installer à l'autre bout du pays s'il avait cru que la perspective d'emploi qui lui avait été décrite n'existerait probablement plus, après son arrivée à Ottawa. Dans une large mesure, ce risque a été atténué par les déclarations faites pendant l'entrevue. Pour ces motifs, le fait que la déclaration en question n'est pas expresse ne devrait pas, compte tenu des circonstances de l'espèce, empêcher l'appelant de s'appuyer sur la doctrine énoncée dans l'arrêt *Hedley Byrne* et d'obtenir un redressement pour le préjudice qu'il a subi.

E. *Le contrat de travail signé après les déclarations inexactes*

Jusqu'ici, j'ai dit que les tribunaux d'instance inférieure avaient eu raison de conclure à l'existence d'un «lien spécial» entre les parties, de façon à donner lieu à une obligation de diligence pendant l'entrevue, et que les déclarations inexactes constatées par le juge de première instance avaient de fait été faites d'une manière négligente, compte tenu de toutes les circonstances de l'espèce. Ici encore, il est certain que l'appelant s'est fié d'une manière raisonnable, à son détriment, à ces déclarations inexactes. Il reste uniquement à savoir si le contrat de travail signé par l'appelant plus de deux semaines après l'entrevue influe de quelque façon

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follow therefrom, namely, liability of the respondent for the damages caused to the appellant.

Finlayson J.A. found that clauses 13 and 14 of the employment agreement constituted an adequate, albeit not express, "disclaimer of responsibility" for the representations made during the interview because these clauses contradicted or were inconsistent with those representations. The respondent adopts this conclusion, submitting that there is a clear inconsistency between the contract and the alleged misrepresentations and that this inconsistency is sufficient to constitute a disclaimer within the meaning of *Hedley Byrne*, *supra*. The respondent argues that the representation relied on by the appellant goes to the issue of job security and that the contract of employment specifically addresses, and contradicts, this issue in its provisions dealing with reassignment and termination of employment, "without cause", on one month's notice. Furthermore, the respondent relies on the decision of this Court in *J. Nunes Diamonds*, *supra*, for the proposition that the doctrine of *Hedley Byrne*, *supra*, "is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract". It is argued that the tort in question is not "independent" from the contract. Moreover, the respondent submits that the one-month termination clause in the contract amounts to a "limitation of liability clause" and that the appellant is attempting to circumvent this clause by its present action in tort, contrary to the decision of this Court in *Central Trust v. Rafuse*, *supra*. Finally, the respondent argues that the appellant's conduct after his arrival at the company and his learning of the developments regarding the Multiview project amounts to an affirmation of his contract of employment.

For his part, the appellant submits that the tort at issue is "independent" of the employment agreement within the meaning of *J. Nunes Diamonds*,

sur les conclusions susmentionnées ou sur la conséquence qui en découlerait normalement, à savoir la responsabilité de l'intimée pour le préjudice causé à l'appelant.

Le juge Finlayson a conclu que les clauses 13 et 14 du contrat de travail constituaient une [TRADUCTION] «dénégation de responsabilité» adéquate, quoique non expresse, à l'égard des déclarations faites pendant l'entrevue, parce qu'elles contredisaient ces déclarations ou étaient incompatibles avec elles. L'intimée fait sienne cette conclusion et soutient qu'il y a clairement une contradiction entre le contrat et les déclarations inexactes alléguées et que cette contradiction est suffisante pour constituer une dénégation au sens de l'arrêt *Hedley Byrne*, précité. L'intimée soutient que la déclaration sur laquelle l'appelant s'est appuyé porte sur la question de la sécurité d'emploi et que cette question est expressément visée, et contredite, par les dispositions du contrat de travail concernant la réaffectation et le congédiement «sans motif» sur préavis d'un mois. En outre, l'intimée s'appuie sur l'arrêt *J. Nunes Diamonds*, précité, de notre Cour en ce qui concerne la proposition selon laquelle la doctrine énoncée dans l'arrêt *Hedley Byrne*, précité, «ne peut pas s'appliquer lorsque les relations entre les parties sont régies par un contrat, à moins qu'il soit possible de considérer que la négligence imputée constitue un délit civil indépendant n'ayant aucun rapport avec l'exécution du contrat». Or, allègue-t-on, le délit en question n'est pas «indépendant» du contrat. En outre, l'intimée soutient que la clause de congédiement sur préavis d'un mois figurant dans le contrat équivaut à une [TRADUCTION] «clause de limitation de responsabilité» et que l'appelant tente de se soustraire à cette clause par son action en responsabilité délictuelle, ce qui va à l'encontre de l'arrêt *Central Trust c. Rafuse*, précité, de notre Cour. Enfin, l'intimée prétend que la conduite de l'appelant après qu'il fut arrivé à la société et qu'il eut pris connaissance de la situation au sujet du projet Multiview équivaut à une confirmation de son contrat de travail.

De son côté, l'appelant fait valoir que le délit en cause est «indépendant» du contrat de travail au sens de l'arrêt *J. Nunes Diamonds*, précité, et qu'il

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supra, and is not affected in any way by its provisions. In particular, it is submitted that clauses 13 and 14 of the employment contract do not amount to a valid disclaimer and have no bearing whatsoever on the respondent's liability in tort. In this respect, he argues that express contractual terms are required in order to negate an otherwise "independent" duty of care. Furthermore, the appellant claims he was simply attempting to mitigate his damages by staying with the respondent after the reassignments. According to him, any "affirmation" of the contract is irrelevant since the tort in issue is "independent" from the contract and because the damages crystallized at the moment he became aware of the misrepresentations.

n'est aucunement touché par ses dispositions. En particulier, il soutient que les clauses 13 et 14 du contrat de travail n'équivalent pas à une dénégation valide et n'influent aucunement sur la responsabilité délictuelle de l'intimée. À cet égard, l'appelant est d'avis que des conditions contractuelles expresses sont requises pour éteindre une obligation de diligence par ailleurs «indépendante». En outre, l'appelant affirme qu'il tentait simplement d'atténuer son préjudice en demeurant chez l'intimée après les réaffectations. Selon lui, toute «confirmation» du contrat n'est pas pertinente puisque le délit en question est «indépendant» du contrat et que le préjudice s'est cristallisé au moment où il a pris connaissance des déclarations inexactes.

As I see the matter, the specific employment agreement signed by the appellant is, in the circumstances of this case, irrelevant to his action for negligent misrepresentation. This contract falls within the third proposition suggested earlier in which a representee's claim for damages for a negligent pre-contractual misrepresentation is not affected, in any way, by the subsequent contract. I observed at p. 111 of these reasons that this appeal is clearly distinguishable from *BG Checo*, *supra*, in that the common law duty of care relied on by the appellant is not, unlike in *BG Checo*, co-extensive with a duty imposed on the respondent by an express term of the employment agreement. This conclusion, in effect, disposes of the respondent's argument based on *J. Nunes Diamonds*, *supra*.

À mon avis, le contrat de travail que l'appelant a signé n'a rien à voir, compte tenu des circonstances de l'espèce, avec l'action fondée sur une déclaration inexacte faite par négligence qu'il a intentée. Ce contrat est visé par la troisième proposition mentionnée ci-dessus, selon laquelle l'action en dommages-intérêts intentée par le destinataire par suite d'une déclaration inexacte faite par négligence avant la passation d'un contrat n'est aucunement touchée par le contrat subséquent. J'ai fait remarquer à la p. 111 des présents motifs que l'on peut facilement faire une distinction entre le présent pourvoi et le pourvoi *BG Checo*, précité, en ce sens que l'obligation de diligence existant en common law sur laquelle s'appuie l'appelant ne coïncide pas, contrairement à ce qui était le cas dans le pourvoi *BG Checo*, avec une obligation imposée à l'intimée par une condition expresse du contrat de travail. En fait, cette conclusion répond à l'argument de l'intimée fondé sur l'arrêt *J. Nunes Diamonds*, précité.

Indeed, as I alluded to in *BG Checo*, the aspect of the judgment of the majority in *J. Nunes Diamonds*, *supra*, upon which the respondent relies (the passage found at pp. 777-78) was qualified by the unanimous judgment of this Court in *Central Trust v. Rafuse*, *supra*, recognizing concurrency between contract and tort as a general

De fait, comme je l'ai mentionné dans l'arrêt *BG Checo*, l'aspect du jugement rendu par la majorité dans l'arrêt *J. Nunes Diamonds*, précité, sur lequel l'intimée s'appuie (le passage figurant aux pp. 777 et 778) a fait l'objet de certaines réserves dans l'arrêt unanime *Central Trust c. Rafuse*, précité, de notre Cour, celle-ci ayant reconnu que la concomitance entre la responsabilité en matière contractuelle et délictuelle est en

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rule subject to certain "exceptions", including (at p. 205):

> 2. What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. [Emphasis added.]

Unlike in *BG Checo*, the common law duty of care invoked by the appellant is, for reasons already given, "independent" of the employment agreement. I would therefore reject this part of the respondent's argument which attempts to disallow the appellant's action in tort and to confine him to whatever remedies are available under the law of contract.

This leaves the question of whether the duty or liability of the respondent in tort is limited or excluded by a term of the employment agreement. As I see the matter, neither the respondent's duty of care nor its liability is affected by the terms of the employment agreement. For convenience, I reproduce again the provisions of this contract which play a determining role according to the Court of Appeal and the respondent:

TRANSFER

> 13. Quasar Systems reserves the right to reassign you to another position with the Company without reduction of your salary or benefits and upon one month's notice to you. Should such reassignment require your permanent relocation to another city, the Company will reimburse you for your expenses in accordance with the then current relocation policy.

général assujettie à certaines «exceptions», et notamment (à la p. 205):

> 2. Les engagements stipulés dans le contrat révèlent la nature des liens dont découle l'obligation de diligence en *common law*, mais la nature et la portée de l'obligation de diligence invoquée comme fondement de la responsabilité délictuelle ne doivent pas dépendre d'obligations ou de devoirs précis créés expressément par le contrat. C'est dans ce sens que l'obligation de diligence en *common law* doit être indépendante du contrat. La distinction, en ce qui concerne les termes du contrat, est, d'une manière générale, entre ce qu'il faut faire et la façon de le faire. On ne saurait affirmer qu'une réclamation est en matière délictuelle si elle tient, en ce qui concerne la nature et la portée de l'obligation de diligence alléguée, à la façon dont une obligation a été expressément et précisément définie dans un contrat. [Je souligne.]

Contrairement à ce qui était le cas dans le pourvoi *BG Checo*, l'obligation de diligence existant en common law que l'appelant a invoquée est, pour les motifs déjà énoncés, «indépendante» du contrat de travail. Par conséquent, je suis d'avis de rejeter la partie de l'argument de l'intimée visant à faire rejeter l'action en responsabilité délictuelle intentée par l'appelant et à limiter ce dernier aux redressements prévus par le droit des contrats.

Il reste à savoir si l'obligation ou la responsabilité délictuelle de l'intimée est limitée ou exclue par une clause du contrat de travail. À mon avis, les clauses du contrat de travail n'influent pas sur l'obligation de diligence de l'intimée ni sur sa responsabilité. Pour plus de commodité, je reproduis ici encore les dispositions de ce contrat qui, selon la Cour d'appel et l'intimée, ont un rôle déterminant:

MUTATION

> 13. Quasar Systems se réserve le droit de vous réaffecter à un autre poste au sein de la société, sans diminution de salaire ou perte d'avantages, sur préavis d'un mois. Advenant le cas où la réaffectation exige que vous vous réinstalliez en permanence dans une autre ville, la société vous dédommagera de vos frais conformément à la politique de réinstallation alors en vigueur.

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TERMINATION NOTICE — ONE MONTH

14. This Agreement may be terminated at any time and without cause by Quasar Systems Ltd. or by you. In the event of termination, Quasar Systems Ltd. will give you one month's notice of termination plus any additional notice that may be required by any applicable legislation. Similarly, you shall give Quasar Systems Ltd. one month's notice if you voluntarily terminate this Agreement. Quasar Systems Ltd. may pay you one month's salary in lieu of the aforesaid notice in which event this Agreement and your employment will be terminated on the date such payment in lieu of notice is made.

In my view, the Court of Appeal erred in giving to clauses 13 and 14 the effect of a "disclaimer of responsibility" within the meaning of *Hedley Byrne* and *Carman Construction*, *supra*. These provisions are clearly distinguishable from the disclaimers at issue in both *Hedley Byrne* and *Carman Construction*.

In *Hedley Byrne*, the representee's bank requested certain financial information from the representors, merchant bankers for a potential client of the representee, "in confidence and without responsibility" on the part of the representors. The latter replied to the inquiry, in part, as follows: "CONFIDENTIAL. For your private use and without responsibility on the part of the bank or its officials." Unlike the present appeal, there was never any contractual relationship between the representee and the representor in *Hedley Byrne*. The House of Lords unanimously held that even though a duty of care with respect to representations could, in appropriate circumstances, exist, such a duty could not arise in *Hedley Byrne* since the representors had manifestly expressed, prior to the representations and to the knowledge of the representee, that they did not assume or accept responsibility for any of the information given.

Carman Construction, *supra*, on the other hand, concerned a misrepresentation made in a contractual setting. The corresponding clause in that case (cl. 3.1) expressly provided that the plaintiff was

AVIS DE CESSATION D'EMPLOI — UN MOIS

14. Le présent contrat peut être résilié à n'importe quel moment et sans motif par Quasar Systems Ltd. ou par vous. En cas de cessation d'emploi, Quasar Systems Ltd. vous donnera un préavis d'un mois en sus de tout avis additionnel prévu par une loi pertinente. De même, vous donnerez à Quasar Systems Ltd. un préavis d'un mois si vous résiliez volontairement ce contrat. Quasar Systems Ltd. peut vous verser un mois de salaire au lieu dudit avis, auquel cas ce contrat et votre emploi prendront fin à la date à laquelle cette somme vous sera versée.

À mon avis, la Cour d'appel a commis une erreur en interprétant les clauses 13 et 14 comme une «dénégation de responsabilité» au sens des arrêts *Hedley Byrne* et *Carman Construction*, précités. Une distinction peut clairement être faite entre ces dispositions et les dénégations en cause dans les arrêts *Hedley Byrne* et *Carman Construction*.

Dans l'arrêt *Hedley Byrne*, la banque du destinataire de la déclaration avait demandé certains renseignements financiers aux auteurs, qui étaient des spécialistes d'une banque d'affaire pour un client éventuel du destinataire, [TRADUCTION] «confidentiellement et sous toutes réserves» de la part de ceux-ci. Les auteurs ont en partie répondu comme suit: [TRADUCTION] «CONFIDENTIEL. Pour votre usage personnel et sous toutes réserves de la part de la banque ou de ses représentants.» Contrairement au présent pourvoi, il n'y avait jamais eu de lien contractuel entre l'auteur et le destinataire de la déclaration dans l'arrêt *Hedley Byrne*. La Chambre des lords a jugé à l'unanimité qu'une obligation de diligence pouvait exister, dans les cas appropriés, à l'égard des déclarations, mais que cette obligation ne pouvait pas exister dans cette affaire étant donné que les auteurs des déclarations avaient clairement fait savoir au préalable, et ce, à la connaissance du destinataire, qu'ils n'assumaient ou ne reconnaissaient aucune responsabilité à l'égard des renseignements fournis.

D'autre part, l'arrêt *Carman Construction*, précité, portait sur une déclaration inexacte faite dans un contexte contractuel. La clause correspondante dans cette affaire (la cl. 3.1) prévoyait expressé-

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not relying on the representations of the defendant: "the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company" (p. 961). The pertinent comments of Martland J., writing for a unanimous Court, are worth quoting (at pp. 972-73):

In the *Hedley Byrne* case the decision was that the disclaimer of responsibility for the persons alleged to be liable for negligent misrepresentation, communicated to the other party, excluded the assumption of a duty of care. I regard the wording of clause 3.1 of the agreement as having the like effect. The judgment at trial dealt with the situation on the basis that negligent misrepresentation had been established, but that clause 3.1 was an exemption clause which exempted C.P.R. from liability. In the circumstances of this case, I would prefer to regard the clause as establishing that C.P.R. did not assume any duty of care, and a claim in negligence will not arise in the absence of a duty of care.

I reach this conclusion in the light of the facts to which I have already referred in dealing with the issue of collateral warranty. Carman was made aware, when Fielding received the tender documents, and read and understood clause 3.1, that if it entered into an agreement with C.P.R. it was doing so on its own knowledge as to the quantities of material to be removed and that it would not rely upon any information or statement made to it by C.P.R. in relation to the work. Fielding was aware of this when he sought information from a C.P.R. employee. He knew that if information was obtained, Carman would be relying upon it at its own risk. In my opinion, on the facts of this case, a duty of care on the part of C.P.R. in respect of information provided by its employee never arose provided the information was given honestly. The trial judge has found that the misrepresentation made to Carman was made innocently without intent to defraud. [Emphasis added.]

Also instructive is the following excerpt from the reasons of Wilson J.A. (as she then was), writing for the majority of the Court of Appeal, in *Carman Construction* ((1981), 33 O.R. (2d) 472, at p. 473):

ment que la demanderesse ne s'appuyait pas sur les déclarations de la défenderesse: [TRADUCTION] «l'entrepreneur ne se fie à aucun renseignement que la Compagnie lui a donné ni à aucune déclaration qu'elle lui a faite concernant les travaux» (à la p. 961). Il vaut la peine de citer les remarques pertinentes du juge Martland, qui a rédigé les motifs unanimes de la Cour (aux pp. 972 et 973):

Dans l'affaire *Hedley Byrne*, on a décidé que la dénégation de responsabilité relative aux personnes auxquelles on imputait une responsabilité en raison d'une déclaration inexacte faite par négligence à l'autre partie, excluait l'hypothèse d'une obligation de diligence. J'estime que les termes de la clause 3.1 du contrat ont le même effet. Le jugement de première instance a traité la situation en tenant pour acquis que l'existence d'une déclaration inexacte faite par négligence avait été établie, mais que la clause 3.1 était une clause d'exonération qui dégageait le C.P. de toute responsabilité. Dans les circonstances en l'espèce, je préfère considérer que cette clause établit que le C.P. n'a assumé aucune obligation de diligence et, en l'absence d'une obligation de diligence, il ne peut y avoir de réclamation fondée sur la négligence.

J'arrive à cette conclusion compte tenu des faits que j'ai déjà mentionnés en traitant la question de la garantie accessoire. Lorsque Fielding a reçu les documents de soumission et qu'il a lu et saisi la clause 3.1, Carman a été informée que si elle se liait par contrat avec le C.P., elle le ferait suivant sa propre connaissance du volume de roc à déplacer et qu'elle ne devrait se fier à aucun renseignement ni à aucune déclaration du C.P. relativement aux travaux. Fielding le savait lorsqu'il a demandé des renseignements à un employé du C.P. Il savait que s'il obtenait un renseignement, Carman ne pourrait s'y fier qu'à ses propres risques. À mon avis, d'après les faits en l'espèce, C.P. n'a jamais assumé une obligation de diligence à l'égard du renseignement donné par son employé, pourvu que ce renseignement ait été donné honnêtement. Le juge de première instance a conclu que la déclaration inexacte a été faite à Carman de bonne foi sans intention frauduleuse. [Je souligne.]

Il est également intéressant de noter l'extrait suivant des motifs du juge Wilson (alors juge à la Cour d'appel), qui a rédigé les motifs au nom de la Cour d'appel à la majorité, dans l'arrêt *Carman Construction* ((1981), 33 O.R. (2d) 472, à la p. 473):

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This is not, in the view of the majority, a case in which, after making a negligent misrepresentation to the plaintiff in order to induce it to enter into a contract, the terms of which were at the time of the misrepresentation unknown, the defendant thereafter inserts into the contract an exculpatory clause in order to insulate itself against antecedent tort liability. This is a case in which the plaintiff tendered knowing that in the very contract on which it was tendering it had agreed to assume the risk of using any information obtained by it from the defendant's employees.

Contrary to *Hedley Byrne* and *Carman Construction*, *supra*, there is no contemporaneity in this case between the alleged disclaimers of responsibility and the negligent misrepresentations. More important than their timing, however, clauses 13 and 14 of the employment agreement are far from being statements, express or implied, that the respondent and its representative are not assuming responsibility for the representations made to the appellant during the hiring interview about the nature and existence of the Multiview project. Although I am not prepared to hold that nothing less than the clearest and most express disclaimer will suffice to negate a duty of care, something more than clauses 13 and 14 is definitely required. These provisions relate to the rights and obligations of the parties in the event of the appellant's termination or transfer. They have nothing to do with representations made during pre- or post-contractual negotiations, let alone disclaimers for said representations.

Assuming, for the sake of argument, that the principle set out in the judgment of the Court of Appeal is correct in law (i.e., "it is a sufficient disclaimer if the contract contains terms which contradict or are inconsistent with the representations relied upon" (p. 183)), there are no inconsistencies in the case at bar between clauses 13 and 14 of the contract and the representations relied on by the appellant. The only way to find such an inconsistency is to agree with Finlayson J.A. and the respondent that the representations relied on by the appellant amount to a warranty of job security. However, as noted above, the representations in

[TRADUCTION] La Cour à la majorité est d'avis qu'il ne s'agit pas en l'espèce d'un cas où, après avoir fait par négligence une déclaration inexacte à la demanderesse en vue de l'inciter à conclure un contrat, dont les conditions n'étaient pas connues au moment de la déclaration, la défenderesse insère par la suite au contrat une clause de disculpation pour se protéger de la responsabilité délictuelle antérieure. Il s'agit d'un cas où la demanderesse a déposé une soumission en sachant que, dans le contrat même pour lequel elle faisait une offre, elle acceptait d'assumer les risques de l'utilisation des renseignements obtenus des employés de la défenderesse.

Contrairement à ce qui était le cas dans les arrêts *Hedley Byrne* et *Carman Construction*, précités, les dénégations de responsabilité alléguées et les déclarations inexactes n'ont pas été faites en même temps en l'espèce. Toutefois, ce qui est encore plus important que le moment où elles ont été faites, les clauses 13 et 14 du contrat de travail sont loin d'être des déclarations, expresses ou implicites, voulant que l'intimée et son représentant n'assument pas la responsabilité des déclarations faites à l'appelant pendant l'entrevue d'embauchage au sujet de la nature et de l'existence du projet Multiview. Je ne suis pas prêt à conclure qu'il faut absolument une dénégation claire et expresse pour exclure l'obligation de diligence, mais il est certain que les clauses 13 et 14 ne suffisent pas. Ces dispositions portent sur les droits et obligations des parties en cas de cessation d'emploi ou de mutation. Elle n'ont rien à voir avec les déclarations faites pendant les négociations qui ont précédé ou suivi la signature du contrat, et sont encore moins des dénégations relatives auxdites déclarations.

À supposer, pour les fins de la discussion, que le principe énoncé dans le jugement de la Cour d'appel soit fondé en droit (à savoir, [TRADUCTION] «il y a une dénégation suffisante si le contrat contient des clauses qui contredisent les déclarations auxquelles on s'est fié ou qui sont incompatibles avec ces déclarations» (à la p. 183)), il n'y a pas de contradictions en l'espèce entre les clauses 13 et 14 du contrat et les déclarations sur lesquelles s'appuie l'appelant. La seule façon de constater pareille contradiction est de souscrire à l'avis du juge Finlayson et de l'intimée, que les déclarations sur lesquelles l'appelant s'est appuyé équivalent à une

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question are not of this nature. Rather, they are representations that a particular job would exist and that it would have certain features. As the trial judge found, the representations made during the job interview were firm representations "that the [respondent] company was committed to the development of additional modules of 'Multiview'" (p. 397), and there were implicit representations "that there was a reasonable plan in existence for the additional modules and that the company had made a financial commitment in the way of budgetary provisions for such development" (p. 398). Characterizing the representations in question as a warranty of job security seems particularly strained because Mr. Johnston actually indicated that the project would last only two years. Thus, Mr. Johnston did not represent that the position would last forever, although he certainly did represent that it would exist.

Again, the appellant's claim is not that Mr. Johnston negligently misrepresented the length of time he would be working on Multiview or the conditions under which his employment could be terminated. He does not argue that Cognos, through its representative, breached a duty of care by negligently misrepresenting his security of employment with the respondent company. Rather, the appellant argues that Mr. Johnston misrepresented the nature and existence of the employment opportunity being offered. It is on these latter representations that the appellant relied in leaving his relatively secure and well paying job in Calgary. The employment agreement neither expressly nor impliedly states that there may be no job of the sort described during the interview after the appellant's arrival in Ottawa. Stipulations that an employee can be dismissed without cause upon proper notice or reassigned to another position are not incompatible with a pre-contractual representation that a

garantie de sécurité d'emploi. Toutefois, comme je l'ai fait remarquer précédemment, les déclarations en question ne sont pas de cette nature. Il s'agit plutôt de déclarations selon lesquelles un emploi particulier existerait, lequel comporterait certains éléments. Comme le juge de première instance l'a conclu, les déclarations faites pendant l'entrevue d'embauchage étaient des déclarations fermes: [TRADUCTION] «la société [intimée] était bien décidée à mettre au point des modules additionnels de «Multiview»» (à la p. 397); on avait implicitement déclaré [TRADUCTION] «qu'il existait un plan raisonnable à l'égard des modules additionnels et que la société s'était financièrement engagée à les mettre au point au moyen de dispositions budgétaires» (à la p. 398). Qualifier les déclarations en question de garanties relatives à la sécurité d'emploi semble être particulièrement exagéré étant donné que M. Johnston a de fait indiqué que le projet ne durerait que deux ans. M. Johnston n'a donc pas déclaré qu'il s'agissait d'un poste permanent, bien qu'il ait certainement affirmé que ce poste serait disponible.

Ici encore, l'appelant n'allègue pas que M. Johnston a fait par négligence des déclarations inexactes quant à la période pendant laquelle il travaillerait au projet Multiview ou aux conditions dans lesquelles il pouvait être mis fin à son emploi. Il ne soutient pas que Cognos, par l'entremise de son représentant, a violé son obligation de diligence en faisant par négligence des déclarations inexactes au sujet de sa sécurité d'emploi auprès de la société intimée. L'appelant fait valoir plutôt que M. Johnston a fait des déclarations inexactes au sujet de la nature et de l'existence de l'emploi offert. L'appelant s'est fié à ces dernières déclarations lorsqu'il a quitté son emploi relativement sûr et rémunérateur à Calgary. Le contrat de travail ne dit pas expressément ni implicitement qu'il se peut qu'une fois l'appelant arrivé à Ottawa, il n'y ait aucun emploi du genre décrit pendant l'entrevue. Les clauses prévoyant que l'employé peut être congédié sans motif à la suite d'un préavis approprié ou qu'il peut être réaffecté à un autre poste ne sont pas incompatibles avec la déclaration faite avant la signature du contrat, à savoir qu'un poste

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particular job would exist, as described, should the employee accept employment.

As for the respondent's liability, clauses 13 and 14 of the employment agreement are clearly not, on their face, general limitation or exclusion of liability clauses as these expressions are commonly used. The language adopted by the parties is unambiguous. By stretching the common definition of "limitation of liability clause", one could interpret clauses 13 and 14 as "limiting" the respondent's "liability" in the event of a transfer or termination to what is specifically provided therein. However, even if this interpretation were adopted, the respondent's liability for pre-contractual negligent misrepresentations is clearly beyond the scope of these provisions. It is trite law that, in determining whether or not a limitation (or exclusion) of liability clause protects a defendant in a particular situation, the first step is to interpret the clause to see if it applies to the tort or breach of contract complained of. If the clause is wide enough to cover, for example, the defendant's negligence, then it may operate to limit effectively the defendant's liability for the breach of a common law duty of care, subject to any overriding considerations. This is not, however, the situation facing this Court.

Clauses 13 and 14 of the employment agreement, even if characterized as "limitation of liability" clauses, cannot support an interpretation which would enable them to protect the respondent from the breach of a common law duty of care, let alone the breach of the particular duty invoked by the appellant in his action for negligent misrepresentation. These provisions are no more relevant to the outcome of this case than is clause 15 of the contract, permitting Cognos to terminate the appellant's employment for cause. Thus, contrary to the respondent's submission, the third proposition set out in *Central Trust v. Rafuse*, *supra*, at p. 206, is of no assistance to this appeal, that is, the appellant is not attempting by his tort claim to "circumvent

particulier serait disponible, tel que décrit, si l'employé acceptait l'emploi.

Quant à la responsabilité de l'intimée, les clauses 13 et 14 du contrat de travail ne constituent clairement pas, à première vue, des clauses de limitation ou d'exclusion de responsabilité au sens où ces expressions sont ordinairement employées. Le libellé adopté par les parties n'est pas ambigu. En élargissant la définition ordinaire de l'expression «clause de limitation de responsabilité», on pourrait interpréter les clauses 13 et 14 comme «limitant» la «responsabilité» de l'intimée à ce qui y est expressément prévu, dans le cas d'une mutation ou d'une cessation d'emploi. Toutefois, même si l'on adoptait cette interprétation, la responsabilité de l'intimée pour les déclarations inexactes faites par négligence avant la signature du contrat irait clairement au-delà de la portée de ces dispositions. Il est de droit constant qu'en déterminant si une clause de limitation (ou d'exclusion) de responsabilité protège un défendeur dans un cas particulier, il faut avant tout interpréter la clause pour déterminer si elle s'applique au délit civil ou à la violation de contrat en cause. Si la clause est suffisamment générale pour viser, par exemple, la négligence du défendeur, elle peut s'appliquer de façon à limiter effectivement la responsabilité de celui-ci pour la violation d'une obligation de diligence existant en common law, sous réserve de quelque considération prépondérante. Toutefois, tel n'est pas ici le cas.

Les clauses 13 et 14 du contrat de travail, même si elles sont considérées comme des clauses de «limitation de responsabilité», ne peuvent pas étayer une interprétation selon laquelle elles pourraient protéger l'intimée contre la violation de l'obligation de diligence existant en common law, et encore moins la violation de l'obligation particulière invoquée par l'appelant dans son action fondée sur la déclaration inexacte faite par négligence. Ces dispositions ne sont pas plus pertinentes, en ce qui concerne l'issue de l'affaire, que la clause 15 du contrat, qui permet à Cognos de congédier l'appelant pour un motif déterminé. Ainsi, contrairement à l'argument de l'intimée, la troisième proposition énoncée dans l'arrêt *Central*

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or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort". Simply put, there is nothing in the employment agreement for the appellant to circumvent or to escape.

Finally, with respect to the respondent's argument that the appellant "affirmed" his contract by his conduct subsequent to his arrival in Ottawa, I would make two brief comments. First, the whole concept of "affirming" a contract is irrelevant in the case at bar as the appellant is seeking to rely on a tort remedy rather than a contractual one. Second, it seems somewhat harsh to characterize the appellant as having affirmed his contract of employment. The appellant found himself in a very difficult job situation, with increasing marital and health problems to exacerbate the situation. In my view, he acted quite reasonably in attempting to mitigate his losses before finally ending his employment relationship with Cognos.

F. *Conclusion*

In my view, the appellant has established all the required elements to succeed in his action. The respondent and its representative, Mr. Johnston, owed a duty of care to the appellant during the course of the hiring interview to exercise such reasonable care as the circumstances required to ensure that the representations made were accurate and not misleading. This duty of care is distinct from, and additional to, the duty of common honesty existing between negotiating parties. The trial judge found, as a fact, that misrepresentations—both express and implied—were made to the appellant and that he relied upon them, reasonably I might add, to his eventual detriment. In all the circumstances of this case, I agree with the trial judge that these misrepresentations were made by Mr. Johnston in a negligent manner. While a subsequent contract may, in appropriate cases, affect a *Hedley Byrne* claim relying on pre-contractual rep-

Trust c. Rafuse, précité, à la p. 206, n'est d'aucune utilité en l'espèce, c'est-à-dire que l'appelant ne tente pas, par l'action en responsabilité délictuelle qu'il a intentée, «de contourner ou d'éluder une clause contractuelle d'exonération ou de limitation de responsabilité pour l'acte ou l'omission qui constitue le délit civil». Bref, il n'y a rien dans le contrat de travail que l'appelant peut contourner ou éluder.

Enfin, en ce qui concerne l'argument de l'intimée selon lequel l'appelant a «confirmé» son contrat vu la façon dont il a agi après son arrivée à Ottawa, je ferais deux brèves remarques. En premier lieu, la notion de «confirmation» de contrat n'est pas pertinente en l'espèce car l'appelant cherche à exercer un recours fondé sur la responsabilité délictuelle plutôt que sur un contrat. En second lieu, il semble que ce soit être plutôt sévère que de considérer que l'appelant a confirmé son contrat de travail. L'appelant s'est trouvé dans une situation professionnelle fort difficile, et des problèmes conjugaux et médicaux sont venus aggraver la situation. À mon avis, il a agi d'une manière tout à fait raisonnable en tentant d'atténuer ses pertes avant de mettre finalement fin à ses relations professionnelles avec Cognos.

F. *Conclusion*

À mon avis, l'appelant a établi tous les éléments nécessaires pour avoir gain de cause. L'intimée et son représentant, M. Johnston, avaient une obligation de diligence envers l'appelant pendant l'entrevue d'embauchage et devaient faire preuve de la diligence raisonnable requise par les circonstances, de façon à s'assurer que les déclarations qui étaient faites étaient exactes et non trompeuses. Cette obligation de diligence est distincte de l'obligation d'honnêteté ordinaire existant entre des parties qui négocient et vient s'y ajouter. Le juge de première instance a tenu pour avéré que des déclarations inexactes, expresses et implicites, avaient été faites à l'appelant et qu'il s'y était fié, de manière raisonnable selon moi, et à son détriment. Compte tenu de toutes les circonstances de l'espèce, je souscris à l'avis du juge de première instance, selon lequel M. Johnston a fait ces déclarations inexactes d'une manière négligente. Un contrat subséquent peut,

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resentations, the employment agreement signed by the appellant is irrelevant to this action. In particular, clauses 13 and 14 of the contract are not valid disclaimers of responsibility for the representations made during the interview.

V. Disposition

For the foregoing reasons, I would allow the appeal, set aside the judgment of the Ontario Court of Appeal, and restore the judgment of White J., finding the respondent liable and granting the appellant damages in the amount of $67,224. The appellant should have his costs here and in the courts below.

The following are the reasons delivered by

MCLACHLIN J.—I agree with my colleague Iacobucci J. that this appeal should be allowed, although for reasons which are obvious from my reasons in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 (released concurrently), I do not concur in all aspects of his reasons.

The first issue raised by this appeal is the effect of the fact that the parties in this case entered into a contract which contained a specific term governing termination. The Court of Appeal (1990), 74 O.R. (2d) 176 concluded that this precluded the plaintiff's action in tort for negligent misrepresentation as to the employment. Finlayson J.A., for the court, stated (at p. 183):

. . . the respondent Queen stated that he would not have given up his secure position in Calgary for a move to Ottawa that was without permanence, and yet he signed a contract which provided him with no assurances respecting his place of employment or its tenure. To rely on *Hedley Byrne*, the negligent misrepresentation must have amounted to a warranty of job security and yet the

dans les cas appropriés, influer sur une demande fondée sur des déclarations faites avant la passation d'un contrat, comme dans l'arrêt *Hedley Byrne*, mais le contrat de travail signé par l'appelant n'a rien à voir avec la présente action. En particulier, les clauses 13 et 14 du contrat ne constituent pas des dénégations valides de responsabilité relativement aux déclarations faites pendant l'entrevue.

V. Dispositif

Pour ces motifs, je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel de l'Ontario et de rétablir le jugement par lequel le juge White a conclu à la responsabilité de l'intimée et a accordé à l'appelant des dommages-intérêts au montant de 67 224 $. L'appelant a droit à ses dépens devant toutes les cours.

Version française des motifs rendus par

LE JUGE MCLACHLIN—Je conviens avec mon collègue le juge Iacobucci que le présent pourvoi devrait être accueilli, quoique je ne souscrive pas entièrement à ses motifs, pour des raisons qui sont évidentes à la lecture de mes motifs dans l'arrêt *BG Checo International Ltd. c. British Columbia Hydro and Power Authority*, [1993] 1 R.C.S. 12 (rendu en même temps que les présents motifs).

La première question soulevée par le présent pourvoi concerne les conséquences que peut avoir le fait que les parties en l'espèce ont conclu un contrat qui renfermait une condition portant expressément sur la cessation de l'emploi. La Cour d'appel (1990), 74 O.R. (2d) 176, a conclu que cette clause vouait à l'échec l'action en responsabilité délictuelle du demandeur pour déclaration inexacte faite par négligence relativement à l'emploi. Le juge Finlayson de la Cour d'appel a dit (à la p. 183):

[TRADUCTION] . . . l'intimé Queen a déclaré qu'il n'aurait pas renoncé à son poste sûr à Calgary pour occuper à Ottawa un poste qui n'était pas permanent, et pourtant il a signé un contrat qui ne lui fournissait aucune garantie au sujet de son lieu de travail ou de sa permanence. Pour que l'arrêt *Hedley Byrne* puisse être invoqué, la déclaration inexacte faite par négligence doit équivaloir

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contract of employment was surely a disclaimer of just that. No representations as to job security, whether based on performance or on job availability, could have survived the one-month termination notice "without cause" contained in the contract. [Emphasis added.]

My colleague, at p. 139, rejects this conclusion on the ground that the contractual duties were different from the common law duty associated with the tort of negligent misrepresentation. The misrepresentation concerned "the nature and existence of the employment opportunity being offered". The contract clauses, by contrast, were concerned with the rights and remedies of the parties relating to termination.

I agree that the pre-contractual representation was different in scope and effect from the contractual obligation. The matter is not merely one of semantics. It turns on the plaintiff's assessment of the risk involved in leaving his employment and joining Cognos. When a person is deciding to enter a contract with terms governing termination, he or she makes an assessment as to the risk of such termination occurring. A stringent term as to termination may not deter the person from entering into the contract if he or she is satisfied that the risk of termination materializing is low. The representation at issue in this case concerned the risk of termination coming about. The representation was not that Cognos would not have the discretion to terminate or transfer the plaintiff on one month's notice. Rather, by implying that the Multiview project was a reality, that it had the financial support of Cognos, and that it had passed through the feasibility and costing stage, Johnston on behalf of Cognos caused the plaintiff to be misled as to the level of the risk to the plaintiff that Cognos might at some point choose to exercise its termination power under the employment contract. The plain-

à une garantie de sécurité d'emploi, et pourtant le contrat de travail contenait certainement une dénégation à ce sujet. Aucune déclaration relative à la sécurité d'emploi, qu'elle soit fondée sur le rendement ou sur la disponibilité d'un emploi, n'aurait pu l'emporter sur la disposition concernant le préavis d'un mois de congédiement «sans motif» figurant dans le contrat. [Je souligne.]

Mon collègue, à la p. 139, rejette cette conclusion au motif que les obligations contractuelles différaient de l'obligation de common law associée au délit civil de déclaration inexacte faite par négligence. La déclaration inexacte touchait «la nature et [. . .] l'existence de l'emploi offert». Les clauses du contrat, par contre, portaient sur les droits et les redressements dont pouvaient se prévaloir les parties en cas de cessation d'emploi.

Je partage l'avis que la déclaration faite antérieurement à la passation du contrat différait, de par sa portée et son effet, de l'obligation contractuelle. Ce n'est pas une simple question de sémantique. Ce dont il s'agit en fait c'est l'appréciation par le demandeur du risque qu'il courait en quittant son poste pour se joindre à Cognos. En effet, avant de décider s'il y a lieu de conclure un contrat contenant des conditions régissant la cessation de l'emploi, il faut soupeser le risque d'une telle éventualité. Il se peut qu'une condition sévère relative à la cessation de l'emploi ne dissuade pas la personne de signer le contrat si elle est convaincue qu'elle ne court qu'un faible risque de perdre son emploi. La déclaration en cause en l'espèce concernait le risque de la cessation de l'emploi. On n'a pas déclaré que Cognos ne détiendrait pas le pouvoir discrétionnaire de congédier ou de muter le demandeur sur préavis d'un mois. Ce qui s'est plutôt passé c'est qu'en laissant entendre que le projet Multiview était une réalité, qu'il jouissait de l'appui financier de Cognos et qu'il avait franchi l'étape de l'étude de faisabilité et de l'estimation des coûts, Johnston, pour le compte de Cognos, a induit le demandeur en erreur quant au degré du risque, auquel s'exposait ce dernier, de voir Cognos décider à un moment donné d'exercer le pouvoir de congédiement que lui conférait le contrat de travail. Le demandeur, ajoutant foi aux pro-

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tiff, believing Johnston, concluded that the risk of being transferred or terminated was low.

To elaborate, a number of situations can be envisaged in which Cognos might have decided to terminate the plaintiff's employment:

(i) his employment not working out in the Multiview project, for reasons that did not amount to just cause for dismissal (e.g., say his work was mediocre, but not incompetent);

(ii) unanticipated serious financial difficulties being encountered by Cognos, such that a decision might be made to lay off staff;

(iii) the situation that actually developed, of Cognos's Corporate Management Team deciding, when the Multiview project reached the end of the feasibility and costing stage, not to make a financial commitment to proceeding with the full development of the Multiview line of products;

(iv) Cognos's Corporate Management Team deciding after a financial commitment had been made to scale back or terminate the development of the Multiview line of products.

The representation excluded the third reason for dismissal, thereby reducing the risk of termination. As found by the trial judge, the plaintiff relied on that representation in deciding to enter into the contract. It turned out to have been negligently made and false. It follows that the plaintiff is entitled to damages for the loss suffered as a result of that representation.

The second issue on the appeal is whether the Court of Appeal was correct in concluding that the trial judge imposed too high a duty of care. Finlayson J.A. correctly stated that the duty on Cognos was "no more than a duty to take care that the representations made were responsible and accurate to the knowledge of Johnston and of his principal,

pos de Johnston, a conclu qu'il ne courait qu'un faible risque de mutation ou de congédiement.

Précisons que l'on peut envisager plusieurs situations dans lesquelles Cognos aurait pu décider de mettre fin à l'emploi du demandeur:

(i) celle où il n'aurait pas fait le poids dans le projet Multiview, mais pour des raisons qui ne constituaient pas un motif valable de congédiement (p. ex. s'il faisait un travail médiocre sans toutefois aller jusqu'à l'incompétence);

(ii) celle où Cognos éprouverait de graves difficultés financières imprévues pouvant entraîner la mise à pied d'employés;

(iii) celle qui s'est en fait produite, où l'équipe de gestion d'entreprise de Cognos a décidé, lorsque le projet Multiview est arrivé au terme de l'étude de faisabilité et de l'estimation des coûts, de ne pas engager les fonds nécessaires pour le développement complet de la gamme de produits Multiview;

(iv) celle où l'équipe de gestion d'entreprise de Cognos déciderait, après avoir engagé les fonds, de limiter le développement de la gamme de produits Multiview ou d'y mettre fin.

Or, la déclaration en cause écartait le troisième motif de congédiement et, par le fait même, diminuait le risque de la cessation de l'emploi. Comme l'a conclu le juge de première instance, le demandeur s'est fondé sur cette déclaration pour décider de signer le contrat. Il s'est toutefois trouvé que la déclaration avait été faite par négligence et qu'elle était fausse. D'où il découle que le demandeur a droit aux dommages-intérêts pour la perte qu'il a subie par suite de cette déclaration.

Le pourvoi soulève en second lieu la question de savoir si la Cour d'appel a eu raison de conclure que le juge de première instance avait imposé une obligation de diligence trop lourde. Le juge Finlayson a dit, avec raison, que l'obligation incombant à Cognos consistait [TRADUCTION] «simplement à veiller à ce que les déclarations soient réfléchies et

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Cognos" (p. 186). However, he went on to conclude "What [Johnston] said was truthful, he believed in it, that was enough" (p. 188). With respect, the second statement cannot be supported. It is not enough that the defendant believed what he said; he must have been non-negligent in having formed and expressed that belief. At the same time, Finlayson J.A. exaggerated the duty of care which the trial judge applied, in stating the trial judge held that Johnston "had to divulge to all of the applicants that he interviewed the precise status of the corporate commitment to the development of the new product so that they could make their own assessment" (p. 187). In fact, the trial judge held only that the defendant had a duty not to hold out to applicants that the project was secure when it knew that funding was not approved and knew or should have known that the final approval was not a rubber stamp process and the secure funding was not a foregone conclusion. I agree with my colleague that this is the appropriate standard and that the duty of care with respect to representations made in a pre-employment situation is the same as that which applies generally. I also agree with my colleague that the argument that the representations are non-actionable by their nature must be rejected.

I would allow the appeal on the terms proposed by Iacobucci J.

Appeal allowed with costs.

Solicitors for the appellant: Peter J. Bishop & Associates, Ottawa.

Solicitors for the respondent: Gowling, Strathy & Henderson, Ottawa.

exactes, à la connaissance de M. Johnston et de son commettant, Cognos» (à la p. 186). Il est toutefois arrivé, plus loin, à la conclusion suivante: [TRADUCTION] «Ce qu'il [Johnston] a dit était vrai, il y croyait, et cela suffisait» (à la p. 188). Avec égards, la seconde déclaration est sans fondement. Il ne suffit pas que le défendeur croie à ce qu'il a dit; il faut en outre qu'il ait agi sans négligence en formant et en exprimant cette opinion. Par ailleurs, le juge Finlayson a exagéré l'obligation de diligence retenue par le premier juge, affirmant en effet que, d'après ce dernier, Johnston [TRADUCTION] «devait informer tous les candidats qu'il rencontrait de la situation exacte relativement à l'engagement pris par la société à l'égard du développement du nouveau produit, de façon que ceux-ci puissent évaluer eux-mêmes la viabilité du projet» (à la p. 187). De fait, le juge de première instance a simplement conclu que la défenderesse avait l'obligation de ne pas faire croire aux candidats que le projet était assuré alors qu'elle savait que l'engagement des fonds n'avait pas été approuvé et qu'elle savait, ou aurait dû savoir, que l'approbation définitive n'était pas qu'une formalité et que l'engagement des fonds n'avait rien de certain. Je conviens avec mon collègue que c'est là le critère qu'il convient d'appliquer et que l'obligation de diligence en ce qui concerne les déclarations faites antérieurement à l'embauchage est identique à celle qui s'applique en général. Je suis également d'accord avec mon collègue que doit être rejeté l'argument voulant que les déclarations, de par leur nature, ne peuvent donner lieu à une action en justice.

Je suis d'avis d'accueillir le pourvoi selon les modalités que propose le juge Iacobucci.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant: Peter J. Bishop & Associates, Ottawa.

Procureurs de l'intimée: Gowling, Strathy & Henderson, Ottawa.

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TAB 57

Her Majesty The Queen in Right of Canada *Appellant/Respondent on cross-appeal*

v.

Imperial Tobacco Canada Limited *Respondent/Appellant on cross-appeal*

and

Attorney General of Ontario and Attorney General of British Columbia *Interveners*

- and -

Attorney General of Canada *Appellant/ Respondent on cross-appeal*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc. *Respondents/Appellants on cross-appeal*

and

Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick *Interveners*

Sa Majesté la Reine du chef du Canada *Appelante/intimée au pourvoi incident*

c.

Imperial Tobacco Canada Limitée *Intimée/appelante au pourvoi incident*

et

Procureur général de l'Ontario et procureur général de la Colombie-Britannique *Intervenants*

- et -

Procureur général du Canada *Appelant/ intimé au pourvoi incident*

c.

Sa Majesté la Reine du chef de la Colombie-Britannique *Intimée*

et

Imperial Tobacco Canada Limitée, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. et Philip Morris International Inc. *Intimées/appelantes au pourvoi incident*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la province du Nouveau-Brunswick *Intervenants*

2011 SCC 42 (CanLII)

Indexed as: R. *v.* Imperial Tobacco Canada Ltd.

2011 SCC 42

File Nos.: 33559, 33563.

2011: February 24; 2011: July 29.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Third-party claims — Motion to strike — Tobacco manufacturers being sued by provincial government to recover health care costs of tobacco-related illnesses, and by consumers of "light" or "mild" cigarettes for damages and punitive damages — Tobacco companies issuing third-party notices to federal government claiming contribution and indemnity — Whether plain and obvious that third-party claims disclose no reasonable cause of action.

Torts — Negligent misrepresentation — Failure to warn — Negligent design — Duty of care — Proximity — Tobacco manufacturers being sued by provincial government and consumers and issuing third-party notices to federal government claiming contribution and indemnity — Federal government claiming representations constituted government policy immune from judicial review — Whether facts as pleaded establish prima facie duty of care — If so, whether conflicting policy considerations negate such duty.

Torts — Provincial statutory scheme establishing rights of action against tobacco manufacturers and suppliers — Whether federal government liable as a "manufacturer" under the Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, or a "supplier" under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and the Trade Practice Act, R.S.B.C. 1996, c. 457.

The appeal concerns two cases before the courts in British Columbia. In the *Costs Recovery* case, the

Répertorié : R. *c.* Imperial Tobacco Canada Ltée

2011 CSC 42

N[os] du greffe : 33559, 33563.

2011 : 24 février; 2011 : 29 juillet.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

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

Procédure civile — Mise en cause — Requête en radiation — Fabricants de tabac poursuivis par le gouvernement d'une province qui cherche à recouvrer les sommes consacrées au traitement des maladies liées au tabagisme, et par des consommateurs de cigarettes dites « légères » ou « douces » qui demandent des dommages-intérêts et des dommages-intérêts punitifs — Compagnies de tabac mettant en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Est-il évident et manifeste que les avis de mise en cause ne révèlent aucune cause d'action raisonnable?

Responsabilité délictuelle — Déclaration inexacte faite par négligence — Défaut de mise en garde — Conception négligente — Obligation de diligence — Lien de proximité — Poursuites engagées par le gouvernement d'une province et des consommateurs contre des fabricants de tabac qui ont mis en cause le gouvernement fédéral pour lui réclamer une contribution et une indemnisation — Gouvernement fédéral prétendant que les déclarations relevaient de la politique générale du gouvernement et étaient de ce fait soustraites au contrôle judiciaire — Les faits allégués établissent-ils l'existence d'une obligation de diligence prima facie? — Dans l'affirmative, des considérations de politique générale opposées écartent-elles cette obligation?

Responsabilité délictuelle — Régime législatif provincial conférant un droit d'action contre les fabricants et les fournisseurs de tabac — Le gouvernement fédéral a-t-il engagé sa responsabilité à titre de « fabricant » au sens de la Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30, ou de « fournisseur » au sens de la Business Practices and Consumer Protection Act, S.B.C. 2004, ch. 2, et de la Trade Practice Act, R.S.B.C. 1996, ch. 457?

Le pourvoi porte sur deux actions intentées devant les tribunaux de la Colombie-Britannique. Dans l'*Affaire du*

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Government of British Columbia is seeking to recover, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act* ("*CRA*"), the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial. British Columbia alleges that by 1950, the tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product. In the *Knight* case, a class action was brought against Imperial alone on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes.

In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity. They also allege that Canada would itself be liable as a "manufacturer" under the *CRA* or a "supplier" under the *Business Practices and Consumer Protection Act* and the *Trade Practice Act*, and that they are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*. Canada brought motions to strike the third-party notices, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claim. The court unanimously struck the remainder of the tobacco companies' claims.

recouvrement des coûts, le gouvernement de la Colombie-Britannique cherche, aux termes de la *Tobacco Damages and Health Care Costs Recovery Act* (« *CRA* »), à recouvrer d'un groupe de compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme. Selon la Colombie-Britannique, dès 1950, les compagnies de tabac savaient ou auraient dû savoir que les cigarettes étaient néfastes pour la santé et ont fait défaut de mettre le public en garde adéquatement contre les risques associés à l'usage de leur produit. Dans l'affaire *Knight*, un recours collectif a été intenté contre Imperial seulement, pour demander, au nom des membres qui ont acheté des cigarettes dites « légères » ou « douces », le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs. Selon eux, la teneur en goudron et en nicotine indiquée sur les paquets de cigarettes fabriquées par Imperial ne correspondait pas aux émissions toxiques réelles pour les fumeurs. Ils font valoir que la fumée dégagée par les cigarettes légères était tout aussi néfaste que celle dégagée par les cigarettes régulières.

Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que, si elles étaient tenues responsables envers les demandeurs, elles avaient le droit d'être indemnisées par le Canada pour déclarations inexactes faites par négligence, conception négligente et défaut de mise en garde; ainsi qu'en vertu de l'equity. Elles font également valoir que le Canada aurait engagé sa propre responsabilité à titre de « fabricant » au sens de la *CRA* ou à titre de « fournisseur » au sens de la *Business Practices and Consumer Protection Act* et de la *Trade Practice Act*, et qu'elles sont en droit d'obtenir du Canada une contribution et une indemnisation en vertu de la *Negligence Act*. Le Canada a présenté des requêtes en radiation des avis de mise en cause, faisant valoir qu'il était évident et manifeste que ces avis ne révélaient aucune cause d'action raisonnable. Dans les deux affaires, les juges siégeant en cabinet ont ordonné la radiation de tous les avis de mise en cause. La Cour d'appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. Les juges majoritaires ont conclu à l'opportunité d'instruire, dans l'*Affaire du recouvrement des coûts* et dans l'affaire *Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d'une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l'affaire *Knight*, les juges majoritaires ont conclu en outre à l'opportunité d'instruire la demande relative aux déclarations inexactes faites par négligence fondée sur une prétendue obligation de diligence du Canada envers les consommateurs, ainsi que la demande relative à la conception négligente. La cour a radié à l'unanimité les autres demandes présentées par les compagnies de tabac.

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Held: The appeals should be allowed and the claims should be struck out. The tobacco companies' cross-appeals should be dismissed.

On a motion to strike, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial. However, the judge cannot consider what evidence adduced in the future might or might not show. Here, it is plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

In the *Costs Recovery* case, the private law claims against Canada for contribution and indemnity based on alleged breaches of a duty of care to smokers must be struck. A third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff, in this case, British Columbia. Here, even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia.

The Claims for Negligent Misrepresentation

There are two relationships at issue in these claims: one between Canada and consumers and one between Canada and tobacco companies. In the *Knight* case, Imperial alleges that Canada negligently represented the health attributes of low-tar cigarettes to consumers. In both the *Knight* case and the *Costs Recovery* case, the tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies.

The facts as pleaded do not bring Canada's relationship with consumers and the tobacco companies within a settled category of negligent misrepresentation. Accordingly, to determine whether the alleged causes of action have a reasonable prospect of success, the general requirements for liability in tort must be met. At

Arrêt : Les pourvois sont accueillis et les demandes sont radiées. Les pourvois incidents interjetés par les compagnies de tabac sont rejetés.

Dans le cas d'une requête en radiation, une demande ne sera radiée que s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que la déclaration ne révèle aucune cause d'action raisonnable. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable. Cependant, le juge ne peut pas anticiper ce que la preuve qui sera produite permettra d'établir. En l'espèce, il est évident et manifeste qu'aucune des allégations des compagnies de tabac visant le Canada n'a une possibilité raisonnable d'être accueillie.

Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts

Dans l'*Affaire du recouvrement des coûts*, les demandes de contribution et d'indemnisation de droit privé dirigées contre le Canada et fondées sur des manquements allégués à une obligation de diligence envers les fumeurs doivent être radiées. Un tiers ne peut être tenu de verser une contribution en vertu de la *Negligence Act* que s'il est directement responsable envers le demandeur, en l'occurrence la Colombie-Britannique. En l'espèce, même si le Canada a manqué à ses obligations envers les fumeurs, ce manquement n'aurait aucune incidence sur la question de savoir s'il est responsable envers la Colombie-Britannique.

Les allégations de déclarations inexactes faites par négligence

Les allégations en l'espèce mettent en cause deux liens : celui entre le Canada et les consommateurs, et celui entre le Canada et les compagnies de tabac. Dans l'affaire *Knight*, Imperial prétend que le Canada a fait preuve de négligence en déclarant faussement aux fumeurs que la cigarette à teneur réduite en goudron serait moins nocive pour la santé. Dans l'affaire *Knight* et l'*Affaire du recouvrement des coûts*, les compagnies de tabac prétendent que le Canada leur a fait des déclarations inexactes par négligence.

Les faits allégués ne font pas entrer la relation du Canada avec les consommateurs et les compagnies de tabac dans une catégorie définie en matière de déclarations inexactes faites par négligence. Par conséquent, afin de déterminer si les causes d'action alléguées ont une possibilité raisonnable d'être accueillies, il faut que

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the first stage, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. In a claim of negligent misrepresentation, both of these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties. A special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case. If proximity is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

Here, on the facts as pleaded, Canada did not owe a *prima facie* duty of care to consumers. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes. However, the relevant statutes establish only general duties to the public, and no private law duties to consumers. In light of the lack of proximity, this claim in the *Knight* case should be struck at the first stage of the analysis.

As for the tobacco companies, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of establishing a special relationship of proximity giving rise to a *prima facie* duty of care. The allegations are that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials, going far beyond the sort of statements made by Canada to the public at large. Furthermore, Canada's regulatory powers over the manufacturers coupled with its specific advice and its commercial involvement could be seen as supporting a conclusion that Canada ought reasonably to have foreseen that the tobacco companies would rely on the representations and that such reliance would be reasonable in the pleaded circumstance.

les exigences générales en matière de responsabilité délictuelle soient remplies. À la première étape, il faut se demander si les faits révèlent l'existence d'un lien de proximité dans le cadre duquel l'omission de faire preuve de diligence raisonnable peut, de façon prévisible, causer une perte ou un préjudice au plaignant. Dans le cadre d'une action pour déclaration inexacte faite par négligence, ces deux conditions pour qu'il existe une obligation de diligence *prima facie* sont remplies lorsqu'un « lien spécial » unit les parties. L'existence d'un lien spécial est établie lorsque : (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration; et que (2) la confiance que le demandeur accorde à la déclaration serait raisonnable dans les circonstances. Si l'existence d'un lien de proximité est établie, il y a obligation de diligence *prima facie* et l'analyse passe à l'étape suivante dans laquelle on se demande si des considérations de politique empêcheraient de reconnaître cette obligation de diligence *prima facie*.

Compte tenu des faits allégués, le Canada n'avait pas d'obligation de ce genre envers les consommateurs. Le lien entre eux se limitait aux déclarations du Canada adressées au grand public selon lesquelles les cigarettes à faible teneur en goudron sont moins dangereuses pour la santé. Le Canada n'entretenait pas de rapports spéciaux avec les membres du groupe. Par conséquent, le constat qu'il s'agit d'un lien suffisamment étroit doit découler des lois applicables. Les lois pertinentes n'établissent toutefois que des obligations générales envers le public, et aucune obligation de nature privée envers les consommateurs. Vu l'absence de lien de proximité, il convient de radier cette allégation dans l'affaire *Knight* à la première étape de l'analyse.

En ce qui concerne les compagnies de tabac, les faits allégués révèlent que le Canada et les compagnies de tabac entretiennent depuis longtemps des rapports qui peuvent constituer un lien spécial imposant une obligation de diligence *prima facie*. On allègue que le Canada a joué un rôle de conseiller auprès d'un nombre déterminé de fabricants et a entretenu des rapports commerciaux avec les sociétés en cause compte tenu, en partie, des avis fournis à ces dernières par des fonctionnaires, avis qui vont bien au-delà des déclarations faites par le Canada au grand public. De plus, les pouvoirs de réglementation du Canada envers les fabricants, conjugués aux avis précis qu'il a donnés et à sa participation à des activités commerciales, pourraient être considérés comme étayant la conclusion que le Canada aurait raisonnablement dû prévoir que les compagnies de tabac se fieraient aux déclarations et que cette confiance serait raisonnable dans les circonstances alléguées.

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Canada's alleged negligent misrepresentations do not give rise to tort liability, however, because of conflicting policy considerations. The alleged representations constitute protected expressions of government policy. Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadian government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who continued to smoke to switch to low-tar cigarettes.

Les déclarations inexactes que le Canada aurait faites par négligence n'engagent toutefois pas sa responsabilité délictuelle parce que des considérations de politique générale s'y opposent. Les déclarations qui auraient été faites sont des expressions protégées de politique générale du gouvernement. Les décisions de politique générale fondamentale du gouvernement qui sont soustraites aux poursuites sont les décisions qui se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Les déclarations en cause faisaient partie intégrante d'une politique générale adoptée par les plus hautes instances du gouvernement canadien et élaborée par souci pour la santé des Canadiens et des Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac, afin d'inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron.

The claims for negligent misrepresentation should also fail because they would expose Canada to indeterminate liability. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers. While the quantum of damages owed by Canada to the companies in both cases would depend on the number of smokers and the number of cigarettes sold, Canada had no control over the number of people who smoked light cigarettes.

Les allégations de déclarations inexactes faites par négligence doivent aussi être rejetées parce qu'elles exposeraient le Canada à une responsabilité indéterminée. Reconnaître une obligation de diligence à l'égard des déclarations faites aux compagnies de tabac reviendrait en fait à reconnaître une obligation envers les consommateurs. Le montant des dommages-intérêts dus par le Canada aux compagnies de tabac dans les deux cas dépendrait du nombre de fumeurs et du nombre de cigarettes vendues, alors que le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères.

The Claims for Failure to Warn

The tobacco companies make two allegations for failure to warn: (1) that Canada directed the tobacco companies not to provide warnings on cigarette packages about the health hazards of cigarettes and (2) that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco it designed and licensed. These two claims should be struck. The crux of the first claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn. The same is true of the second claim. While the tort of failure to warn requires evidence of a positive duty towards the plaintiff, nothing in the third-party notices suggests that Canada was under such a positive duty here. A plea of negligence, without more, will not suffice to raise a duty to warn. In any event,

Les allégations de défaut de mise en garde

Les compagnies de tabac formulent deux allégations de défaut de mise en garde : (1) le Canada a interdit aux compagnies de tabac d'apposer sur les paquets de cigarettes des mises en garde à l'égard des dangers que présentent les cigarettes pour la santé et (2) le Canada n'a pas avisé les compagnies de tabac des dangers que présentent les souches de tabac conçues par le Canada et pour lesquelles il a octroyé des licences. Il faut radier ces allégations. L'élément crucial de la première allégation est essentiellement le même que celui des allégations de déclarations inexactes faites par négligence, et il y a lieu de la rejeter pour les mêmes considérations de politique générale. Les recommandations du ministre de la Santé sur les mises en garde faisaient partie intégrante de la politique générale du gouvernement visant à inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. En tant que telles, elles ne peuvent fonder une action pour défaut de mise en garde. Cela vaut aussi pour la deuxième allégation. Bien que le délit

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such a claim would fail for the policy reasons applicable to the negligent misrepresentation claim.

The Claims for Negligent Design

The tobacco companies have brought two types of negligent design claims against Canada. They submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. In the *Knight* case, Imperial submits that Canada breached its duty of care to consumers of light and mild cigarettes. The two negligent design claims establish a *prima facie* duty of care. With respect to Canada's design of low-tar tobacco strains, the proximity alleged with the tobacco companies is not based on a statutory duty, but on commercial interactions between Canada and the tobacco companies. In the *Knight* case also, it is at least arguable that Canada was acting in a commercial capacity towards the consumers of light and mild cigarettes when it designed its strains of tobacco. However, the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy and based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. These claims should accordingly be struck.

Liability as a "Manufacturer" and a "Supplier"

The tobacco companies' contribution claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* should be struck. It is plain and obvious that the federal government does not qualify as a manufacturer of tobacco under that Act. When the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act,

de défaut de mise en garde requière la preuve d'une obligation positive envers le demandeur, les avis de mise en cause ne donnent aucunement matière à croire que le Canada avait une telle obligation en l'espèce. Une allégation de négligence, sans plus, est insuffisante pour imposer une obligation de mise en garde. Quoi qu'il en soit, une allégation de ce genre serait rejetée pour les considérations de politique générale qui s'appliquent aux allégations de déclarations inexactes faites par négligence.

La conception négligente

Les compagnies de tabac ont soulevé à l'encontre du Canada deux types d'allégations de conception négligente. Elles affirment que le Canada a manqué à son obligation de diligence envers elles en concevant de manière négligente ses souches de tabac à faible teneur en goudron. Dans l'affaire *Knight*, Imperial fait valoir que le Canada a manqué à son obligation de diligence envers les consommateurs de cigarettes légères et douces. Ces deux allégations de conception négligente établissent l'existence d'une obligation de diligence *prima facie*. Pour ce qui est des souches de tabac à faible teneur en goudron conçues par le Canada, le prétendu lien de proximité avec les compagnies de tabac se fonde non pas sur une obligation prévue par la loi, mais sur les rapports entre le Canada et les compagnies de tabac. Dans l'affaire *Knight* également, il est au moins possible de soutenir que le Canada agissait comme une entreprise commerciale envers les consommateurs de cigarettes légères et douces lorsqu'il a conçu ses souches de tabac. Cependant, la décision de concevoir des souches de tabac à faible teneur en goudron parce qu'on croit que les cigarettes fabriquées avec ce tabac seraient moins nuisibles pour la santé constitue une ligne de conduite fondée sur la politique générale du Canada en matière de santé et repose sur des facteurs sociaux et économiques. Cette décision de politique générale fondamentale du gouvernement ne saurait fonder une poursuite pour conception négligente. Il faut donc rejeter ces allégations.

Responsabilité d'un « fabricant » et d'un « fournisseur »

Dans l'*Affaire du recouvrement des coûts*, la demande de contribution des compagnies de tabac visant à faire reconnaître au Canada la qualité de « fabricant » au sens de la *CRA* doit être radiée. Il est manifeste et évident que le gouvernement fédéral n'est pas un fabricant de produits du tabac au sens de cette loi. Lorsqu'on interprète la loi dans son contexte eu égard à l'ensemble de ses dispositions, il appert que la législature de la Colombie-Britannique ne voulait pas imposer au Canada la responsabilité d'un fabricant. C'est ce que

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and the broader context of the relationship between the province and the federal government. Holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco-related wrongs from taxpayers to the tobacco industry. Similarly, the tobacco companies cannot rely on the recently adopted *Health Care Costs Recovery Act* in an action for contribution under the *CRA*. Finally, Canada could not be liable for contribution under the *Negligence Act* or at common law since it is not directly liable to British Columbia.

confirment le texte de la loi, l'intention qu'avait le législateur au moment de l'adopter et le contexte plus général des rapports entre la province et le gouvernement fédéral. Tenir le Canada responsable en application de la *CRA* contrecarrerait l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une faute du fabricant. Dans le même ordre d'idées, les compagnies de tabac ne peuvent s'appuyer sur la *Health Care Costs Recovery Act*, récemment édictée, dans le cadre d'une action intentée pour obtenir une contribution en vertu de la *CRA*. Enfin, le Canada ne peut être tenu à une contribution au titre de la *Negligence Act* ou en common law parce qu'il n'est pas directement responsable envers la Colombie-Britannique.

Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *Trade Practice Act* and the *Business Practices and Consumer Protection Act* which replaced it should also be struck. Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in those statutes. Those phrases must be understood as limited to activities undertaken for a commercial purpose. Here, it is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier and is not liable under those statutes.

Dans l'affaire *Knight*, la demande d'Imperial de reconnaître au Canada la qualité de « fournisseur » au sens de la *Trade Practice Act* et de la loi qui l'a remplacée, la *Business Practices and Consumer Protection Act*, doit aussi être radiée. Le but recherché par le Canada lorsqu'il a développé et promu le tabac, comme l'indique l'avis de mise en cause, tend à indiquer que le Canada n'agissait pas « dans le cours de ses affaires », dans le sens où cette expression est employée dans ces lois. Cette expression doit être interprétée comme visant seulement les activités exercées à une fin commerciale. Il ressort de façon évidente et manifeste des faits allégués que le Canada a promu la consommation de cigarettes à faible teneur en goudron non pas à une fin commerciale, mais à une fin liée à la santé. Le Canada n'est donc pas un fournisseur et sa responsabilité n'est pas engagée en application de ces lois.

Claims for Equitable Indemnity and Procedural Considerations

The tobacco companies' claims of equitable indemnity should be struck. Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Demandes d'indemnité fondées sur l'equity et considérations d'ordre procédural

Les demandes des compagnies de tabac relatives à l'indemnisation en equity doivent être radiées. La doctrine de l'indemnité fondée sur l'equity est une doctrine restreinte qui ne s'applique que dans les cas où le mandant s'engage expressément ou implicitement à indemniser son mandataire pour avoir agi conformément à ses directives. Lorsque le Canada a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Dans ces circonstances, il est déraisonnable de déduire que le Canada avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

Finally, the claims for declaratory relief should be struck. The tobacco companies' ability to mount defences would not be severely prejudiced if Canada was no longer a third party in the litigation.

Enfin, il convient de radier les demandes de jugement déclaratoire. La capacité des compagnies de tabac de se défendre ne serait pas gravement compromise si la mise en cause du Canada en l'espèce prenait fin.

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Supreme Court Rules, B.C. Reg. 221/90, r. 19(24), (27).
Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, ch. 30, art. 1(1) « *manufacture* », « *manufacturer* », 2, 3(3)b).
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POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Hall, Saunders, Lowry, Tysoe et Smith), 2009 BCCA 540, 98 B.C.L.R. (4th) 201, 313 D.L.R. (4th) 651, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100, [2009] B.C.J. No. 2444 (QL), 2009 CarswellBC 3307, qui a infirmé en partie une décision de la juge Wedge qui a ordonné la radiation des

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2008 BCSC 419, 82 B.C.L.R. (4th) 362, 292 D.L.R. (4th) 353, [2008] 12 W.W.R. 241, [2008] B.C.J. No. 609 (QL), 2008 CarswellBC 687 (*sub nom. British Columbia v. Imperial Tobacco Canada Ltd.*). Appeal allowed and cross-appeal dismissed.

John S. Tyhurst, *Paul Vickery* and *Travis Henderson*, for the appellant/respondent on cross-appeal Her Majesty the Queen in Right of Canada (33559).

Paul Vickery, *John S. Tyhurst* and *Travis Henderson*, for the appellant/respondent on cross-appeal the Attorney General of Canada (33563).

Deborah Glendining and *Nada Khirdaji*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559).

Ryan D. W. Dalziel and *Daniel A. Webster*, *Q.C.*, for the respondent Her Majesty the Queen in Right of British Columbia (33563).

John J. L. Hunter, *Q.C.*, and *Brent B. Olthuis*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563).

Written submissions only by *Kenneth N. Affleck*, *Q.C.*, for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563).

Written submissions only by *Jeffrey J. Kay*, *Q.C.*, for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563).

Written submissions only by *Craig P. Dennis* and *Michael D. Shirreff*, for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563).

Written submissions only by *Christopher M. Rusnak*, for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563).

Written submissions only by *D. Ross Clark*, for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563).

avis de mise en cause, 2008 BCSC 419, 82 B.C.L.R. (4th) 362, 292 D.L.R. (4th) 353, [2008] 12 W.W.R. 241, [2008] B.C.J. No. 609 (QL), 2008 CarswellBC 687 (*sub nom. British Columbia c. Imperial Tobacco Canada Ltd.*). Pourvoi accueilli et pourvoi incident rejeté.

John S. Tyhurst, *Paul Vickery* et *Travis Henderson*, pour l'appelante/intimée au pourvoi incident Sa Majesté la Reine du chef du Canada (33559).

Paul Vickery, *John S. Tyhurst* et *Travis Henderson*, pour l'appelant/intimé au pourvoi incident le procureur général du Canada (33563).

Deborah Glendining et *Nada Khirdaji*, pour l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33559).

Ryan D. W. Dalziel et *Daniel A. Webster*, *c.r.*, pour l'intimée Sa Majesté la Reine du chef de la Colombie-Britannique (33563).

John J. L. Hunter, *c.r.*, et *Brent B. Olthuis*, pour l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33563).

Argumentation écrite seulement par *Kenneth N. Affleck*, *c.r.*, pour les intimées/appelantes au pourvoi incident Rothmans, Benson & Hedges Inc. et Rothmans Inc. (33563).

Argumentation écrite seulement par *Jeffrey J. Kay*, *c.r.*, pour les intimées/appelantes au pourvoi incident JTI-MacDonald Corp., R.J. Reynolds Tobacco Company et R.J. Reynolds Tobacco International Inc. (33563).

Argumentation écrite seulement par *Craig P. Dennis* et *Michael D. Shirreff*, pour les intimées/appelantes au pourvoi incident B.A.T. Industries p.l.c. et British American Tobacco (Investments) Limited (33563).

Argumentation écrite seulement par *Christopher M. Rusnak*, pour l'intimée/appelante au pourvoi incident Carreras Rothmans Limited (33563).

Argumentation écrite seulement par *D. Ross Clark*, pour l'intimée/appelante au pourvoi incident Philip Morris U.S.A. Inc. (33563).

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Malliha Wilson and *Lynne McArdle*, for the intervener the Attorney General of Ontario (33559-33563).

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Nancy Brown, for the intervener the Attorney General of British Columbia (33559-33563).

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

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Simon V. Potter, *Michael A. Feder* et *Angela M. Juba*, pour l'intimée/appelante au pourvoi incident Philip Morris International Inc. (33563).

Malliha Wilson et *Lynne McArdle*, pour l'intervenant le procureur général de l'Ontario (33559-33563).

Jeffrey S. Leon, *Robyn M. Ryan Bell* et *Michael A. Eizenga*, pour l'intervenante Sa Majesté la Reine du chef de la province du Nouveau-Brunswick (33563).

Nancy Brown, pour l'intervenant le procureur général de la Colombie-Britannique (33559-33563).

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

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I. Introduction

[1] Imperial Tobacco Canada Ltd. ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("*Costs Recovery* case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost

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I. Introduction

[1] Imperial Tobacco Canada Limitée (« Imperial ») est défenderesse dans deux actions intentées devant les tribunaux de la Colombie-Britannique, soit *British Columbia c. Imperial Tobacco Canada Ltd.*, dossier : S010421, et *Knight c. Imperial Tobacco Canada Ltd.*, dossier : L031300. Dans la première, le gouvernement de la Colombie-Britannique cherche à recouvrer d'un groupe de 14 compagnies de tabac, dont Imperial, les sommes consacrées au traitement médical de personnes souffrant de maladies liées au tabagisme (l'« *Affaire du recouvrement des coûts* »). Dans la deuxième action, un recours collectif intenté contre Imperial uniquement, M. Knight, au nom

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of the cigarettes and punitive damages ("*Knight* case").

[2] In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

[3] In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously

des autres membres qui ont acheté des cigarettes dites « légères » ou « douces », demande le remboursement du coût des cigarettes ainsi que le versement de dommages-intérêts punitifs (l'« *Affaire Knight* »).

[2] Dans les deux affaires, les compagnies de tabac ont mis en cause le gouvernement du Canada, prétendant que si elles sont tenues responsables envers les demandeurs, elles ont le droit d'être indemnisées par le Canada pour déclarations inexactes faites par négligence, pour conception négligente et défaut de mise en garde; elles fondent aussi leur demande sur l'equity. Elles font également valoir que le Canada aurait engagé sa propre responsabilité au titre des régimes législatifs invoqués dans ces deux affaires. Dans l'*Affaire du recouvrement des coûts*, elles invoquent sa responsabilité, à titre de [TRADUCTION] « fabricant », aux termes de la *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, ch. 30 (« *CRA* »). Dans l'*Affaire Knight*, c'est à titre de [TRADUCTION] « fournisseur » que le Canada serait responsable, aux termes de la *Business Practices and Consumer Protection Act*, S.B.C. 2004, ch. 2 (« *BPCPA* ») et de la loi qui l'a précédée, la *Trade Practice Act*, R.S.B.C. 1996, ch. 457 (« *TPA* »).

[3] Dans les deux affaires, le Canada a présenté des requêtes en radiation des avis de mise en cause en vertu du par. 19(24) des *Supreme Court Rules*, B.C. Reg. 221/90 (remplacé par la règle 9-5 des *Supreme Court Civil Rules*, B.C. Reg. 168/2009), faisant valoir qu'il était évident et manifeste que ces avis ne révélaient aucune cause d'action raisonnable. Les juges siégeant en cabinet, faisant droit aux requêtes du Canada dans les deux actions, ont ordonné la radiation de tous les avis de mise en cause. La Cour d'appel de la Colombie-Britannique a accueilli en partie les appels interjetés par les compagnies de tabac. À trois voix contre deux, les juges majoritaires ont conclu à l'opportunité d'instruire, dans l'*Affaire du recouvrement des coûts* et dans l'*Affaire Knight*, les demandes relatives aux déclarations inexactes faites par négligence en violation d'une prétendue obligation de diligence du Canada envers les compagnies de tabac. Dans l'*Affaire Knight*, les juges majoritaires ont conclu en

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struck the remainder of the tobacco companies' claims.

[4] The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

[5] For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

II. Underlying Claims and Judicial History

A. *The Knight Case*

[6] In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

outre à l'opportunité d'instruire la demande relative aux déclarations inexactes faites par négligence fondée sur une prétendue obligation de diligence du Canada envers les consommateurs, ainsi que la demande relative à la conception négligente dans l'*Affaire Knight*. La cour a radié à l'unanimité les autres demandes présentées par les compagnies de tabac.

[4] Le gouvernement du Canada en appelle de la décision de permettre l'instruction des demandes pour déclarations inexactes faites par négligence et pour conception négligente. Les compagnies de tabac forment un appel incident à l'égard de la radiation des autres demandes.

[5] Pour les motifs qui suivent, je conclus que toutes les demandes introduites par Imperial et les autres compagnies de tabac à l'encontre du gouvernement du Canada sont vouées à l'échec et doivent être radiées. Je suis d'avis d'accueillir les appels du gouvernement du Canada dans les deux affaires et de rejeter les appels incidents.

II. Demandes initiales et historique judiciaire

A. *L'Affaire Knight*

[6] Dans l'*Affaire Knight*, un groupe de consommateurs de la Colombie-Britannique, composé de fumeurs de cigarettes légères ou douces, a intenté un recours collectif contre Imperial en vertu de la *BPCPA* et de la loi qui l'a précédée, la *TPA*. Ces consommateurs prétendent qu'Imperial s'est livrée à des pratiques trompeuses en présentant les cigarettes à teneur réduite en goudron comme un choix moins nuisible à la santé des consommateurs que les autres cigarettes. Selon eux, la teneur en goudron et en nicotine indiquée sur les paquets de cigarettes légères et douces fabriquées par Imperial ne correspondait pas aux émissions toxiques réelles pour les fumeurs. Ils font valoir que la fumée dégagée par les cigarettes légères était tout aussi néfaste que celle dégagée par les cigarettes régulières. Ils réclament le remboursement du coût d'achat des cigarettes ainsi que des dommages-intérêts punitifs.

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[7] Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

[8] Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were "almost the only tobacco varieties available to Canadian tobacco manufacturers" (*Knight* case, amended third-party notice of Imperial, at para. 97).

[9] Imperial makes five allegations against Canada:

(1) Canada is itself liable under the *BPCPA* and the *TPA* as a "supplier" of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

(2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco

[7] Par voie d'avis, Imperial a mis en cause le gouvernement du Canada. Selon elle, Santé Canada aurait informé les compagnies de tabac et le public que les cigarettes à teneur réduite en goudron étaient moins nuisibles que les cigarettes régulières. Imperial fait valoir que Santé Canada s'était d'abord opposé à l'impression de mises en garde relatives à la santé sur les paquets de cigarettes avant de changer sa politique en 1967. Le ministère invitait les fumeurs ne souhaitant pas cesser de fumer à consommer des cigarettes à teneur réduite en goudron et a demandé aux compagnies de tabac de révéler volontairement les quantités de goudron et de nicotine dans leurs publicités afin d'encourager les consommateurs à acheter des marques à faible teneur en goudron. Contre toute attente, il appert maintenant que ces cigarettes seraient peut-être plus nuisibles à la santé des fumeurs que les autres.

[8] Imperial prétend également qu'Agriculture Canada a protégé par licences plusieurs souches de tabac à teneur réduite en goudron — cultivées par lui après des travaux de recherche et de développement — et a perçu des redevances des compagnies, dont Imperial, qui utilisaient ses souches. Selon Imperial, en 1982, les souches d'Agriculture Canada représentaient [TRADUCTION] « presque les seules variétés dont disposaient les fabricants canadiens de produits du tabac » (l'*Affaire Knight*, avis de mise en cause modifié d'Imperial, par. 97).

[9] Imperial formule contre le Canada les cinq allégations suivantes :

(1) La responsabilité du Canada lui-même est engagée aux termes de la *BPCPA* et de la *TPA* à titre de [TRADUCTION] « fournisseur » de produits du tabac puisqu'il s'est livré à des pratiques trompeuses, et Imperial a le droit, aux termes de la *Negligence Act*, R.S.B.C. 1996, ch. 333, de réclamer au Canada une contribution et une indemnisation.

(2) Le Canada a manqué à ses obligations de droit privé envers les consommateurs en faisant par négligence des déclarations inexactes au sujet de l'effet, sur la santé, des cigarettes à teneur réduite en goudron, en faisant défaut de les

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strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.

(3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.

(4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.

(5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

[10] Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (2007 BCSC 964, 76 B.C.L.R. (4th) 100). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93). The Court of Appeal unanimously struck the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the

mettre en garde contre les risques associés à ces produits et en ne faisant pas preuve de diligence raisonnable dans la conception de sa souche de tabac. Par conséquent, Imperial se dit en droit d'obtenir du Canada une contribution et une indemnisation en vertu de la *Negligence Act*.

(3) Le Canada a manqué à ses obligations de droit privé envers Imperial en faisant par négligence des déclarations inexactes au sujet de l'effet, sur la santé, des cigarettes à teneur réduite en goudron, en faisant défaut de mettre en garde Imperial contre les risques associés à ces produits et en ne faisant pas preuve de diligence raisonnable dans la conception de sa souche de tabac. Imperial se dit en droit de réclamer au Canada des dommages-intérêts dans la mesure de leur responsabilité envers les membres du groupe.

(4) Subsidiairement, le Canada est tenu en equity d'indemniser Imperial.

(5) Si la responsabilité du Canada envers Imperial n'est reconnue à l'égard d'aucune des allégations précédentes, Imperial peut obtenir un jugement déclarant que le Canada reste partie au litige, ce qui le soumettra aux obligations de communication préalable de la preuve prévues aux *Supreme Court Rules*.

[10] Par requête, le Canada a demandé et obtenu de la juge Satanove de la Cour suprême de la Colombie-Britannique la radiation des avis de mise en cause (2007 BCSC 964, 76 B.C.L.R. (4th) 100). La juge siégeant en cabinet a radié toutes les demandes formées contre le Canada. Imperial a eu partiellement gain de cause devant la Cour d'appel (2009 BCCA 541, 99 B.C.L.R. (4th) 93). Les juges de cette cour ont radié à l'unanimité la demande relative aux manquements aux obligations légales, la demande relative à la conception négligente qui oppose Imperial au Canada, ainsi que la demande d'indemnisation en equity. Au nom des juges majoritaires, le juge Tysoe a permis l'instruction des deux demandes concernant les déclarations

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failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

B. *The Costs Recovery Case*

[11] The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

[12] Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the "tobacco companies". The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

inexactes faites par négligence et de celle portant sur la conception négligente opposant le Canada et les consommateurs. Les juges majoritaires n'ont pas traité de la demande relative au défaut de mise en garde. Le juge Hall, dissident, aurait radié toutes les demandes de mise en cause.

B. *L'Affaire du recouvrement des coûts*

[11] Le gouvernement de la Colombie-Britannique a demandé aux termes de la *CRA* de recouvrer les sommes consacrées au traitement des maladies liées au tabagisme découlant d'une [TRADUCTION] « faute d'un fabricant ». Cette loi prévoit que les fabricants de produits du tabac sont tenus de verser ces sommes directement à la province. La demande visait 14 compagnies de tabac. Selon la Colombie-Britannique, dès 1950, ces compagnies de tabac savaient ou auraient dû savoir que les cigarettes étaient néfastes pour la santé et ont fait défaut de mettre le public en garde adéquatement contre les risques associés à l'usage de leur produit.

[12] Divers défendeurs dans l'*Affaire du recouvrement des coûts*, dont Imperial, ont mis en cause le Canada pour le rôle qu'il aurait joué dans l'industrie du tabac. Je les désigne collectivement comme les « compagnies de tabac ». Les allégations contenues dans l'avis présentent une similitude frappante avec celles formulées dans l'*Affaire Knight*. Les compagnies de tabac font valoir que Santé Canada les aurait informées, ainsi que le public, de l'effet moins nuisible des cigarettes à teneur réduite en goudron par rapport aux cigarettes régulières et aurait conseillé aux fumeurs d'abandonner le tabagisme ou d'acheter des cigarettes à teneur réduite en goudron. Les compagnies de tabac prétendent que, bien qu'initialement opposé à l'impression de mises en garde sur les paquets de cigarettes, le Canada a fini par l'exiger et a déterminé les renseignements qui devaient y figurer. Les compagnies de tabac plaident également qu'Agriculture Canada avait protégé par licences les souches de tabac à teneur réduite en goudron — cultivées par lui après des travaux de recherche et de développement — que les compagnies utilisaient dans la fabrication des cigarettes en échange du paiement de redevances.

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[13] The tobacco companies brought the following claims against Canada:

(1) Canada is itself liable under the *CRA* as a "manufacturer" of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.

(2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.

(5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

[14] Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation claim between Canada and the tobacco companies to proceed (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Hall J.A.,

[13] Les compagnies de tabac ont formulé contre le Canada les allégations suivantes :

(1) La responsabilité du Canada lui-même est engagée aux termes de la *CRA* à titre de [TRADUCTION] « fabricant » de produits du tabac, et les compagnies de tabac ont le droit, en vertu de la *Negligence Act*, de réclamer au Canada une contribution et une indemnisation.

(2) Le Canada a manqué à ses obligations de droit privé envers les consommateurs en raison du défaut de mise en garde, de la conception négligente et de déclarations inexactes faites par négligence. De plus, les compagnies de tabac sont en droit de réclamer du Canada contribution et indemnisation dans la mesure de leur responsabilité envers la Colombie-Britannique suivant la *CRA*.

(3) Le Canada a manqué à ses obligations de droit privé envers les compagnies de tabac en raison du défaut de mise en garde, de la conception négligente et de déclarations inexactes faites par négligence au sujet de l'effet, sur la santé, des cigarettes à faible teneur en goudron. Les compagnies de tabac se disent en droit de réclamer au Canada des dommages-intérêts dans la mesure de leur responsabilité envers la Colombie-Britannique au titre de la *CRA*.

(4) Subsidiairement, le Canada est tenu d'indemniser en equity les compagnies de tabac.

(5) Si la responsabilité du Canada envers les compagnies de tabac n'est retenue à l'égard d'aucune des allégations précédentes, les compagnies de tabac ont droit à une réparation de nature déclaratoire.

[14] La juge Wedge, siégeant en cabinet, a fait droit à toutes les requêtes en radiation présentées par le Canada (2008 BCSC 419, 82 B.C.L.R. (4th) 362). Les juges majoritaires de la Cour d'appel, sous la plume du juge Tysoe, ont permis l'instruction de la demande relative aux déclarations inexactes faites par négligence opposant les compagnies

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dissenting, would have struck all the third-party claims.

III. Issues Before the Court

[15] There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

[16] There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?

2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?

3. Should the tobacco companies' negligent misrepresentation claims be struck out?

de tabac au Canada (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Le juge Hall, dissident, aurait radié toutes les demandes de mise en cause.

III. Questions en litige

[15] Les questions à trancher dans l'*Affaire du recouvrement des coûts* et dans l'*Affaire Knight* se chevauchent considérablement, tout particulièrement quant aux demandes fondées sur la common law. Dans les deux cas, il s'agit de savoir si le Canada pourrait être tenu responsable, d'une part en common law, pour déclarations inexactes faites par négligence, conception négligente et défaut de mise en garde et, d'autre part, suivant la doctrine de l'indemnisation en equity. Par souci d'éviter les répétitions, j'examinerai ensemble les questions communes.

[16] Par ailleurs, les deux affaires présentent également des questions et des arguments distincts. Ainsi, dans l'*Affaire du recouvrement des coûts*, le Canada fait valoir que les demandes de contribution fondées sur la *Negligence Act* et sur l'obligation de diligence qu'on lui impute à l'égard des fumeurs devraient être radiées, car, même s'il avait manqué à une telle obligation, il ne pourrait être tenu responsable envers la demanderesse, la Colombie-Britannique. Les demandes fondées sur les lois sont elles aussi distinctes. Par conséquent, les questions en litige peuvent être formulées comme suit :

1. Quel est le critère applicable à la radiation d'une demande pour absence de cause d'action raisonnable?

2. Les demandes de contribution et d'indemnisation fondées sur la *Negligence Act* et sur les manquements allégués à l'obligation de diligence envers les fumeurs doivent-elles être radiées dans l'*Affaire du recouvrement des coûts*?

3. Les demandes des compagnies de tabac relatives aux déclarations inexactes faites par négligence doivent-elles être radiées?

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4. Should the tobacco companies' claims of failure to warn be struck out?

5. Should the tobacco companies' claims of negligent design be struck out?

6. Should the tobacco companies' claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* be struck out?

7. Should Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *TPA* and the *BPCPA* be struck out?

8. Should the tobacco companies' claims of equitable indemnity be struck out?

9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the *Supreme Court Rules*?

IV. Analysis

A. *The Test for Striking Out Claims*

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of

4. Les demandes des compagnies de tabac relatives au défaut de mise en garde doivent-elles être radiées?

5. Les demandes des compagnies de tabac relatives à la conception négligente doivent-elles être radiées?

6. Dans l'*Affaire du recouvrement des coûts*, la demande des compagnies de tabac de reconnaître au Canada la qualité de [TRADUCTION] « fabricant » au sens de la *CRA* doit-elle être radiée?

7. Dans l'*Affaire Knight*, la demande d'Imperial de reconnaître au Canada la qualité de [TRADUCTION] « fournisseur » au sens de la *TPA* et de la *BPCPA* doit-elle être radiée?

8. Les demandes des compagnies de tabac relatives à l'indemnisation en equity doivent-elles être radiées?

9. Si la responsabilité du Canada envers les compagnies de tabac n'est retenue à l'égard d'aucune des demandes de mise en cause, les compagnies de tabac ont-elles quand même le droit d'obtenir contre lui un jugement le déclarant partie aux deux litiges, ce qui le soumettra aux obligations de communication préalable de la preuve prévues aux *Supreme Court Rules*?

IV. Analyse

A. *Le critère applicable à la radiation d'une demande*

[17] Les parties conviennent du critère applicable à la radiation d'une demande pour absence de cause d'action raisonnable en vertu de l'al. 19(24)a) des *Supreme Court Rules* de la Colombie-Britannique. La Cour a réitéré ce critère à maintes reprises : l'action ne sera rejetée que s'il est évident et manifeste, dans l'hypothèse où les faits allégués seraient avérés, que la déclaration ne révèle aucune cause d'action raisonnable : *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263, par. 15; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 980. Autrement dit, la demande doit n'avoir

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success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[18] Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

[19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised

aucune possibilité raisonnable d'être accueillie. Sinon, il faut lui laisser suivre son cours : voir généralement *Syl Apps Secure Treatment Centre c. B.D.*, 2007 CSC 38, [2007] 3 R.C.S. 83; *Succession Odhavji*; *Hunt*; *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735.

[18] Bien que les parties acceptent d'emblée ce critère, il ressort des arguments qui nous ont été présentés que toutes ne voient pas du même œil son application aux faits. Il peut donc se révéler utile de revoir l'objet du critère et son application.

[19] Le pouvoir de radier les demandes ne présentant aucune possibilité raisonnable de succès constitue une importante mesure de gouverne judiciaire essentielle à l'efficacité et à l'équité des procès. Il permet d'élaguer les litiges en écartant les demandes vaines et en assurant l'instruction des demandes susceptibles d'être accueillies.

[20] Ce faisant, il favorise deux conséquences positives, soit l'instruction efficace des litiges et le bien-fondé des décisions sur ces demandes. La radiation des demandes n'ayant aucune possibilité raisonnable de succès favorise l'efficacité et fait épargner temps et argent. Les plaideurs peuvent se concentrer sur les demandes importantes et n'ont pas à consacrer des jours — parfois même des semaines — à la preuve et aux arguments de demandes vouées de toute façon à l'échec. Il en va de même pour les juges et les jurés, dont l'attention est portée là où il le faut, soit sur les demandes présentant une possibilité raisonnable de succès. Les gains d'efficacité découlant de cet élagage contribuent à leur tour à l'amélioration de l'administration de la justice. Plus la preuve et les arguments sont axés sur les vraies questions, mieux les thèses des parties à l'égard de ces questions et le bien-fondé de l'affaire se dégageront de l'instruction du procès.

[21] Quoique très utile, la requête en radiation ne saurait être accueillie à la légère. Le droit n'est pas immuable. Des actions qui semblaient hier encore vouées à l'échec pourraient être accueillies demain. Avant qu'une obligation générale de diligence envers son prochain reposant sur la prévisibilité

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on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

soit reconnue dans l'arrêt *Donoghue c. Stevenson*, [1932] A.C. 562 (H.L.), peu de gens auraient pu prévoir qu'une entreprise d'embouteillage puisse être tenue responsable, en l'absence de tout lien contractuel, du préjudice corporel et du traumatisme émotionnel causé par la découverte d'un escargot dans une bouteille de bière de gingembre. Avant l'arrêt *Hedley Byrne & Co. c. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), l'action en responsabilité délictuelle pour déclarations inexactes faites par négligence aurait paru vouée à l'échec. L'histoire de notre droit nous apprend que souvent, des requêtes en radiation ou des requêtes préliminaires semblables, à l'instar de celle présentée dans *Donoghue c. Stevenson*, amorcent une évolution du droit. Par conséquent, le fait qu'une action en particulier n'a pas encore été reconnue en droit n'est pas déterminant pour la requête en radiation. Le tribunal doit plutôt se demander si, dans l'hypothèse où les faits allégués seraient avérés, il est raisonnablement possible que l'action soit accueillie. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable.

[22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[22] Une requête en radiation pour absence de cause d'action raisonnable repose sur le principe que les faits allégués sont vrais, sauf s'ils ne peuvent manifestement pas être prouvés : *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, p. 455. Aucune preuve n'est admissible à l'égard d'une telle requête : par. 19(27) des *Supreme Court Rules* de la Colombie-Britannique (maintenant le par. 9-5(2) des *Supreme Court Civil Rules*). Il incombe au demandeur de plaider clairement les faits sur lesquels il fonde sa demande. Un demandeur ne peut compter sur la possibilité que de nouveaux faits apparaissent au fur et à mesure que l'instruction progresse. Il peut arriver que le demandeur ne soit pas en mesure de prouver les faits plaidés au moment de la requête. Il peut seulement espérer qu'il sera en mesure de les prouver. Il doit cependant les plaider. Les faits allégués sont le fondement solide en fonction duquel doit être évaluée la possibilité que la demande soit accueillie. S'ils ne sont pas allégués, l'exercice ne peut pas être exécuté adéquatement.

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[23] Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

[23] Dans notre Cour, Imperial et les autres compagnies de tabac ont prétendu que la requête en radiation devrait prendre en compte non seulement les faits plaidés, mais la possibilité que, au fur et à mesure que l'instruction progresse, la preuve en révélerait davantage quant au comportement du Canada et au rôle qu'il a joué dans la promotion de la consommation de cigarettes à teneur réduite en goudron. Cette position dénote une compréhension fondamentalement erronée de ce que vise une requête en radiation. Elle n'a rien à voir avec la preuve. Elle porte sur les actes de procédure. Les faits allégués sont réputés véridiques. La question de savoir si la preuve corrobore ou corroborera les faits allégués n'a aucune pertinence quant à la requête en radiation. Le juge saisi de la requête en radiation ne peut pas anticiper ce que la preuve qui sera produite permettra d'établir. Si l'on exigeait cela du juge, la requête en radiation perdrait sa logique et deviendrait en fin de compte inutile.

[24] This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities — as they sometimes do — the remedy is to amend the pleadings to plead new facts at that time.

[24] Cela n'a rien d'inéquitable pour le demandeur. La présomption selon laquelle les faits allégués sont vrais joue en sa faveur. Le demandeur choisit les faits qu'il allègue en fonction de la cause d'action qu'il fait valoir. Si des faits nouveaux soulèvent de nouvelles possibilités — comme c'est parfois le cas —, la solution consiste à modifier les actes de procédure afin d'alléguer les faits nouveaux à ce moment-là.

[25] Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the*

[25] La question de la conjecture est liée à la question de savoir si la requête devrait être rejetée en raison de la possibilité qu'une nouvelle preuve apparaisse éventuellement. Le juge saisi d'une requête en radiation se demande s'il existe une possibilité raisonnable que la demande soit accueillie. Dans le monde de la conjecture abstraite, il existe une probabilité mathématique qu'un certain nombre d'événements se produisent. Ce n'est pas ce que le critère applicable aux requêtes en radiation cherche à déterminer. Il suppose plutôt que la demande sera traitée de la manière habituelle dans le système judiciaire — un système fondé sur le débat contradictoire dans lequel les juges sont tenus d'appliquer le droit (et son évolution) énoncé dans les

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law and the litigation process, the claim has no reasonable chance of succeeding.

[26] With this framework in mind, I proceed to consider the tobacco companies' claims.

B. *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case*

[27] In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

[28] The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence Act* is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

[29] I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, dealing

lois et la jurisprudence. Il s'agit de savoir si, dans *le contexte du droit et du processus judiciaire*, la demande n'a aucune possibilité raisonnable d'être accueillie.

[26] C'est en tenant compte de ce cadre que j'entame l'examen des demandes des compagnies de tabac.

B. *Les prétendues obligations de diligence du Canada envers les fumeurs dans l'Affaire du recouvrement des coûts*

[27] Dans l'*Affaire du recouvrement des coûts*, le Canada plaide que toutes les demandes de contribution fondées sur ses prétendues obligations de diligence envers les fumeurs doivent être radiées. Le Canada prétend que, aux termes de la *Negligence Act*, une contribution ne peut être accordée si le tiers n'est pas directement responsable envers le plaignant. Il prétend que même s'il a manqué à ses obligations envers les fumeurs, ce manquement ne peut pas servir de fondement aux demandes de contribution des compagnies de tabac si elles sont tenues responsables envers la Colombie-Britannique, l'unique demanderesse dans l'*Affaire du recouvrement des coûts*. La Cour d'appel a accepté cet argument.

[28] Les compagnies de tabac prétendent qu'il n'est pas nécessaire qu'une personne soit directement responsable envers le demandeur pour être tenue de verser une contribution. Elles prétendent que la contribution dont parle la *Negligence Act* repose sur la faute et non pas sur la responsabilité. Elles affirment que la *Negligence Act* vise à permettre aux défendeurs d'être indemnisés par d'autres parties qui sont également responsables du dommage causé au plaignant, et qu'interdire un droit d'action contre le Canada ferait échec à cet objectif.

[29] Je souscris à l'opinion du Canada et de la Cour d'appel selon laquelle un tiers ne peut être tenu de verser une contribution en vertu de la *Negligence Act* que s'il est directement responsable envers le plaignant. Dans l'arrêt *Giffels Associates*

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with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

> . . . I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss. [Emphasis added; p. 1354.]

[30] Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

[31] The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

C. *The Claims for Negligent Misrepresentation*

[32] There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members

Ltd. c. Eastern Construction Co., [1978] 2 R.C.S. 1346, où il était question d'une disposition législative semblable à celle de la Colombie-Britannique, le juge en chef Laskin a déclaré ce qui suit :

> . . . j'estime qu'il faut d'abord établir la responsabilité envers la demanderesse pour pouvoir réclamer la contribution. Je ne vois pas comment une personne pourrait, en vertu du par. 2(1), réclamer à une autre personne une contribution relativement à la perte subie par un tiers sans que chacune des deux premières personnes soit responsable envers le tiers de la perte qu'il a subie. [Je souligne; p. 1354.]

[30] Par conséquent, il est évident et manifeste que les réclamations de droit privé dirigées contre le Canada dans l'*Affaire du recouvrement des coûts* qui découlent de prétendues obligations de diligence envers les consommateurs doivent être radiées. Même si le Canada a manqué à ses obligations envers les fumeurs, ce manquement n'aurait aucune incidence sur la question de savoir s'il est responsable envers la Colombie-Britannique, la demanderesse dans cette affaire. Cette conclusion n'a aucune incidence sur la réclamation des consommateurs dans l'*Affaire Knight* puisque dans cette instance, les consommateurs de cigarettes légères ou douces sont les demandeurs.

[31] Dans le reste des présents motifs, l'examen des réclamations de droit privé ne portera que sur les demandes fondées sur les prétendues obligations de diligence du Canada envers les compagnies de tabac dans les deux causes dont la Cour est saisie, et sur les prétendues obligations du Canada envers les consommateurs dans l'*Affaire Knight*.

C. *Les demandes fondées sur des déclarations inexactes faites par négligence*

[32] Deux types de demandes fondées sur des déclarations inexactes faites par négligence sont toujours en litige dans le présent appel. Premièrement, dans l'*Affaire Knight*, Imperial prétend que le Canada a fait preuve de négligence en déclarant faussement aux consommateurs que la cigarette à teneur réduite en goudron serait

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are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

[33] Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

[34] For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

[35] The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne*. Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

[36] Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the

moins nocive pour la santé, et qu'il est donc tenu à contribution et à indemnisation sur la base de la *Negligence Act* si les membres du groupe ont gain de cause dans cette poursuite. Deuxièmement, dans les deux affaires dont la Cour est saisie, Imperial et les autres compagnies de tabac prétendent que le Canada a fait aux compagnies de tabac des déclarations inexactes par négligence et qu'il est responsable des pertes que pourraient subir les compagnies de tabac en raison des indemnités à verser aux plaignants dans l'une ou l'autre de ces affaires.

[33] Le Canada demande la radiation des demandes parce qu'il n'existe aucune possibilité raisonnable qu'elles soient accueillies.

[34] Pour les besoins de la requête en radiation, nous devons tenir pour avérés les faits allégués. Nous devons donc accepter que le Canada a déclaré aux consommateurs et aux compagnies de tabac que les cigarettes légères ou douces étaient moins nocives et que ces déclarations n'étaient pas exactes. Nous devons également accepter que les consommateurs et les compagnies de tabac ont agi à leur détriment sur la foi des déclarations inexactes du Canada.

[35] Le droit a reconnu pour la première fois l'action en responsabilité délictuelle par suite d'une déclaration inexacte faite par négligence dans *Hedley Byrne*. Avant cette décision, les parties ne disposaient que de recours contractuels en matière de déclarations inexactes. La décision *Hedley Byrne* a rompu avec cette tradition en accueillant une action pour perte financière par suite d'une déclaration inexacte faite par négligence en l'absence d'un contrat entre les parties. Dans les décennies qui ont suivi, la responsabilité délictuelle pour déclaration inexacte faite par négligence a été retenue dans diverses situations où la relation entre les parties révélait une prévisibilité et l'existence d'un lien suffisamment étroit et où les considérations de politique générale n'empêchaient pas la reconnaissance de la responsabilité délictuelle.

[36] Imperial et les autres compagnies de tabac prétendent que, vu les faits allégués contre le Canada, les paramètres définis du délit de

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tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

[37] The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

[38] In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test

déclaration inexacte faite par négligence correspondent à leurs demandes et, par conséquent, l'existence d'une obligation de diligence *prima facie* est établie. Les juges majoritaires de la Cour d'appel ont retenu cet argument dans les deux décisions en cause (l'*Affaire Knight*, par. 45 et 66; l'*Affaire du recouvrement des coûts*, par. 70).

[37] Il faut se demander en premier lieu si les faits allégués font entrer la relation du Canada avec les consommateurs et les compagnies de tabac dans une catégorie définie de relations qui donnent naissance à une obligation de diligence. Le cas échéant, l'existence d'une obligation de diligence *prima facie* sera établie : voir *Childs c. Desormeaux*, 2006 CSC 18, [2006] 1 R.C.S. 643, par. 15. Toutefois, il importe de signaler que la responsabilité pour déclaration inexacte faite par négligence dépend de la nature de la relation entre le plaignant et le défendeur, comme je l'expliquerai davantage plus loin. La question n'est pas de savoir si une déclaration inexacte faite par négligence est un délit reconnu, mais de savoir s'il existe une possibilité raisonnable que la relation alléguée dans les actes de procédure engage la responsabilité pour déclaration inexacte faite par négligence.

[38] À mon avis, les faits allégués ne font entrer aucune des demandes à l'intérieur d'une catégorie définie de déclarations inexactes faites par négligence. Le droit en matière de déclaration inexacte faite par négligence n'a jusqu'à présent pas reconnu la responsabilité dans les types de relations en cause dans ces affaires. Les compagnies de tabac ont fait l'erreur de supposer que les relations, révélées par les actes de procédure, entre le Canada et les compagnies de tabac, d'une part, et entre le Canada et les consommateurs, d'autre part, sont semblables aux autres relations à l'égard desquelles la responsabilité délictuelle pour déclaration inexacte faite par négligence a été retenue. En fait, elles comportent des différences importantes. Il suffit à ce stade de signaler que les compagnies de tabac ont été incapables de citer une décision dans laquelle un gouvernement a été tenu responsable d'une déclaration inexacte faite par négligence relativement à des déclarations faites à une industrie.

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set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

[39] At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

(1) Stage One: Proximity and Foreseeability

[40] On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or "proximate", relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the

Afin de déterminer si une pareille cause d'action a une possibilité raisonnable d'être accueillie, nous devons donc examiner s'il a été satisfait aux exigences générales en matière de responsabilité délictuelle énoncées dans le critère établi par la Chambre des lords dans *Anns c. Merton London Borough Council*, [1978] A.C. 728, et quelque peu reformulé, mais appliqué de façon constante par la Cour, notamment dans l'arrêt *Cooper c. Hobart*, 2001 CSC 79, [2001] 3 R.C.S. 537.

[39] À la première étape de ce critère, il faut se demander si les faits révèlent l'existence d'un lien de proximité dans le cadre duquel l'omission de faire preuve de diligence raisonnable peut, de façon prévisible, causer une perte ou un préjudice au plaignant. Si cette condition est remplie, il y a obligation de diligence *prima facie* et l'analyse passe à l'étape suivante dans laquelle on se demande si des considérations de politique générale empêcheraient de reconnaître cette obligation de diligence *prima facie* : *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41, [2007] 3 R.C.S. 129.

(1) Première étape de l'analyse : le lien de proximité et la prévisibilité

[40] Quant au premier volet du critère, les compagnies de tabac font valoir que les faits allégués établissent l'existence d'un lien suffisamment étroit et direct, ou lien [TRADUCTION] « de proximité », d'une part, entre le Canada et les consommateurs (dans l'*Affaire Knight*) et, d'autre part, entre le Canada et les compagnies de tabac (dans les deux affaires) pour justifier une obligation de diligence à l'égard des déclarations du gouvernement au sujet des cigarettes légères et douces. Les compagnies de tabac ajoutent que le Canada aurait pu raisonnablement prévoir que les consommateurs et l'industrie du tabac se fieraient à ses déclarations au sujet des avantages des cigarettes légères au chapitre de la santé, et qu'il était raisonnable pour eux de se fier à ces déclarations. Le Canada rétorque qu'il agissait seulement à titre d'autorité de réglementation lorsqu'il a fait des déclarations à la population et à l'industrie, ce qui n'entraîne pas la création d'un lien suffisamment étroit pour

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potential losses of the tobacco companies under that Act.

[41] Proximity and foreseeability are two aspects of one inquiry — the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

[42] Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. In *Hercules Managements*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (*ibid.*). Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.

fonder l'obligation de diligence revendiquée. Dans l'*Affaire du recouvrement des coûts*, le Canada prétend aussi qu'il n'aurait pas pu raisonnablement prévoir que la législature de la Colombie-Britannique adopterait la *CRA*, et qu'il ne saurait donc être tenu responsable des pertes éventuelles des compagnies de tabac en application de cette Loi.

[41] Le lien de proximité et la prévisibilité sont deux aspects d'une même analyse — celle visant à déterminer si les faits révèlent l'existence d'un lien donnant lieu à une obligation de diligence *prima facie* en common law. La prévisibilité est l'élément fondamental du droit de la négligence. Par contre, ce ne sont pas tous les résultats prévisibles qui donnent lieu à une obligation de diligence comparable. La prévisibilité doit reposer sur un lien suffisamment étroit, ou lien de proximité suffisant, pour qu'il soit juste et raisonnable d'imposer à une partie l'obligation de prendre les mesures raisonnables pour ne pas porter préjudice à l'autre.

[42] On se soucie davantage du lien de proximité et de la prévisibilité dans les actions pour perte financière, comme celles pour déclaration inexacte faite par négligence : voir, de façon générale, *Cie des chemins de fer nationaux du Canada c. Norsk Pacific Steamship Co.*, [1992] 1 R.C.S. 1021; *Bow Valley Husky (Bermuda) Ltd. c. Saint John Shipbuilding Ltd.*, [1997] 3 R.C.S. 1210. Ces deux conditions d'une obligation de diligence *prima facie* sont remplies dans le cadre d'une action pour déclaration inexacte faite par négligence lorsqu'un « lien spécial » unit les parties : *Hercules Managements Ltd. c. Ernst & Young*, [1997] 2 R.C.S. 165, par. 24. S'exprimant au nom de la Cour dans *Hercules Managements*, le juge La Forest a affirmé que l'existence d'un lien spécial est établie lorsque : (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration; et que (2) la confiance que le demandeur accorde à la déclaration serait raisonnable dans les circonstances (*ibid.*). Si pareil lien est établi, le demandeur peut être tenu responsable des pertes subies par le demandeur du fait d'une déclaration inexacte faite par négligence.

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[43] A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

[44] The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).

[45] The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the

[43] Un élément complique les choses : la place que doit occuper la loi lorsqu'on détermine si un acteur gouvernemental avait une obligation de diligence *prima facie*. Il est possible de distinguer deux situations. Dans la première, l'obligation de diligence revendiquée découlerait explicitement ou implicitement du régime législatif. Dans la seconde, l'obligation de diligence découlerait des rapports entre le demandeur et le gouvernement et n'est pas exclue par la loi.

[44] Selon l'argument avancé dans la première catégorie de cas, la loi elle-même crée un rapport de proximité de nature privée qui donne lieu à une obligation de diligence *prima facie*. Il peut être difficile d'arriver au constat qu'une loi crée un lien suffisamment étroit pour donner lieu à une obligation de diligence. Certaines lois peuvent imposer à des représentants de l'État des obligations envers des demandeurs en particulier, mais plus souvent, les lois visent des objectifs d'intérêt public, tels la réglementation d'une industrie (*Cooper*), ou le retrait d'un enfant d'un milieu qui lui est préjudiciable (*Syl Apps*). Dans ces circonstances, il peut être difficile d'inférer que le législateur entendait créer des obligations de droit privé envers des demandeurs. Il est encore plus difficile d'inférer cette intention si l'établissement d'une obligation de nature privée irait à l'encontre des obligations d'une autorité publique envers la population : voir notamment *Cooper* et *Syl Apps*. Tel qu'il est mentionné dans *Syl Apps*, « [u]n conflit entre l'obligation de diligence revendiquée et une obligation primordiale de nature publique ou imposée par la loi peut constituer une raison de principe impérieuse pour refuser de conclure à la proximité » (par. 28; voir aussi *Fullowka c. Pinkerton's of Canada Ltd.*, 2010 CSC 5, [2010] 1 R.C.S. 132, par. 39).

[45] Dans la deuxième catégorie de cas, on prétend que le lien étroit essentiel à l'obligation de diligence de nature privée tire son origine d'une série de rapports précis entre le gouvernement et le demandeur. On fait valoir dans ces cas que le gouvernement, de par sa conduite, a tissé avec le demandeur un lien suffisamment spécial pour établir la proximité nécessaire à une obligation de

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governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

[46] Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

[47] Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *Syl Apps*. On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

[48] As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie* diligence. Dans ces cas, les lois applicables restent pertinentes pour l'analyse. Par exemple, si un constat de proximité irait à l'encontre du devoir général de nature publique imposé par la loi à l'État, le tribunal peut conclure que cette proximité n'existe pas : *Syl Apps*; voir aussi *Heaslip Estate c. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. Cependant, ce sont les rapports précis entre l'organisme gouvernemental et le demandeur qui font naître une obligation de diligence dans un cas de ce genre.

[46] Enfin, il est possible d'imaginer une action mettant en cause un lien étroit qui se fonde à la fois sur les rapports entre les parties et sur les obligations imposées au gouvernement par la loi.

[47] Puisqu'il s'agit en l'espèce d'une requête en radiation, la question qui nous est soumise est simplement de savoir si, à supposer que les faits allégués soient vrais, il est raisonnablement possible de réussir à établir la proximité en raison d'une loi ou d'un autre facteur. D'une part, dans les cas où on invoque uniquement la loi comme fondement du lien étroit, des obligations opposées de nature publique peuvent exclure toute possibilité d'établir ce lien sur le plan de l'interprétation législative : *Syl Apps*. D'autre part, dans les cas où on affirme que le lien étroit repose sur un acte et des rapports précis, il peut être difficile de rejeter une action à ce stade. Tant qu'il est raisonnablement possible que les rapports allégués, s'ils sont vrais, amènent à conclure à l'existence d'un lien suffisamment étroit, et que la loi n'exclut pas clairement cette possibilité, il faut permettre que l'affaire soit instruite, sous réserve de l'existence de quelque considération de politique générale susceptible d'écarter l'obligation de diligence *prima facie* à la deuxième étape de l'analyse.

[48] Comme je l'ai déjà mentionné, les allégations en l'espèce mettent en cause deux liens : celui entre le Canada et les consommateurs (dans l'*Affaire Knight*), et celui entre le Canada et les compagnies de tabac (dans les deux affaires). La question qui se pose à ce stade est de savoir s'il existe une obligation de diligence *prima facie* dans l'un ou l'autre de ces liens. À mon sens, compte tenu des

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duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

[49] The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

[50] The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the *Tobacco Act*, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, R.S.C. 1985, c. 14 (4th Supp.), s. 3 [rep. 1997, c. 13, s. 64], only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

faits allégués, le Canada n'avait pas d'obligation de ce genre envers les consommateurs, mais il en avait une envers les compagnies de tabac.

[49] Les faits allégués dans l'avis de mise en cause d'Imperial dans l'*Affaire Knight* n'établissent aucun lien direct entre le Canada et les consommateurs de cigarettes légères. Le lien dans ce cas se limitait aux déclarations du Canada adressées au grand public selon lesquelles les cigarettes à faible teneur en goudron sont moins dangereuses pour la santé. Le Canada n'entretenait pas de rapports spéciaux avec les membres du groupe. Par conséquent, le constat qu'il s'agit d'un lien suffisamment étroit doit découler des lois applicables : *Cooper*, par. 43.

[50] Les lois pertinentes n'établissent que des obligations générales envers le public, et non des obligations de nature privée envers les consommateurs. Selon la *Loi sur le ministère de la Santé*, L.C. 1996, ch. 8, les obligations du ministre de la Santé ont trait à « la promotion et au maintien de la santé de la population » : par. 4(1). Dans la même veine, l'art. 4 de la *Loi sur le ministère de l'Agriculture et de l'Agroalimentaire*, L.R.C. 1985, ch. A-9, l'art. 4 de la *Loi sur le tabac*, L.C. 1997, ch. 13, et l'art. 3 de la *Loi réglementant les produits du tabac*, L.R.C. 1985, ch. 14 (4e suppl.), art. 3 [abr. 1997, ch. 13, art. 64], ne prévoient eux aussi que des obligations envers le grand public. Ces obligations générales envers le public n'entraînent pas d'obligation de diligence de droit privé envers des personnes en particulier. Pour reprendre les termes utilisés par le juge Sharpe de la Cour d'appel de l'Ontario dans *Eliopoulos Estate c. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, [TRADUCTION] « [j]e ne vois pas en quoi il serait possible de transformer l'un des pouvoirs discrétionnaires de droit public du ministre, qui doivent être exercés dans l'intérêt public, en obligations de droit privé envers des personnes en particulier » : par. 17. Par contre, les lois applicables n'excluent pas la possibilité de reconnaître une obligation de diligence envers les compagnies de tabac. Le fait d'imposer au gouvernement une obligation de diligence lorsqu'il fait, à ces compagnies, des déclarations relativement aux effets des souches de tabac sur la santé ne serait pas incompatible avec son obligation générale de protéger la santé de la population.

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[51] Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

[52] The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Managements*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

[53] What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, A.R., vol. II, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains

[51] Passons au lien entre le Canada et les compagnies de tabac qui est en litige dans les deux affaires soumises à la Cour. Selon les compagnies de tabac, les opérations qu'elles ont conclues avec le Canada au fil des ans ont imposé une obligation de diligence au Canada. D'après elles, le Canada a dépassé les limites de son rôle comme autorité de réglementation des membres de l'industrie et a entretenu des rapports avec les compagnies de tabac en les conseillant et en les aidant à réduire le préjudice causé aux consommateurs de leurs produits. Les compagnies de tabac espèrent démontrer que le Canada leur a donné des renseignements et des conseils erronés en sachant qu'elles s'y fieraient, ce qu'elles ont d'ailleurs fait.

[52] Il s'agit de déterminer si les actes de procédure mentionnés ci-dessus font en sorte que les compagnies de tabac répondent aux conditions d'un lien spécial selon le droit en matière de déclaration inexacte faite par négligence qui sont énoncées dans *Hercules Managements*. Comme je l'ai mentionné, un lien spécial est établi lorsque (1) le défendeur doit raisonnablement prévoir que le demandeur se fiera à sa déclaration, et que (2) la confiance accordée par le demandeur serait raisonnable dans les circonstances. En l'espèce, les faits allégués révèlent que le Canada et les compagnies de tabac entretiennent depuis longtemps des rapports qui peuvent remplir ces conditions.

[53] Ce qu'on reproche au Canada, c'est que Santé Canada a exercé des fonctions distinctes de celles prévues par sa loi habilitante, y compris des recherches sur le tabac et des produits du tabac ainsi que la conception et la promotion du tabac et des produits du tabac (déclaration de mise en cause d'Imperial dans l'*Affaire du recouvrement des coûts*, d.a., vol. II, p. 66). Il est aussi allégué qu'Agriculture Canada a mis en œuvre un programme de coopération et de soutien destiné aux producteurs de tabac et aux fabricants de cigarettes, notamment en avisant ces derniers de la teneur en nicotine que devrait avoir le tabac utilisé pour la fabrication des produits du tabac. On allègue que des fonctionnaires ont fait appel à leurs connaissances et à leur expertise dans les domaines de l'usage du tabac et de la santé pour fournir à la fois des avis et des

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designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (*ibid.*, at pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

[54] What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

[55] The indicia of proximity offered in *Hercules Managements* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged

instructions aux fabricants, en les avisant notamment que les souches de tabac conçues et mises au point par des fonctionnaires d'Agriculture Canada, qui leur ont été vendues ou pour lesquelles des licences leur ont été octroyées, n'exposeraient pas les consommateurs à des dangers accrus pour leur santé, ni ne leur seraient autrement néfastes (*ibid.*, p. 109-110). Par conséquent, on allègue non seulement que l'exercice de larges pouvoirs de réglementation a eu des répercussions sur l'industrie du tabac, mais aussi que le Canada a joué un rôle de conseiller auprès d'un nombre déterminé de fabricants et a entretenu des rapports commerciaux avec les sociétés en cause compte tenu, en partie, des avis fournis à ces dernières par des fonctionnaires.

[54] Les allégations relatives aux rapports entre le Canada et les fabricants vont bien au-delà des déclarations que fait le Canada au grand public. Les rapports précis qu'aurait entretenus le Canada avec les fabricants se distinguent de l'absence de pareils rapports entre le Canada et les membres du groupe. Alors que les allégations relatives aux consommateurs doivent reposer sur un cadre législatif établissant des obligations fort générales envers le public, les allégations visant les fabricants découleraient principalement, non pas de tels obligations et pouvoirs généraux de réglementation, mais des fonctions exercées spécifiquement à l'égard des fabricants par le Canada, et ce, indépendamment de ses obligations légales. Il s'agit en l'occurrence de ses fonctions de concepteur, d'inventeur, et de promoteur de souches de tabac ainsi que de concédant de licence à l'égard de ces souches. Pour ce qui est de la confiance raisonnable, les pouvoirs de réglementation du Canada envers les fabricants, conjugués aux avis précis qu'il a donnés et à sa participation à des activités commerciales, pourraient être considérés comme étayant la conclusion que la confiance accordée était raisonnable dans les circonstances alléguées.

[55] Il se peut que les indices de proximité énoncés dans *Hercules Managements* dans le cas d'un lien spécial (intérêt financier direct, aptitudes ou connaissances professionnelles, avis donné dans le cours normal des affaires, délibérément ou en réponse à une demande précise) ne soient pas très

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negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

[56] Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F., at para. 36).

[57] In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Managements*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysoe J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is sufficient that Canada could have reasonably foreseen in a general way that the appellants would

utiles dans le contexte de déclarations inexactes que le gouvernement aurait faites par négligence. Je signale toutefois que ces déclarations auraient été faites dans le cours des activités de réglementation et des autres activités de Santé Canada, et non dans le cadre de rapports informels. Elles ont été faites précisément aux fabricants assujettis aux pouvoirs de réglementation de Santé Canada, par des fonctionnaires prétendument dotés d'aptitudes, d'une capacité de discernement et de connaissances particulières.

[56] Il faut examiner deux autres arguments avant de passer à une autre question. Premièrement, dans l'*Affaire du recouvrement des coûts*, le Canada soutient ne pas avoir d'obligation de diligence *prima facie* envers les compagnies de tabac parce que les dommages que peuvent subir les compagnies de tabac au titre de la *CRA* n'étaient pas prévisibles. En outre, [TRADUCTION] « [l]e Canada ne pouvait pas raisonnablement s'attendre à ce qu'un gouvernement d'une province puisse créer une obligation de droit civil entièrement nouvelle pour rembourser les coûts engagés par un régime provincial de soins de santé au titre des fautes d'un fabricant définies dans une loi et qu'il confère à cette obligation une portée rétroactive et prospective illimitée » (m.a., par. 36).

[57] À mon sens, les juges majoritaires de la Cour d'appel ont eu raison de rejeter l'argument du Canada. Le Canada n'avait pas à prévoir la mesure législative précise qui engagerait la responsabilité des compagnies de tabac. Il suffit qu'il ait été à même de prévoir que ses déclarations inexactes faites par négligence causeraient un quelconque préjudice à ces compagnies : *Hercules Managements*, par. 25-26 et 42. Compte tenu des faits allégués, il n'est pas exclu que les compagnies de tabac réussissent à prouver que le Canada s'attendait à ce que l'industrie du tabac soit pénalisée de la sorte pour avoir vendu un produit plus dangereux. Comme l'a mentionné le juge Tysoe, le Canada n'avait pas à prévoir que la responsabilité viserait précisément les coûts des soins de santé, ou que des provinces créeraient un droit d'action d'origine législative pour recouvrer ces coûts. [TRADUCTION] « Il suffit que le Canada ait pu raisonnablement prévoir de

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suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes" (*Costs Recovery* case, at para. 78).

façon générale que les appelantes subiraient un préjudice si les cigarettes légères et douces étaient plus néfastes pour la santé des fumeurs que les cigarettes ordinaires » (l'*Affaire du recouvrement des coûts*, par. 78).

[58] Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that "it could never have been the perception of the appellants that Canada was taking responsibility for their interests" (*Costs Recovery* case, at para. 51).

[58] Deuxièmement, le Canada fait valoir que le lien en l'espèce ne satisfait pas à la condition de la confiance raisonnable parce que le Canada agissait non pas comme une entreprise commerciale, mais plutôt comme une autorité de réglementation d'une industrie. Il n'était donc pas raisonnable, selon le Canada, que les compagnies de tabac se soient fiées à lui en qualité de conseiller. Le juge Hall, dissident, a souscrit à cette opinion, concluant que [TRADUCTION] « les appelantes n'auraient jamais pu croire que le Canada prenait la responsabilité de leurs intérêts » (l'*Affaire du recouvrement des coûts*, par. 51).

[59] In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Managements*. When the jurisprudence refers to "reasonable reliance" in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker's statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Managements*, at para. 41.

[59] À mon avis, cet argument dénature la confiance nécessaire en cas de déclaration inexacte faite par négligence selon le critère établi dans *Hercules Managements*. Lorsque la jurisprudence parle de « confiance raisonnable » dans le contexte d'une déclaration inexacte faite par négligence, elle pose la question de savoir s'il était raisonnable pour l'interlocuteur de se fier à l'exactitude de la déclaration, et non pas celle de savoir s'il était raisonnable de croire que l'auteur de la déclaration garantissait l'exactitude de celle-ci. Il n'est pas manifeste et évident que les compagnies de tabac se sont fiées de manière déraisonnable aux déclarations du Canada relatives aux avantages des cigarettes légères ou douces. J'estime que l'argument du Canada selon lequel il agissait en qualité d'autorité de réglementation n'a rien à voir avec la confiance raisonnable, mais il fait ressortir des considérations de politique générale qui doivent être examinées au deuxième volet du critère établi dans les arrêts *Anns* et *Cooper* : *Hercules Managements*, par. 41.

[60] In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight*

[60] En résumé, je conclus que les allégations visant les compagnies de tabac et le Canada ne doivent pas être radiées à la première étape de l'analyse. À supposer qu'ils soient exacts, les actes de procédure révèlent l'existence d'une obligation de diligence *prima facie* d'éviter les déclarations

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case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

(2) Stage Two: Conflicting Policy Considerations

[61] Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

[62] For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

(a) *Government Policy Decisions*

[63] Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes,

inexactes faites par négligence. Toutefois, les faits, tels qu'ils ont été plaidés dans l'*Affaire Knight*, ne démontrent pas l'existence, entre le Canada et les consommateurs, d'une relation qui donnerait naissance à une obligation de diligence. Cette allégation doit donc être radiée à cette étape de l'analyse.

(2) Deuxième étape de l'analyse : considérations de politique générale opposées

[61] Le Canada fait valoir qu'il ne peut y avoir d'obligation de diligence dans les présentes affaires en raison des considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse. Le Canada invoque à cet égard quatre considérations de cette nature : (1) les prétendues déclarations inexactes constituaient des décisions de politique générale du gouvernement; (2) la reconnaissance d'une obligation de diligence entraînerait la création d'une responsabilité indéterminée envers une catégorie indéterminée de personnes; (3) la reconnaissance d'une telle obligation aurait pour effet imprévu d'instaurer un régime d'assurance; et (4) si l'on fait droit à la demande d'Imperial, la responsabilité à l'égard des produits du tabac passerait du fabricant au gouvernement, et le fabricant [TRADUCTION] « est le mieux en mesure d'assumer la responsabilité des pertes financières » (m.a., par. 72).

[62] Pour les motifs exposés ci-après, je retiens la prétention du Canada selon laquelle les déclarations inexactes qu'il aurait faites par négligence à l'industrie du tabac dans les deux affaires ne doivent pas engager sa responsabilité délictuelle en raison des considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse. D'abord, les déclarations alléguées sont des expressions protégées de politique générale du gouvernement. Ensuite, la reconnaissance d'une obligation de diligence exposerait le Canada à une responsabilité indéterminée.

a) *Décisions de politique générale du gouvernement*

[63] Le Canada prétend qu'il avait pour politique générale d'encourager les fumeurs à consommer

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and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240).

des cigarettes à faible teneur en goudron, et qu'il a promu ce type de cigarette et développé des souches de tabac à faible teneur en goudron conformément à cette politique. Il ajoute que les déclarations faites en application de cette politique générale ne sauraient fonder une responsabilité délictuelle. Il s'appuie sur les propos suivants tenus par le juge Cory dans *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228 : « Les véritables décisions de politique devraient être à l'abri des poursuites en responsabilité délictuelle, de sorte que les gouvernements soient libres de prendre leurs décisions en fonction de facteurs sociaux, politiques ou économiques » (p. 1240-1241).

[64] The tobacco companies, for their part, contend that Canada's actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada's argument fails to account for the "facts" as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government's actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

[64] Pour leur part, les compagnies de tabac prétendent que les actes du Canada ne relevaient pas de la politique générale; il s'agissait plutôt d'actes de mise en œuvre d'une politique générale qui engagent pour cette raison la responsabilité délictuelle du Canada. Selon elles, l'argument du Canada ne tient pas compte des « faits » allégués dans les avis de mise en cause, soit que le Canada exerçait une fonction opérationnelle en tant que membre de l'industrie du tabac. Les compagnies de tabac prétendent aussi qu'il faut plus d'éléments de preuve pour décider si les actes du gouvernement étaient de nature opérationnelle ou conformes à une politique générale, et que l'affaire doit être instruite pour cette raison.

[65] In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial's submissions, holding that "evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions" (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada's initiatives were matters of government policy:

[65] Dans l'*Affaire Knight*, les juges majoritaires de la Cour d'appel, sous la plume du juge Tysoe, ont souscrit aux prétentions d'Imperial, affirmant qu'[TRADUCTION] « une preuve est nécessaire pour déterminer lesquels des actes et déclarations du Canada en l'espèce constituaient des décisions de politique générale et lesquels étaient des décisions opérationnelles » (par. 52). Le juge Hall était dissident; à son avis, toutes les initiatives du Canada relevaient manifestement de la politique générale du gouvernement :

[Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of

[TRADUCTION] Tel qu'il est allégué dans l'avis de mise en cause, [le Canada] avait la responsabilité de protéger la santé de la population canadienne, y compris les fumeurs. Toutes les mesures qu'il a prises pour développer des souches de tabac moins dangereuses, ou pour rendre publiques les teneurs en goudron et en nicotine

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new strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government. [para. 100]

[66] In order to resolve the issue of whether the alleged "policy" nature of Canada's conduct negates the *prima facie* duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

(i) Conduct at Issue

[67] The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct — one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada's role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct — conduct relevant to statements and representations made by Canada — is at issue.

(ii) Relevance of Evidence

[68] This brings us to the second and related preliminary matter — the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be

de différentes marques de cigarettes, visaient cet objectif. Bien qu'Agriculture Canada ait participé au développement de nouvelles souches de tabac, j'estime que le gouvernement s'est livré à pareilles activités en qualité d'autorité de réglementation de l'industrie du tabac dans le but de protéger la santé de la population canadienne. Des considérations de politique générale sous-tendaient l'ensemble des diverses activités susmentionnées entreprises par les ministères fédéraux. [par. 100]

[66] Pour régler la question de savoir si la nature censément « politique » de la conduite du Canada a pour effet d'écarter l'obligation de diligence *prima facie* en matière de déclarations inexactes faites par négligence, une obligation dont l'existence a été établie à la première étape de l'analyse, il faut d'abord examiner plusieurs questions préliminaires.

(i) La conduite en cause

[67] La conduite en cause est la première question préliminaire à examiner dans le cadre de la présente analyse. Les avis de mise en cause traitent de deux types distincts de conduite : la conduite visée par l'allégation de déclaration inexacte faite par négligence et la conduite non visée par cette allégation. La première a trait aux déclarations du Canada selon lesquelles les cigarettes à faible teneur en goudron et les cigarettes légères étaient moins nuisibles pour la santé que les autres cigarettes. La deuxième conduite a trait au rôle joué par Agriculture Canada dans le développement et la culture d'une souche de tabac à faible teneur en goudron ainsi que dans la perception des redevances sur le produit. Les compagnies de tabac ont fusionné les deux types de conduite dans leur plaidoirie, en faisant ressortir des éléments qui campent le Canada dans un rôle de commerçant dans l'industrie du tabac. Toutefois, dans l'analyse des déclarations inexactes faites par négligence, seul est en cause le premier type de conduite, celui relatif aux déclarations du Canada.

(ii) La pertinence de la preuve

[68] Cela nous amène à la deuxième question préliminaire connexe : l'utilité de la preuve pour déterminer s'il convient de radier les demandes de mise en cause fondées sur les déclarations inexactes faites

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struck. The majority of the Court of Appeal concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

[69] There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct — the development and marketing of a strain of low-tar tobacco — that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

[70] The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the

par négligence. La Cour d'appel a conclu à la majorité qu'une preuve était nécessaire pour établir si les déclarations inexactes attribuées au Canada avaient été faites conformément à une politique générale du gouvernement. Dans la même veine, les compagnies de tabac ont soutenu vigoureusement devant notre Cour que, dans la mesure où le Canada développait et cultivait du tabac à faible teneur en goudron et en tirait profit, il devrait être considéré non pas comme une autorité de réglementation du gouvernement ou un architecte des politiques publiques, mais comme un commerçant. Les compagnies de tabac ont fait valoir avec insistance qu'une preuve était nécessaire pour déterminer la mesure dans laquelle il s'agissait d'une activité commerciale.

[69] Cet argument pose problème à deux égards. Premièrement, comme je l'ai mentionné, il repose principalement sur des actes — le développement et la commercialisation d'une souche de tabac à faible teneur en goudron — qui n'ont pas de lien direct avec l'allégation de déclarations inexactes faites par négligence. La seule question qui se pose à ce stade de l'analyse est de savoir si les considérations de politique générale militent contre la conclusion que le Canada avait envers les compagnies de tabac l'obligation de prendre les mesures raisonnables pour énoncer correctement les avantages du tabac à faible teneur en goudron. La question de savoir si le Canada a produit des souches de tabac à faible teneur en goudron n'est pas directement pertinente pour cette analyse. Il s'agit plutôt de savoir si, dans la mesure où le Canada a fait des déclarations à cet égard, des considérations de politique générale nous empêcheraient de le tenir responsable de ces déclarations.

[70] Deuxièmement, comme je l'ai déjà indiqué, une requête en radiation ne dépend pas, de par sa nature, de la preuve. Les faits allégués doivent être tenus pour avérés. Le rejet de la requête en radiation s'impose, à moins qu'il ne soit évident et manifeste, d'après ces faits, que l'action n'a aucune possibilité raisonnable de succès. Autrement dit, s'il existe une possibilité raisonnable que la question alléguée s'avère en fait une question de politique générale, la requête en radiation doit alors être rejetée. Les doutes quant à ce que la preuve peut démontrer

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evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

[71] Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune From Judicial Review?

[72] The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

[73] The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

ne devraient pas empêcher la tenue d'un procès. La question dont nous sommes saisis est donc de savoir s'il ressort clairement des faits tenus pour avérés qu'une obligation de faire diligence afin d'éviter les déclarations inexactes faites par négligence serait écartée parce que la conduite à l'origine de la déclaration inexacte alléguée relève d'une politique générale du gouvernement et n'est donc pas susceptible d'engager la responsabilité délictuelle de son auteur.

[71] Pour être en mesure de répondre à cette question, nous devons examiner une troisième question préliminaire : en quoi consiste une décision de politique générale soustraite au contrôle judiciaire?

(iii) Les décisions de politique générale soustraites au contrôle judiciaire

[72] La question de savoir en quoi consiste une décision de politique générale qui écarte généralement toute responsabilité pour négligence est une question épineuse qui a fait couler beaucoup d'encre. Les tribunaux de common law de partout dans le monde s'entendent généralement pour dire que les décisions de politique générale des gouvernements ne sont pas justiciables et ne peuvent engager la responsabilité délictuelle de ces derniers. On s'entend aussi généralement pour dire que la responsabilité délictuelle de l'État peut être engagée lorsque ses mandataires exercent de façon négligente des fonctions prescrites. La difficulté tient à l'élaboration d'un critère qui permette de distinguer ces situations.

[73] La jurisprudence révèle l'existence de deux méthodes d'analyse utilisées pour résoudre cette difficulté, l'une étant axée sur la notion de pouvoir discrétionnaire, et l'autre sur la notion de politique générale, et chacune a ses propres variantes. La première méthode met l'accent sur la nature discrétionnaire de la conduite reprochée. La méthode fondée sur la [TRADUCTION] « décision discrétionnaire » a été retenue pour la première fois dans *Home Office c. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). Selon cette méthode, les autorités publiques doivent être exonérées de toute responsabilité lorsqu'elles agissent dans l'exercice de leur pouvoir discrétionnaire, à moins que la décision attaquée ne soit irrationnelle.

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[74] The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just*; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

[74] La seconde méthode insiste sur la qualité de « politique générale » de la conduite de l'État bénéficiant d'une protection. On considère que les décisions de politique générale forment un sous-groupe de décisions discrétionnaires, qui font habituellement intervenir des considérations d'ordre social, économique et politique. Elles sont parfois qualifiées de « véritables » décisions de politique générale ou décisions de politique générale « fondamentale ». Les décisions de politique générale sont soustraites au contrôle judiciaire et ne peuvent engager la responsabilité délictuelle de l'État, sauf si elles sont irrationnelles ou ont été prises de mauvaise foi. Une variante de cette méthode est le critère politique générale-opérations, lequel fait la distinction entre les « véritables » décisions de politique générale et les décisions « opérationnelles », qui visent la mise en œuvre ou l'application d'une politique générale établie. De nos jours, c'est le critère politique générale-opérations qui prévaut au Canada : *Just*; *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Lewis (Tutrice à l'instance de) c. Colombie-Britannique*, [1997] 3 R.C.S. 1145.

[75] To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 754).

[75] Pour compliquer les choses, les notions de pouvoir discrétionnaire et de politique générale se chevauchent et sont parfois employées de manière interchangeable. Ainsi, dans *Anns*, lord Wilberforce a décrit la notion de politique générale comme étant synonyme de pouvoir discrétionnaire (p. 754).

[76] There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge,

[76] On admet généralement que le droit de la négligence doit prendre en compte le rôle unique des organismes gouvernementaux : *Just*. D'une part, il importe que les organismes publics soient responsables en général de leur négligence compte tenu du grand rôle qu'ils jouent dans tous les aspects de la vie en société. Soustraire les gouvernements à toute responsabilité pour leurs actes entraînerait des conséquences inacceptables. Par contre, « la Couronne n'est pas une personne et elle doit pouvoir être libre de gouverner et de prendre de véritables décisions de politique sans encourir pour autant une

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to repeat, is to fashion a just and workable legal test.

[77] The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

[78] The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

[79] The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision,

responsabilité civile délictuelle » : *Just*, p. 1239. La difficulté, encore une fois, consiste à formuler un critère juridique équitable et utile.

[77] La principale difficulté que pose la méthode d'analyse fondée sur la notion de « décision discrétionnaire » réside dans la possibilité qu'elle applique à la conduite des acteurs gouvernementaux une exemption trop générale. Bien des décisions peuvent être qualifiées de discrétionnaires dans une certaine mesure. Cette méthode d'analyse a donc parfois été peaufinée ou remplacée par des critères restreignant le pouvoir discrétionnaire qui dégage son titulaire de toute responsabilité.

[78] La principale difficulté que pose le critère politique générale-opérations tient au fait qu'il est notoirement difficile pour les tribunaux de décider si une décision gouvernementale donnée relève d'une politique générale ou des opérations. Même des fonctionnaires aux échelons inférieurs peuvent jouir d'un certain pouvoir discrétionnaire pour ce qui est d'établir le montant des fonds disponibles ou de décider quelle tâche parmi d'autres revêt le plus d'importance à un moment donné. La décision d'un travailleur social quant au moment de rendre visite à une famille perturbée, ou celle d'un conducteur de chasse-neige quant au moment d'épandre du sable sur une route glacée, sont-elles des décisions de politique générale ou des décisions opérationnelles? On peut soutenir que les deux réponses sont bonnes, selon les circonstances. Bien qu'elle illustre un facteur clé en raison duquel certains actes du gouvernement doivent généralement être à l'abri de toute responsabilité, la distinction politique générale-opérations ne constitue pas un critère juridique très utile.

[79] L'historique du traitement de la question par différents tribunaux illustre la difficulté que présente l'élaboration d'un critère utile pour décrire les décisions de politique générale soustraites au contrôle judiciaire. Commençons par la Chambre des lords, qui estimait au départ que toutes les décisions discrétionnaires du gouvernement qui ne sont pas irrationnelles sont soustraites au contrôle judiciaire : *Dorset Yacht*. Elle a ensuite appliqué un critère à deux volets, en se demandant en

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in which case it was entirely exempt from judicial scrutiny: *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353. Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (H.L.), *per* Lord Hoffmann. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550. The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

[80] Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J.

premier lieu si la décision était discrétionnaire et, dans l'affirmative, si elle était rationnelle; elle s'est demandé en second lieu s'il s'agissait d'une décision de politique fondamentale, et donc entièrement soustraite à l'examen judiciaire : *X c. Bedfordshire County Council*, [1995] 3 All E.R. 353. Moins d'un an après avoir retenu ce critère à deux volets, la Chambre des lords l'a laissé tomber en déclamant de manière retentissante que le critère politique générale-opérations était inapplicable dans les cas difficiles, ce dont témoignerait la jurisprudence canadienne : *Stovin c. Wise*, [1996] A.C. 923 (H.L.), lord Hoffmann. Lors de sa dernière incursion dans ce domaine, la Chambre des lords a mentionné que tant le critère politique générale-opérations que l'analyse fondée sur la notion de décision discrétionnaire sont utiles pour déterminer les décisions du gouvernement qui engagent la responsabilité délictuelle de celui-ci, mais elle a jugé que le critère final en est un de « justiciabilité » : *Barrett c. Enfield London Borough Council*, [2001] 2 A.C. 550. Selon ce critère, il s'agit de savoir, en définitive, si le tribunal est habile, sur le plan institutionnel, à trancher la question ou [TRADUCTION] « si le tribunal doit reconnaître qu'il n'a pas à intervenir » (p. 571). Ainsi, à la fin de ce long périple jurisprudentiel, on se retrouve avec un critère qui ne fait que reformuler la question. Quand le tribunal doit-il juger qu'une décision gouvernementale ne donne pas prise à la responsabilité pour négligence? Quand le tribunal conclut que l'affaire est du ressort du gouvernement et non des tribunaux.

[80] Des juges australiens s'étant prononcés dans des décisions successives sont partagés entre le modèle décision discrétionnaire-décision irrationnelle et celui de la « véritable décision de politique générale ». Dans *Sutherland Shire Council c. Heyman* (1985), 157 C.L.R. 424 (H.C.), deux des juges (le juge en chef Gibbs et le juge Wilson) ont adopté la règle établie dans l'arrêt *Dorset Yacht*, selon laquelle toutes les décisions discrétionnaires échappent au contrôle judiciaire, pourvu qu'elles soient rationnelles (p. 442). Ils ont souscrit à la thèse que la distinction entre la politique générale et les opérations était un critère logique pour déterminer quelles décisions ne donnent pas prise à la responsabilité, et ils ont fait leur la description de lord

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for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

Wilberforce voulant que la politique générale soit synonyme de pouvoir discrétionnaire. Pour sa part, le juge Mason a affirmé que l'État bénéficiait de la protection uniquement à l'égard des décisions de politique générale fondamentale, qu'il considérait comme un sous-groupe plus restreint de décisions discrétionnaires (p. 500). Le juge Deane a souscrit à l'opinion du juge Mason, mais pour des raisons quelque peu différentes. Quant au juge Brennan, il n'a pas dit quel critère devrait être retenu, laissant cette question en suspens. La Haute Cour d'Australie était encore une fois divisée dans *Pyrenees Shire Council c. Day*, [1998] HCA 3, 192 C.L.R. 330, où trois juges ont conclu qu'une mesure gouvernementale discrétionnaire n'engage la responsabilité de l'État que si elle est irrationnelle, et deux juges ont retenu des versions différentes du critère politique générale-opérations.

[81] In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("*FTCA*"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

[81] Aux États-Unis, la responsabilité du gouvernement fédéral est régie par la *Federal Tort Claims Act* de 1946, 28 U.S.C. (« *FTCA* »), qui écarte l'immunité absolue à l'égard de la responsabilité délictuelle, mais crée une exemption en faveur des décisions discrétionnaires. L'alinéa 2680a) écarte la responsabilité du gouvernement à l'égard de

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

> [TRADUCTION] [t]oute poursuite fondée sur l'acte ou l'omission d'un fonctionnaire dans l'exécution diligente d'une loi ou d'un règlement, que ces derniers soient ou non valides, ou fondée sur l'exercice ou le défaut d'exercice d'une fonction ou d'un pouvoir discrétionnaire de la part d'un organisme fédéral ou d'un fonctionnaire, qu'il y ait eu ou non exercice abusif de ce pouvoir discrétionnaire.

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 430; *United States v. Neustadt*, 366 U.S. 696 (1961).

Fait important, l'al. 2680h) de la *FTCA* soustrait le gouvernement fédéral à toute poursuite pour déclaration inexacte, faite délibérément ou par négligence : *Office of Personnel Management c. Richmond*, 496 U.S. 414 (1990), p. 430; *United States c. Neustadt*, 366 U.S. 696 (1961).

[82] Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions:

[82] Sans entrer dans les détails de l'historique complexe de la jurisprudence américaine en la matière, il suffit de dire que les tribunaux ont restreint le concept de pouvoir discrétionnaire énoncé dans la *FTCA* en invoquant la notion de politique générale. Dans certaines décisions, ils développent

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e.g., *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "protects only governmental actions and decisions based on considerations of public policy" (at p. 323, citing *Berkovitz v. United States*, 486 U.S. 531 (1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

[83] In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy — though . . . not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rdinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

cette analyse en distinguant les décisions de politique générale des décisions opérationnelles : p. ex. *Dalehite c. United States*, 346 U.S. 15 (1953). La Cour suprême des États-Unis s'est depuis distanciée de l'approche qui consiste à décrire de façon négative une véritable décision de politique générale comme une décision [TRADUCTION] « n'étant pas de nature opérationnelle » et favorise une approche visant à déterminer si la conduite contestée de l'État reposait sur des considérations d'intérêt public. Dans *United States c. Gaubert*, 499 U.S. 315 (1991), le juge White a reproché à la Court of Appeals de se fonder sur une [TRADUCTION] « dichotomie inexistante entre les fonctions discrétionnaires et les activités opérationnelles » (p. 326). Selon lui, l'« exception relative aux fonctions discrétionnaires » prévue par la *FTCA* « ne vise que les mesures et les décisions du gouvernement qui reposent sur des considérations d'intérêt public » (p. 323, citant *Berkovitz c. United States*, 486 U.S. 531 (1988), p. 537 (je souligne)), comme celles faisant intervenir des considérations sociales, économiques ou politiques; voir aussi *United States c. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

[83] Dans *Gaubert*, seul le juge Scalia trouvait encore attrayante l'idée de définir les décisions de politique générale comme des décisions [TRADUCTION] « n'étant pas de nature opérationnelle », mais seulement au sens strict selon lequel les employés au niveau opérationnel prennent rarement des décisions de politique générale. Selon lui, [TRADUCTION] « un facteur intervient dans la dichotomie entre la planification et les opérations [. . .] mais ce n'est pas tout à fait ce que les cours d'appel avaient en tête » (p. 335). Ce « facteur », c'est que, « [h]abituellement, un employé au niveau opérationnel n'a pas à prendre des décisions de politique générale, même si ses actes peuvent être étroitement liés à des considérations de cette nature ». D'après le juge Scalia, une décision du gouvernement constitue une décision de politique générale bénéficiant de protection si elle « doit tenir compte de considérations sociales, économiques ou politiques et si elle est prise par un fonctionnaire dont l'une des responsabilités officielles consiste à évaluer ces considérations ».

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[84] A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

[84] Les observations suivantes s'imposent comme suite à l'analyse de la jurisprudence. Premièrement, un critère fondé uniquement sur l'exercice du pouvoir discrétionnaire du gouvernement est maintenant perçu par la plupart des tribunaux comme étant trop général. Même les tâches courantes, comme la conduite d'un véhicule du gouvernement, peuvent requérir l'exercice d'un certain pouvoir discrétionnaire. Soustraire à l'examen judiciaire tous les actes de l'administration publique qui font intervenir un pouvoir discrétionnaire, pourvu qu'ils ne soient pas irrationnels, a pour effet de donner une portée trop large à l'immunité.

[85] The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

[85] Deuxièmement, un grand nombre de tribunaux dans tous les ressorts visés par l'analyse s'entendent pour dire que l'État devrait être soustrait à toute responsabilité pour négligence dans les cas de « véritables » décisions de politique générale ou de décisions de politique générale « fondamentale ». Selon le point de vue qui prévaut au Canada, seules les « véritables » décisions de politique générale (par opposition aux décisions opérationnelles) ne devraient pas donner prise à cette responsabilité : *Just*. La difficulté liée à la détermination des décisions de cette nature ne change rien au fait que les tribunaux s'en remettent encore à ces indications essentielles. Même le critère de « justiciabilité » établi tout récemment au Royaume-Uni s'inspire de ce concept pour déterminer ce qui doit être perçu comme étant justiciable.

[86] A third observation is that defining a core policy decision negatively as a decision that is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments — policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

[86] Troisièmement, le fait de définir négativement une décision de politique générale fondamentale comme une décision n'étant pas de nature « opérationnelle » ne constitue peut-être pas un critère distinct utile dans tous les cas. Ce critère suppose une nette dichotomie entre deux compartiments étanches : les décisions de politique générale et les décisions opérationnelles. Dans les faits, il est possible que les décisions n'appartiennent pas clairement à l'une ou l'autre de ces catégories.

[87] Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and

[87] Au lieu de définir négativement les décisions de politique générale à l'abri de l'examen judiciaire comme des décisions [TRADUCTION] « n'étant pas de nature opérationnelle », les juges majoritaires dans *Gaubert* les décrivent positivement comme

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political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

étant des décisions et des mesures discrétionnaires d'ordre législatif ou administratif qui se fondent sur des considérations sociales, économiques ou politiques. Les décisions de politique générale sont habituellement prises par le législateur ou un fonctionnaire tenu officiellement d'évaluer et de mettre en balance des considérations d'intérêt public. La décision est réfléchie et traduit une « politique générale » dans le sens d'une règle ou orientation générale appliquée dans une situation précise. La politique désigne une « ligne de conduite adoptée par un organisme [. . .] public » : *Multidictionnaire de la langue française*, p. 1261. Les juges saisis d'une pareille ligne de conduite adoptée par un organisme public estiment généralement qu'il s'agit d'une décision de politique générale. Il appartient véritablement au gouvernement, et non aux tribunaux, de mettre en balance des considérations sociales, économiques et politiques pour en arriver à une ligne de conduite. C'est pourquoi les décisions et les actes reposant sur ces considérations ne sauraient fonder une action en responsabilité délictuelle.

[88] Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

[88] Utilisée dans ce sens, la notion de politique générale diffère de la notion de pouvoir discrétionnaire. Un tel pouvoir dépend de la question de savoir si un acteur donné a la faculté de choisir d'agir d'une façon ou d'une autre. Les politiques générales forment un sous-ensemble restreint de décisions discrétionnaires, et n'englobent que les décisions fondées sur des considérations d'intérêt public, comme des considérations d'ordre économique, social ou politique. Toutes les décisions de politique générale sont discrétionnaires, en ce sens qu'une politique différente aurait pu être retenue. Toutefois, les décisions discrétionnaires du gouvernement ne sont pas toutes des décisions de politique générale.

[89] While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that

[89] Bien que l'approche préconisée dans *Gaubert* mette l'accent sur la nature de la décision, le rôle du décideur peut se révéler utile. Ce dernier était-il chargé d'étudier les facteurs sociaux, économiques ou politiques et d'élaborer une « ligne de conduite » à l'égard d'un problème auquel fait face le gouvernement? Sans prétendre qu'il est possible de répondre à la question en invoquant

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the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

[90] I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[91] Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

simplement le niveau hiérarchique du décideur, on peut s'inspirer de l'observation faite par le juge Scalia dans *Gaubert* selon laquelle les employés au niveau opérationnel ne participent habituellement pas à la prise de décisions de politique générale.

[90] Je conclus que les décisions de « politique générale fondamentale » du gouvernement à l'égard desquelles ce dernier est soustrait aux poursuites se rapportent à une ligne de conduite et reposent sur des considérations d'intérêt public, tels des facteurs économiques, sociaux ou politiques, pourvu qu'elles ne soient ni irrationnelles ni prises de mauvaise foi. Cette approche concorde avec le message essentiel de la jurisprudence canadienne à cet égard, bien qu'elle fasse ressortir des caractéristiques positives des décisions de politique générale, au lieu de se fonder exclusivement sur le fait qu'elles ne sont pas de « nature opérationnelle ». Elle est aussi étayée par les réflexions faites dans la nouvelle jurisprudence canadienne et étrangère. Cela dit, elle n'est pas censée constituer un critère décisif. On peut s'attendre à ce que surviennent de temps à autre des situations délicates où il n'est pas facile de décider si le degré de « politique générale » en cause suffit à mettre une décision à l'abri de toute responsabilité pour négligence. Il serait illusoire de vouloir établir un critère absolu qui donnerait rapidement et infailliblement une réponse à l'égard de toute décision parmi la gamme infinie de celles que peuvent prendre les acteurs gouvernementaux. On pourra néanmoins facilement cerner la plupart des décisions gouvernementales qui représentent une ligne de conduite fondée sur une mise en balance de considérations économiques, sociales et politiques.

[91] L'application de l'approche exposée ci-dessus aux requêtes en radiation nous permet de conclure que, dans les cas où il est « évident et manifeste » qu'une décision contestée du gouvernement constitue une décision de politique générale, l'allégation peut à juste titre être radiée au motif qu'elle ne saurait fonder une action en responsabilité délictuelle. S'il n'est pas évident et manifeste qu'il s'agit d'une décision de politique générale, il faut permettre l'instruction de l'affaire.

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(iv) Conclusion on the Policy Argument

[92] As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

[93] The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

[94] The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

[95] In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government

(iv) Conclusion sur l'argument relatif à la politique générale

[92] Comme je l'ai indiqué, il s'agit de savoir si les déclarations qu'aurait faites le Canada aux compagnies de tabac, selon lesquelles les cigarettes à faible teneur en goudron sont moins nuisibles pour la santé, sont des questions de politique générale, en ce sens qu'elles constituent une ligne de conduite du gouvernement. Dans l'affirmative, ces déclarations ne peuvent fonder une action en responsabilité délictuelle.

[93] On soutient dans les avis de mise en cause que le Canada a mis en garde la population (et les compagnies de tabac) contre les dangers de l'usage du tabac et a affirmé que les cigarettes à faible teneur en goudron sont moins nocives que les cigarettes ordinaires. On soutient aussi que ces déclarations étaient fausses et que, dans la mesure où l'usage du tabac a causé aux consommateurs un préjudice additionnel dont sont tenues responsables les compagnies de tabac, le Canada doit indemniser celles-ci ou éponger une partie de leurs pertes.

[94] Les avis de mise en cause concèdent implicitement que Santé Canada a fait les déclarations qu'on lui attribue par souci pour la santé des Canadiens et Canadiennes, conformément à sa politique d'inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. Ils mentionnent en fait que Santé Canada avait pour politique de mettre en garde la population contre les effets nocifs de l'usage du tabac, et d'encourager les Canadiens et Canadiennes à fumer plus sainement. Les demandes de mise en cause reposent sur l'allégation que Santé Canada s'est résigné à ce que certaines personnes continuent de fumer malgré les effets nuisibles de cette habitude sur leur santé, et a décidé qu'il convenait de les inciter à fumer des cigarettes à faible teneur en goudron.

[95] En bref, les déclarations sur lesquelles s'appuient les demandes de mise en cause faisaient partie intégrante d'une politique générale du gouvernement visant à inciter les personnes qui continuaient de fumer à opter pour des cigarettes à faible teneur en goudron. Il s'agissait d'une « véritable »

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adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

[96] Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) *Indeterminate Liability*

[97] Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

[98] The tobacco companies respond that Canada faces extensive, but not indeterminate liability.

politique générale ou d'une politique générale « fondamentale » au sens d'une ligne de conduite adoptée par le gouvernement. La ligne de conduite gouvernementale alléguée a été adoptée par les plus hautes instances du gouvernement canadien et mettait en jeu des considérations sociales et économiques. Selon les actes de procédure, le Canada a élaboré cette politique par souci pour la santé des Canadiens et Canadiennes et en raison des coûts individuels et institutionnels associés aux maladies causées par le tabac. Il m'apparaît évident et manifeste que les déclarations alléguées relevaient de la politique générale du gouvernement, de sorte que les allégations de déclarations inexactes faites par négligence qu'ont formulées les compagnies de tabac à l'encontre du Canada doivent être radiées.

[96] Vu ma conclusion que les allégations de déclarations inexactes faites par négligence ne peuvent fonder une action parce que les déclarations alléguées relevaient de la politique générale du gouvernement, point n'est besoin de passer en revue les autres motifs de politique générale — liés à la deuxième étape de l'analyse — qu'a invoqués le Canada à l'encontre des demandes de mise en cause pour déclarations inexactes faites par négligence. Mais, comme l'argument relatif à la responsabilité indéterminée a été débattu à fond, je vais l'analyser brièvement. À mon avis, cet argument confirme que la responsabilité délictuelle du Canada ne doit pas être reconnue à l'égard des déclarations inexactes qu'il aurait faites.

b) *Responsabilité indéterminée*

[97] Le Canada soutient que, si l'on accepte les allégations des défenderesses en matière de déclaration inexacte faite par négligence, cela entraînerait une responsabilité indéterminée de sa part, et qu'il faut donc les rejeter. Le Canada affirme que le nombre de cigarettes vendues était indépendant de sa volonté. En outre, dans les cas de perte financière, les tribunaux ne doivent conclure à la responsabilité du mis en cause que lorsque celui-ci est à même d'en contrôler la portée.

[98] Les compagnies de tabac répondent que la responsabilité à laquelle s'expose le Canada est

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They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

[99] I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

[100] The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

[101] Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco

considérable, mais non indéterminée. Selon les compagnies de tabac, la responsabilité du Canada envers elles se limite au délit de déclaration inexacte faite par négligence. Le Canada ne serait responsable qu'envers les fumeurs de cigarettes légères et les compagnies de tabac.

[99] Je suis d'accord avec le Canada pour dire que la possibilité d'une responsabilité indéterminée porte un coup fatal aux allégations des compagnies de tabac relatives aux déclarations inexactes faites par négligence. Dans la mesure où les allégations reposent sur des déclarations faites aux consommateurs, le Canada n'exerçait aucun contrôle sur le nombre de fumeurs de cigarettes légères. Cette situation est analogue à celle dans l'arrêt *Cooper* dans lequel notre Cour a affirmé qu'elle aurait refusé d'attribuer au registrateur des courtiers en hypothèques une obligation de diligence à l'égard des pertes financières subies par les investisseurs, parce que « [l]a Loi elle-même n'impose aucune limite au nombre des investisseurs et aux montants d'argent investis dans le système de courtage en hypothèques, et le registrateur ne dispose d'aucun moyen pour les contrôler » (par. 54). Cette affirmation constituait une remarque incidente, mais il s'agit d'un argument convaincant.

[100] Le risque de responsabilité indéterminée est aggravé par le caractère purement financier de la perte alléguée. Dans *Design Services Ltd. c. Canada*, 2008 CSC 22, [2008] 1 R.C.S. 737, sous la plume du juge Rothstein, la Cour a mentionné que « dans les cas de perte purement financière, il faut, pour paraphraser le juge en chef Cardozo, prendre soin de ne reconnaître une obligation que dans la mesure où l'on peut déterminer la catégorie des demandeurs, la période et les montants en cause » (par. 62). Si le Canada avait une obligation de diligence envers les fumeurs de cigarettes légères, le nombre potentiel de demandeurs et l'ampleur de la responsabilité seraient indéterminés.

[101] Dans la mesure où les allégations reposent sur des déclarations faites aux compagnies de tabac, elles semblent plus limitées à première vue. Cette distinction ne résiste toutefois pas à l'analyse. Si l'on reconnaissait une obligation de diligence à

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companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

(c) *Summary on Stage-Two Policy Arguments*

[102] In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

D. *Failure to Warn*

[103] The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

(1) Labelling Claim

[104] B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure

l'égard des déclarations faites aux compagnies de tabac, cela reviendrait effectivement à reconnaître une obligation envers les consommateurs, vu que le montant des dommages-intérêts dus aux compagnies de tabac dans les deux cas dépendrait du nombre de fumeurs et du nombre de cigarettes vendues. Il s'agit d'allégations de déclaration inexacte faite par négligence par lesquelles les compagnies de tabac détournent leur responsabilité potentielle vers les consommateurs et la province de la Colombie-Britannique. À mon avis, il faut rejeter ces allégations dans les deux cas, parce que le Canada n'avait aucune prise sur l'ampleur de sa responsabilité potentielle.

c) *Résumé quant aux arguments de politique générale soulevés à la deuxième étape de l'analyse*

[102] J'estime que notre Cour doit radier les allégations de déclarations inexactes faites par négligence dans les deux pourvois en raison de considérations de politique générale soulevées à la deuxième étape de l'analyse, à savoir l'immixtion dans les décisions de politique générale du gouvernement et la possibilité de responsabilité indéterminée.

D. *Le défaut de mise en garde*

[103] Les compagnies de tabac formulent deux allégations au sujet du défaut de mise en garde : B.A.T. prétend que le Canada a interdit aux compagnies de tabac d'apposer sur les paquets de cigarettes des mises en garde (l'allégation relative à l'étiquetage) à l'égard des dangers que présentent les cigarettes pour la santé; Imperial, quant à elle, prétend que le Canada a fait défaut de mettre les compagnies de tabac en garde contre les dangers que présentent les souches de tabac conçues par le Canada et pour lesquelles il a octroyé des licences.

(1) L'allégation relative à l'étiquetage

[104] B.A.T. allègue que, en donnant à l'industrie la directive de ne pas apposer de mise en garde sur ses paquets de cigarettes, le Canada a engagé sa responsabilité délictuelle pour défaut de mise en

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to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

garde. Dans l'*Affaire Knight*, le juge Tysoe n'a pas abordé les allégations relatives au défaut de mise en garde. Pour sa part, le juge Hall, exprimant l'opinion de la minorité, aurait rejeté ces allégations pour des motifs liés à l'étape deux de l'analyse, estimant que la décision du Canada était une décision de politique générale et que la responsabilité du Canada serait indéterminée. Il a aussi conclu qu'imposer cette responsabilité au gouvernement irait à l'encontre des obligations du Canada envers la population (par. 99). Dans l'*Affaire du recouvrement des coûts*, le juge Tysoe a souscrit à l'analyse faite par le juge Hall dans l'*Affaire Knight* en rejetant l'allégation relative au défaut du Canada de mettre en garde les compagnies de tabac (par. 89). B.A.T. conteste ces conclusions.

[105] The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

[105] L'élément crucial de cette allégation relative au défaut de mise en garde est essentiellement le même que celui des allégations de déclarations inexactes faites par négligence, et il y a lieu de la rejeter pour les mêmes considérations de politique générale. Les recommandations du ministre de la Santé sur les mises en garde faisaient partie intégrante de la politique générale du gouvernement visant à inciter les fumeurs à opter pour des cigarettes à faible teneur en goudron. En tant que telles, elles ne peuvent fonder une action pour défaut de mise en garde.

(2) Failure to Warn Imperial About Health Hazards

(2) Le défaut de mettre Imperial en garde contre les dangers pour la santé

[106] The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

[106] S'exprimant au nom de la Cour d'appel, le juge Tysoe a conclu que l'on n'avait pas suffisamment plaidé, dans les avis de mise en cause, que le Canada avait fait défaut de mettre l'industrie en garde contre les dangers pour la santé que présentaient ses souches de tabac. Imperial prétend que cette conclusion était erronée, car les éléments de l'allégation de défaut de mise en garde sont identiques à ceux de l'allégation de négligence qui, elle, avait suffisamment été plaidée.

[107] Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to

[107] Le Canada souligne que les deux paragraphes des avis de mise en cause où il est question du défaut de mise en garde ne font allusion qu'aux allégations concernant l'étiquetage, et non à l'allégation

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warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

[108] I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

> Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, *per* Drossos J.; see also *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133 (Ont. S.C.J.), *per* Macdonald J. (paras. 6 to 9).

[109] Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

E. *Negligent Design*

[110] The tobacco companies have brought two types of negligent design claims against Canada

que le Canada a fait défaut de mettre Imperial en garde contre les dangers possibles pour la santé que présentaient les souches de tabac. Le Canada soutient également que pour étayer une allégation de défaut de mise en garde, le demandeur doit non seulement démontrer que le défendeur a fait preuve de négligence, mais aussi que celui-ci avait l'obligation positive d'agir. Toujours selon le Canada, les avis de mise en cause ne donnent aucunement matière à croire qu'il avait une telle obligation en l'espèce.

[108] Je conviens avec le Canada que le délit de défaut de mise en garde requiert la preuve d'une obligation positive envers le demandeur. En droit des délits, les obligations positives constituent l'exception et non la règle. Dans *Childs c. Desormeaux*, la Cour a affirmé ce qui suit :

> Bien qu'il ne fasse aucun doute qu'une omission peut emporter négligence, la common law, en règle générale, est une fervente protectrice de l'autonomie individuelle. L'obligation de prendre des mesures concrètes face à un risque ou à un danger n'est pas une obligation distincte. Généralement, le simple fait qu'une personne court un danger ou constitue un danger pour autrui n'impose pas en soi une quelconque obligation aux personnes susceptibles d'intervenir. [par. 31]

Qui plus est, aucune des décisions citées par Imperial n'étaye l'argument qu'une allégation de négligence, sans plus, est suffisante pour imposer une obligation de mise en garde : *Day c. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, le juge Drossos; voir aussi *Elias c. Headache and Pain Management Clinic*, 2008 CanLII 53133 (C.S.J. Ont.), le juge Macdonald (par. 6 à 9).

[109] Même si l'on considérait qu'il suffit de plaider la négligence pour formuler une allégation d'obligation de mise en garde, ce que je ne puis accepter, l'allégation serait rejetée pour les considérations de politique générale liées à la deuxième étape de l'analyse et qui s'appliquent à l'allégation de déclaration inexacte faite par négligence.

E. *La conception négligente*

[110] Les compagnies de tabac ont soulevé à l'encontre du Canada deux types d'allégations

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that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

[111] In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

(1) *Prima Facie* Duty of Care

[112] I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

[113] In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the

de conception négligente qu'il reste à examiner. Premièrement, elles affirment que le Canada a manqué à son obligation de diligence envers elles en concevant de manière négligente ses souches de tabac à faible teneur en goudron. La Cour d'appel a jugé que les actes de procédure appuyaient une obligation de diligence *prima facie* à cet égard, mais que cette obligation était écartée par la considération de politique générale liée à la responsabilité indéterminée, soulevée à la deuxième étape de l'analyse. Deuxièmement, Imperial fait valoir que le Canada a manqué à son obligation de diligence envers les consommateurs de cigarettes légères et douces dans l'*Affaire Knight*. La Cour d'appel a conclu à la majorité que cette allégation est matière à procès.

[111] J'estime que ces deux allégations de conception négligente établissent l'existence d'une obligation de diligence *prima facie*, mais doivent être rejetées à la deuxième étape de l'analyse parce qu'elles ont trait à des décisions de politique générale fondamentale du gouvernement.

(1) Obligation de diligence *prima facie*

[112] Je commence par l'allégation que le Canada avait une obligation de diligence *prima facie* envers les compagnies de tabac. Se fondant sur les mêmes arguments qu'il avance à l'encontre des allégations de déclarations inexactes faites par négligence, le Canada affirme ne pas avoir d'obligation de cette nature, parce qu'il n'existe pas de lien de proximité entre lui et les compagnies de tabac.

[113] À mon sens, la Cour d'appel a conclu avec raison que le Canada avait une obligation de diligence *prima facie* envers les compagnies de tabac relativement à la conception des souches de tabac à faible teneur en goudron. Je suis d'accord avec le juge Tysoe pour dire que les rapports invoqués en l'espèce répondent aux conditions de proximité :

[TRADUCTION] Si les rapports entre le concepteur et l'acheteur d'un produit sont suffisamment étroits, il s'ensuit, à mon avis, qu'il existe un lien suffisamment étroit entre le concepteur d'un produit et celui qui s'en sert pour fabriquer des biens vendus au public. En outre, dans le contexte de la présente affaire, le concepteur du

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product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

[114] The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

[115] For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

(2) Stage-Two Policy Considerations

[116] For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on

produit devrait raisonnablement s'attendre à ce que sa conception ait une incidence sur le fabricant. Le concepteur pouvait raisonnablement prévoir qu'un fabricant de biens auxquels le produit est intégré serait tenu de rembourser le prix d'achat payé par des consommateurs si la conception du produit n'atteignait pas l'objectif qu'elle était censée atteindre. [L'*Affaire Knight*, par. 67]

[114] On allègue que le Canada se comportait comme une société commerciale privée et entretenait des rapports étroits avec les compagnies de tabac. Le prétendu lien de proximité se fonde non pas sur une obligation prévue par la loi, mais sur les rapports entre le Canada et les compagnies de tabac. L'argument du Canada selon lequel une obligation de diligence donnerait lieu à un conflit entre des obligations de droit privé et des obligations de droit public n'écarte pas la possibilité qu'un lien de proximité découle de sa conduite, mais il peut constituer une considération de politique générale pertinente à la deuxième étape de l'analyse.

[115] Pour des motifs semblables et compte tenu des faits allégués, je conclus que le Canada avait une obligation de diligence *prima facie* envers les consommateurs de cigarettes légères et douces dans l'*Affaire Knight*. Vu ces faits, il est au moins possible de soutenir que le Canada agissait comme une entreprise commerciale lorsqu'il a conçu ses souches de tabac. Comme l'a affirmé le juge Tysoe de la Cour d'appel, [TRADUCTION] « le concepteur d'un produit destiné à être vendu au public a une obligation de diligence *prima facie* envers ceux et celles qui achètent ce produit » (par. 48).

(2) Considérations de politique générale soulevées à la deuxième étape de l'analyse

[116] Pour les motifs fournis à l'égard des allégations de déclarations inexactes faites par négligence, j'estime que les considérations de politique générale qui entrent en jeu à la deuxième étape de l'analyse écartent l'obligation de diligence *prima facie* à l'égard des allégations de conception négligente. La décision de concevoir des souches de tabac à faible teneur en goudron parce qu'on croit que les cigarettes fabriquées avec ce tabac seraient

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social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage-two policy objection to the claim of negligent design.

moins nuisibles pour la santé constitue une ligne de conduite fondée sur la politique générale du Canada en matière de santé. Il s'agissait d'une décision reposant sur des facteurs sociaux et économiques. Cette décision de politique générale fondamentale du gouvernement ne saurait fonder une poursuite pour conception négligente. Vu cette conclusion, point n'est besoin d'examiner l'argument relatif à la responsabilité indéterminée, opposé lui aussi à l'allégation de conception négligente en tant que considération de politique générale à la deuxième étape de l'analyse.

F. *The Direct Claims Under the Costs Recovery Acts*

[117] The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges ("RBH") and Philip Morris only).

[118] Section 2 of the *CRA* establishes that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong". The words "manufacture" and "manufacturer" are defined in s. 1(1) of the Act as follows:

1 (1) . . .

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

F. *Les allégations directes faites en vertu des lois sur le recouvrement des coûts*

[117] Selon les compagnies de tabac, la Cour d'appel a conclu à tort qu'il était manifeste et évident que le Canada ne pouvait pas être un fabricant au sens de la *CRA*. Elles présentent également trois arguments subsidiaires : (1) si la responsabilité du Canada n'est pas engagée en application de la *CRA*, elle l'est aux termes de la *Health Care Costs Recovery Act*, S.B.C. 2008, ch. 27 (« *HCCRA* »), récemment édictée; (2) si la responsabilité du Canada n'est pas engagée aux termes de l'une de ces deux lois, il est néanmoins tenu de verser aux défenderesses une contribution aux termes de la *Negligence Act*; et (3) enfin, le Canada peut être tenu en common law de verser une contribution (mémoire conjoint de Rothmans, Benson & Hedges (« RBH ») et de Philip Morris seulement).

[118] Aux termes de l'art. 2 de la *CRA*, [TRADUCTION] « [l]e gouvernement a contre un fabricant un droit d'action direct et distinct pour le recouvrement du coût des services de soins de santé occasionnés ou favorisés par une faute du fabricant ». Les termes « fabrication » et « fabricant » sont définis comme suit à l'art. 1(1) de la *CRA* :

[TRADUCTION]

1 (1) . . .

« fabricant » Personne qui fabrique ou a fabriqué un produit du tabac, y compris la personne qui, selon le cas :

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"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d) is a trade association primarily engaged in

(i) the advancement of the interests of manufacturers,

(ii) the promotion of a tobacco product, or

(iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada "promoted" the use of mild or light cigarettes to the industry and the public. These facts, they say, bring Canada within the definition of "manufacturer" of the *CRA*.

[119] Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

[120] For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed,

a) directement ou indirectement, fait ou a fait fabriquer un produit du tabac dans le cadre d'ententes conclues avec des entrepreneurs, des sous-traitants, des titulaires de licence, des franchisés ou d'autres personnes;

b) au cours d'un de ses exercices, tire ou a tiré au moins 10 % de ses revenus, calculés sur une base consolidée conformément aux principes comptables généralement reconnus au Canada, de la fabrication ou de la promotion de produits du tabac par elle-même ou par d'autres personnes;

c) se livre ou s'est livrée à la promotion d'un produit du tabac ou fait ou a fait, directement ou indirectement, que d'autres personnes s'y livrent;

d) est une association commerciale se consacrant principalement :

(i) à l'avancement des intérêts des fabricants,

(ii) à la promotion d'un produit du tabac, ou

(iii) à faire faire, directement ou indirectement, la promotion par d'autres personnes d'un produit du tabac.

« fabrication » Est assimilé à la fabrication d'un produit du tabac sa production, son assemblage ou son empaquetage;

On allègue dans les avis de mise en cause que le Canada a cultivé (fabriqué) du tabac et octroyé des licences visant celui-ci à l'industrie du tabac à des fins lucratives, et qu'il a « fait la promotion » des cigarettes douces ou légères auprès de l'industrie et de la population. Selon les compagnies de tabac, ces faits font en sorte que le Canada répond à la définition de « fabricant » qui figure dans la *CRA*.

[119] Le Canada dit ne pas être un fabricant au sens de la *CRA*. Subsidiairement, il affirme être soustrait à l'application de cette loi provinciale en vertu de la common law et, sinon, en vertu de la Constitution.

[120] Pour les motifs exposés ci-après, je conclus que le Canada n'est pas un fabricant au sens de la

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holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

(1) Could Canada Qualify as a Manufacturer Under the *Tobacco Damages and Health Care Costs Recovery Act*?

[121] The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

(a) *Text of the Statute*

[122] The definition of manufacturer in s. 1(1) "manufacturer" (b) of the Act includes a person who "for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

CRA. En effet, si l'on tenait le Canada responsable en application de la *CRA*, cela contrecarrerait l'intention de la législature de faire passer des contribuables à l'industrie du tabac la responsabilité des coûts des soins de santé résultant d'une « faute d'un fabricant ». Vu cette conclusion, nul n'est besoin d'étudier les arguments du Canada voulant qu'il soit en tout état de cause exonéré de toute responsabilité en vertu de la loi provinciale. Je suis également d'avis de rejeter l'argument des compagnies de tabac en faveur d'une contribution au titre de la *HCCRA* et de la *Negligence Act*, ainsi que l'argument en faveur d'une contribution en common law.

(1) Le Canada peut-il être un fabricant au sens de la *Tobacco Damages and Health Care Costs Recovery Act*?

[121] La Cour d'appel a affirmé que le gouvernement canadien ne pouvait pas être visé par la définition de « fabricant ». Je suis du même avis. L'argument selon lequel le Canada peut être un fabricant au sens de la *CRA* a un attrait superficiel, mais, lorsqu'on interprète la *CRA* dans son contexte eu égard à l'ensemble de ses dispositions, il appert que la législature de la Colombie-Britannique ne voulait pas imposer au Canada la responsabilité d'un fabricant. C'est ce que confirment le texte de la loi, l'intention qu'avait le législateur au moment d'adopter la *CRA* et le contexte plus général des rapports entre la province et le gouvernement fédéral.

a) *Le texte de la loi*

[122] Aux termes de l'al. b) de la définition de [TRADUCTION] « fabricant » qui se trouve à l'art. 1(1) de la *CRA*, ce terme s'entend d'une personne qui, « au cours d'un de ses exercices, tire ou a tiré au moins 10 % de ses revenus, calculés sur une base consolidée conformément aux principes comptables généralement reconnus au Canada, de la fabrication ou de la promotion de produits du tabac par elle-même ou par d'autres personnes ». Le juge Hall a conclu que, selon cette définition, le législateur souhaitait que la *CRA* s'applique aux compagnies membres de l'industrie du tabac, et non aux gouvernements.

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[123] The tobacco companies respond that the definition of "manufacturer" is disjunctive since it uses the word "or", such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

[124] Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

[125] The fact that one of the statutory definitions is based on revenue percentage suggests that the term "manufacturer" is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that "each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product". This language cannot be stretched to include the Government of Canada.

[126] I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a "manufacturer" under the Act.

[123] Les compagnies de tabac répondent que la définition du mot « *manufacturer* » (« fabricant ») est disjonctive, vu qu'elle renferme le mot « *or* » (habituellement rendu en français par l'expression « selon le cas »), de telle sorte qu'une personne sera considérée comme un fabricant si elle répond à l'une des quatre définitions qui figurent aux al. a) à d). Même si le Canada ne peut répondre à la définition de l'al. b) de la *CRA* (tirer 10 % de ses revenus de la fabrication ou de la promotion de produits du tabac), elles soutiennent que, à la lumière des faits allégués, le Canada répond aux définitions des al. a) (fait fabriquer un produit du tabac) et c) (fait ou fait faire la promotion d'un produit du tabac).

[124] À l'instar de la Cour d'appel, je suis d'avis de rejeter l'argument susmentionné. Il est vrai qu'il faut interpréter de façon disjonctive la définition de fabricant à l'article premier, et qu'un particulier sera assimilé à un fabricant s'il répond à l'une ou l'autre des quatre définitions des al. a) à d). Il faut néanmoins interpréter de manière téléologique la *CRA* dans son ensemble. Par conséquent, une interprétation adéquate de la *CRA* tient compte de chacune des quatre définitions. Elle prend aussi en considération le reste du régime législatif et le contexte législatif. Interprétée ainsi, la *CRA* indique clairement que la législature de la Colombie-Britannique ne voulait pas faire du gouvernement fédéral un fabricant potentiel au sens de cette loi.

[125] Le fait qu'une des définitions de la *CRA* repose sur un pourcentage des revenus donne à penser que le mot « fabricant » est censé viser des entreprises ou des particuliers qui tirent profit des activités liées au tabac. Les dispositions de la *CRA* établissant la responsabilité des défenderesses renforcent cette interprétation. Aux termes de l'al. 3(3)b), [TRADUCTION] « chaque défendeur auquel s'appliquent les présomptions [créées par le par. 3(2) de la *CRA*] est responsable du coût global visé à l'alinéa a) au prorata de sa part de marché du type de produit du tabac ». On ne saurait considérer cette disposition comme visant le gouvernement du Canada.

[126] J'estime que, interprété dans son ensemble, le texte de la *CRA* n'étaye pas la thèse selon laquelle le Canada est un « fabricant » au sens de cette loi.

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(b) *Legislative Intention*

[127] I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of "manufacturer". When the *CRA* was introduced in the legislature, the Minister responsible stated that "the industry" manufactured a lethal product, and that "the industry" composed of "tobacco companies" should accordingly be held accountable (B.C. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

[128] Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff's claim. Courts may consider all evidence relevant to statutory interpretation in order to achieve this purpose.

(c) *Broader Context*

[129] The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473:

b) *L'intention du législateur*

[127] Je suis d'accord avec le Canada pour dire que les considérations liées à l'intention du législateur appuient davantage la thèse voulant que la définition de [TRADUCTION] « fabricant » ne vise pas le Canada. Quand la *CRA* a été présentée à l'assemblée législative, le ministre responsable a affirmé que [TRADUCTION] « l'industrie » fabriquait un produit mortel, et que les « compagnies de tabac » qui en faisaient partie devraient en être tenues responsables pour cette raison (C.-B., *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4e sess., 36e lég., 7 juin 2000, p. 16314). Il est évident et manifeste que le gouvernement du Canada n'appartient pas à cette catégorie.

[128] Selon Imperial, il ne convient pas d'invoquer des extraits du *Hansard* dans le cadre d'une requête en radiation d'une allégation, étant donné que des éléments de preuve ne peuvent être présentés à l'occasion d'une telle demande. Il y a toutefois une distinction entre une preuve produite pour établir un fait et une preuve de l'intention du législateur qui est produite pour aider la cour à déterminer l'interprétation que doit recevoir une loi. La première n'est pas pertinente dans le cadre d'une requête en radiation, mais la seconde peut l'être. Les requêtes en radiation visent à économiser les ressources judiciaires dans les cas où la loi n'appuie pas une demande compte tenu des faits allégués. Les tribunaux peuvent prendre en considération tous les éléments de preuve pertinents à l'interprétation de la loi pour arriver à cette fin.

c) *Le contexte plus général*

[129] Le contexte plus général de la loi étaye fortement la conclusion que la législature de la Colombie-Britannique n'avait pas l'intention d'imposer au gouvernement fédéral la responsabilité d'un fabricant de produits du tabac. La *CRA* a pour objet le recouvrement du coût des soins de santé fournis aux Britanno-Colombiens auprès des compagnies qui leur ont vendu des produits du tabac. Comme l'a affirmé notre Cour dans *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473 :

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[T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

[L']élément déterminant de la cause d'action créée par la Loi demeure l'indemnisation des coûts engagés par le gouvernement de la Colombie-Britannique au titre des soins de santé, et non la correction des manquements aux obligations des fabricants de produits du tabac. La Loi fait de l'existence d'une violation d'une obligation une des diverses conditions préalables à l'établissement de la responsabilité du fabricant envers le gouvernement, mais ce n'est pas cette faute que vise la cause d'action créée par la Loi. [par. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

La législature cherchait à transférer la responsabilité des frais médicaux des contribuables provinciaux aux entreprises privées qui vendaient un produit nocif. Cet objectif serait gravement compromis si l'on recouvrait simplement les fonds auprès du gouvernement fédéral, qui tire son revenu des mêmes contribuables.

[130] The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

[130] L'assujettissement du Canada à la *CRA* que font valoir les compagnies de tabac est particulièrement problématique compte tenu des rapports de longue date entre le gouvernement fédéral et les provinces en matière de financement des soins de santé. Depuis des décennies, le gouvernement fédéral verse aux provinces des paiements de transfert relatifs à la santé. Comme l'a mentionné le juge Hall :

If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these long-standing fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

[TRADUCTION] Si l'on interprétait la *Costs Recovery Act* comme permettant de qualifier le Canada de fabricant visé aux fins du recouvrement des coûts engagés par les provinces au titre des soins de santé, il serait possible pour la Colombie-Britannique d'exercer un recours pécuniaire direct contre le Canada en vue d'obtenir des fonds supplémentaires au titre des soins de santé. Étant donné ces accords fiscaux de longue date entre les gouvernements, je ne puis imaginer que la législature de la Colombie-Britannique ait pensé à quelque moment que ce soit à la possibilité que le Canada soit poursuivi en vertu de la *Costs Recovery Act*. [par. 33]

[131] Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

[131] Imperial soutient que le seul moyen de réaliser l'objet de la *CRA* est d'autoriser la province à recouvrer le coût des soins de santé auprès de tous les participants à l'industrie du tabac, dont le gouvernement fédéral. Je ne puis retenir cet argument. Si l'on tenait le gouvernement fédéral responsable en vertu de la *CRA*, cela contrecarrerait l'intention du législateur de transférer le coût des traitements médicaux des contribuables à l'industrie du tabac.

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(d) *Summary*

[132] For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

(2) Could Canada Be Found Liable Under the *Health Care Costs Recovery Act*?

[133] The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as "tobacco related wrong[s]" under the *CRA* (s. 24(3)(b)). RBH and Philip Morris respond that a "tobacco related wrong" under the *CRA* may only be committed by a "manufacturer". Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

[134] In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in cases "arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*" (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

d) *Résumé*

[132] Pour les motifs qui précèdent, j'estime qu'il est manifeste et évident que le gouvernement fédéral n'est pas un fabricant de produits du tabac au sens de la *CRA*. Cette allégation doit donc être radiée.

(2) Le Canada peut-il être tenu responsable en vertu de la *Health Care Costs Recovery Act*?

[133] Les compagnies de tabac affirment que si la responsabilité du Canada n'est pas engagée au titre de la *CRA*, elle le serait en vertu de la *HCCRA*, qui confère à la province un droit d'action pour recouvrer auprès de l'auteur d'une faute le coût des soins de santé dans la plupart des cas (par. 8(1)). Selon le Canada, la *HCCRA* est inapplicable parce qu'elle dispose que le droit d'action ne peut être exercé dans les cas de [TRADUCTION] « faute d'un fabricant » au sens de la *CRA* (al. 24(3)b)). RBH et Philip Morris rétorquent qu'une [TRADUCTION] « faute d'un fabricant » au sens de la *CRA* ne peut être commise que par un [TRADUCTION] « fabricant ». Par conséquent, si la *CRA* ne s'applique pas au Canada parce que ce dernier ne peut être un fabricant, il n'est pas loisible au Canada de faire valoir que la *HCCRA* — une loi plus générale — ne trouve pas application non plus.

[134] À mon avis, les compagnies de tabac ne peuvent s'appuyer sur la *HCCRA* dans le cadre d'une action intentée en vertu de la *CRA* pour obtenir une contribution. Certes, le Canada n'est pas en mesure de commettre lui-même une faute d'un fabricant s'il n'est pas un fabricant, mais la cause d'action sous-jacente en l'espèce est la faute d'un fabricant qu'auraient commise les défenderesses. Il est précisé dans la *HCCRA* que cette loi ne s'applique pas dans les affaires [TRADUCTION] « découlant d'une faute d'un fabricant au sens de la *Tobacco Damages and Health Care Costs Recovery Act* » (al. 24(3)b)), ce qui fait obstacle aux demandes de contribution présentées en application de cette loi.

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(3) Could Canada Be Liable for Contribution Under the *Negligence Act* if It Is Not Directly Liable to British Columbia?

[135] RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

[136] As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

[137] Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

[138] RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, in which this Court recognized claims of contribution which were not permitted by statute.

[139] I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (*per* McLachlin C.J.), which stated that a "common law right of contribution between tortfeasors may exist" (para. 68

(3) Le Canada peut-il être tenu à une contribution en application de la *Negligence Act* s'il n'est pas directement responsable envers la Colombie-Britannique?

[135] RBH et Philip Morris affirment que, même si le Canada n'est pas responsable envers la Colombie-Britannique, il peut néanmoins être tenu à une contribution au titre de la *Negligence Act*. Elles font valoir que le défendeur n'a pas à être directement responsable envers le demandeur pour être condamné à verser une contribution.

[136] Comme je l'ai déjà mentionné, je souscris à l'argument du Canada que, depuis l'arrêt *Giffels*, une partie ne peut être condamnée à verser une contribution que si elle est aussi directement responsable envers le demandeur.

[137] Je suis donc d'avis de rejeter l'argument selon lequel la *Negligence Act* de la Colombie-Britannique permet de recouvrer des sommes d'argent auprès d'un tiers qui ne pouvait pas être responsable envers le demandeur.

(4) Le Canada peut-il être tenu en common law de verser une contribution?

[138] D'après RBH et Philip Morris, si notre Cour rejette la demande de contribution présentée en vertu de la *Negligence Act*, elle devrait faire droit à une telle demande en common law. Elles invoquent les arrêts *Bow Valley* et *Blackwater c. Plint*, 2005 CSC 58, [2005] 3 R.C.S. 3, où notre Cour a accueilli des demandes de contribution non permises par la loi.

[139] Je suis d'avis de rejeter cet argument. Les décisions citées par RBH et Philip Morris me semblent n'appuyer les demandes de contribution en common law que dans les cas où le tiers est directement responsable envers le demandeur. Dans *Bow Valley*, la Cour a reconnu un droit restreint à la contribution « entre coauteurs d'un délit », et a fait remarquer que les défenderesses étaient « solidairement responsables envers la demanderesse » (par. 101 et 102). Notre Cour a fait une observation semblable dans *Blackwater* (la juge en chef

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(emphasis added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

McLachlin), affirmant que, « en common law, les coauteurs d'un délit pouvaient se réclamer mutuellement une contribution » (par. 68 (je souligne)). Rien dans notre jurisprudence ne permet d'accueillir des demandes de contribution en l'absence de responsabilité du tiers envers le demandeur.

G. *Liability Under the Trade Practice Act and the Business Practices and Consumer Protection Act*

G. *Responsabilité en vertu de la Trade Practice Act et de la Business Practices and Consumer Protection Act*

[140] In the *Knight* case, Imperial alleges that Canada satisfies the definition of a "supplier" under the *Trade Practice Act* ("*TPA*") and the *Business Practices and Consumer Protection Act* ("*BPCPA*"). The *TPA* was repealed and replaced by the *BPCPA* in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

[140] Dans l'*Affaire Knight*, Imperial prétend que le Canada répond aux définitions de « *supplier* » (« fournisseur ») qui figurent dans la *Trade Practice Act* (« *TPA* ») et la *Business Practices and Consumer Protection Act* (« *BPCPA* »). La *TPA* a été abrogée et remplacée par la *BPCPA* en 2004. Imperial fait valoir que la Cour d'appel a radié à tort la poursuite qu'elle avait intentée contre le Canada en vertu de ces lois.

[141] In my view, Canada could not qualify as a "supplier" under the Acts on the facts pled. Section 1 of the *TPA* defined "supplier" as follows:

[141] À mon avis, le Canada ne peut être un « fournisseur » au sens de ces deux lois compte tenu des faits allégués. L'article 1 de la *TPA* définissait ainsi le mot « fournisseur » :

1 . . .

"**supplier**" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

[TRADUCTION]

1 . . .

« fournisseur » Une personne autre qu'un consommateur qui, dans le cours de ses affaires, sollicite, offre ou annonce l'aliénation ou la fourniture de l'objet d'une opération commerciale ou se livre à des activités promotionnelles à cet égard, prend part à une opération commerciale, l'exécute ou y participe autrement, qu'il y ait ou non un lien contractuel entre cette personne et le consommateur. Sont également visés par la présente définition le successeur du fournisseur et le cessionnaire de ses droits et obligations.

Section 1(1) of the *BPCPA* defines "supplier" as follows:

Pour sa part, l'art. 1(1) de la *BPCPA* le définit ainsi :

[TRADUCTION]

1 (1) . . .

"supplier" means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by

1 (1) . . .

« fournisseur » Une personne, se trouvant en Colombie-Britannique ou ailleurs qui, dans le cours de ses affaires, prend part à une opération commerciale

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(a) supplying goods or services or real property to a consumer, or

(b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",

whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

a) soit en fournissant des biens ou des services à un consommateur,

b) soit en sollicitant, en offrant ou en annonçant l'opération visée à l'alinéa a) de la définition d'« opération commerciale » ou en se livrant à des activités promotionnelles à cet égard,

qu'il y ait ou non un lien contractuel entre cette personne et le consommateur. Sont également visés par la présente définition le successeur de cette personne, le cessionnaire de ses droits et obligations et, sauf aux parties 3 à 5 *[Droits des cessionnaires et garants en matière de crédit au consommateur; Contrats de consommation; Communication du coût du crédit au consommateur]*, la personne qui demande une somme d'argent ou un bien à un consommateur;

[142] The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken "in the course of business". The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (*Knight* case, para. 35).

[142] La Cour d'appel a jugé à l'unanimité qu'aucune de ces définitions ne pouvaient s'appliquer au Canada, parce que celui-ci n'a pas commis les actes qu'on lui reproche [TRADUCTION] « dans le cours de ses affaires ». Selon la Cour d'appel, il est allégué dans les actes de procédure que le Canada a encouragé la consommation de cigarettes douces et légères, mais uniquement dans le but de réduire les risques que présente l'usage du tabac pour la santé, et non dans le cadre d'une activité exercée en vue de réaliser un profit (l'*Affaire Knight*, par. 35).

[143] Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a "supplier" under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

[143] Imperial soutient que le Canada n'avait pas à être motivé par le profit pour être un « fournisseur » au sens des lois applicables, pourvu qu'il ait conçu et fabriqué un produit défectueux et fait des recherches à cet égard. Le Canada répond que son intention d'améliorer la santé des Canadiens et Canadiennes démontre qu'il n'agissait pas dans le cours de ses affaires. Il n'était pas question en l'espèce d'un organisme public exerçant les activités d'une entreprise du secteur privé, mais plutôt d'un organisme public qui cherche à réglementer l'industrie en faisant la promotion d'un type de cigarette.

[144] I accept that Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in

[144] Je reconnais que le but recherché par le Canada lorsqu'il a développé et promu le tabac, comme l'indique l'avis de mise en cause, tend à indiquer que le Canada n'agissait pas [TRADUCTION] « dans le cours de ses affaires », dans le sens où

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the *TPA* or the *BPCPA*, and therefore that Canada could not be a "supplier" under either of those statutes. The phrases "in the course of business" and "in the course of the person's business" may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of "supplier" in both Acts refer to "consumer transaction[s]", and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

cette expression est employée dans la *TPA* ou la *BPCPA*, et que le Canada ne peut donc être un « fournisseur » au sens de l'une ou l'autre de ces lois. L'expression [TRADUCTION] « dans le cours de ses affaires » peut avoir des significations différentes selon le contexte. D'une part, il est possible de considérer qu'elle englobe toutes les activités auxquelles se livre un particulier durant sa carrière professionnelle : voir notamment l'analyse ci-dessus des indices de confiance raisonnable. D'autre part, elle peut être interprétée comme visant seulement les activités exercées à une fin commerciale. J'estime que les contextes dans lesquels cette expression est employée dans la *TPA* et la *BPCPA* appuient la deuxième interprétation. Les définitions de [TRADUCTION] « fournisseur » figurant dans les deux lois renvoient à des [TRADUCTION] « opérations commerciales » et font la distinction entre les fournisseurs — qui poursuivent une fin commerciale — et les consommateurs. Il ressort de façon évidente et manifeste des faits allégués que le Canada a promu la consommation de cigarettes à faible teneur en goudron non pas à une fin commerciale, mais à une fin liée à la santé. Le Canada n'est donc pas un fournisseur au sens de la *TPA* ou de la *BPCPA*, et la demande de contribution fondée sur ce motif et sur la *Negligence Act* doit être radiée.

[145] Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

[145] Vu ma conclusion que la responsabilité du Canada n'est pas engagée en application de la *TPA* ou de la *BPCPA*, point n'est besoin de déterminer si le Canada serait, dans l'affirmative, protégé par l'immunité de l'État.

H. *The Claim for Equitable Indemnity*

H. *La demande d'indemnité fondée sur l'equity*

[146] RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for "equitable indemnity" on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

[146] RBH et Philip Morris soutiennent que, si les compagnies de tabac sont tenues responsables dans l'*Affaire du recouvrement des coûts*, le Canada doit verser une [TRADUCTION] « indemnité en equity » compte tenu des faits allégués. Selon elles, chaque fois qu'une personne demande ou ordonne à une autre de faire quelque chose qui engage la responsabilité de cette dernière, la personne qui demande ou ordonne de faire cette chose est tenue d'indemniser l'autre pour sa responsabilité. C'est ce que fait valoir Imperial dans l'*Affaire Knight*.

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[147] Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.

[147] La doctrine de l'indemnité fondée sur l'equity est une doctrine restreinte qui ne s'applique que dans les cas où le mandant s'engage expressément ou implicitement à indemniser son mandataire pour avoir agi conformément à ses directives. Comme le mentionne l'arrêt *Parmley c. Parmley*, [1945] R.C.S. 635, les demandes d'indemnité fondées sur l'equity [TRADUCTION] « reposent sur l'idée qu'une personne fait une demande dans des circonstances où la loi présume que les deux parties sont conscientes de l'obligation d'indemniser la personne donnant suite à la demande » (p. 648, citant le juge Bowen, *Birmingham and District Land Co. c. London and North Western Railway Co.* (1886), 34 Ch. D. 261, p. 275.

[148] In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

[148] À mon avis, le juge Hall de la Cour d'appel avait raison de conclure que les compagnies de tabac n'étaient pas en mesure d'établir cette condition de la demande :

[I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. [*Costs Recovery* case, para. 57]

[TRADUCTION] [S]i l'on demandait à l'observateur raisonnable hypothétique si, dans les rapports qu'il a entretenus pendant de nombreuses décennies avec les appelantes, le Canada s'était engagé à les indemniser pour une quelconque responsabilité ultérieure susceptible de découler de leurs activités, l'observateur répondrait que cette attente ne pourrait être rationnelle, eu égard à la relation entre les parties. De même, si les représentants des appelantes avaient demandé explicitement ou suggéré au Canada, par l'entremise de ses mandataires, d'indemniser les appelantes pour une telle responsabilité ou d'engager pareille responsabilité, le Canada aurait répondu fermement par la négative. [L'*Affaire du recouvrement des coûts*, par. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Lorsque le Canada a donné à l'industrie du tabac des directives sur la manière dont elle devrait se comporter, il le faisait à titre d'autorité de réglementation du gouvernement qui se souciait de la santé des Canadiens et des Canadiennes. Dans ces circonstances, il est déraisonnable de déduire que le Canada avait promis implicitement d'indemniser l'industrie pour avoir donné suite à sa demande.

I. *Procedural Considerations*

I. *Considérations d'ordre procédural*

[149] In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should

[149] Les compagnies de tabac ont fait valoir devant les juridictions inférieures que, même si les demandes d'indemnisation présentées à l'encontre

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remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

[150] The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

V. Conclusion

[151] I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Recovery* case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

Appeals allowed and cross-appeals dismissed with costs.

Solicitor for the appellants/respondents on cross-appeal (33559-33563): Attorney General of Canada, Ottawa.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559):

du Canada étaient radiées, la mise en cause du Canada devrait se poursuivre en l'espèce pour des motifs d'ordre procédural. Toujours selon les compagnies de tabac, leur capacité de se défendre contre la Colombie-Britannique dans l'*Affaire du recouvrement des coûts* ainsi que contre le groupe dans l'*Affaire Knight* serait gravement compromise si la mise en cause du Canada prenait fin. Les juges Wedge et Satanove, qui siégeaient en cabinet, ont toutes deux rejeté cet argument. La Cour d'appel a conclu à la majorité qu'il était inutile d'examiner la question, alors que le juge Hall était d'avis de confirmer les conclusions des juges siégeant en cabinet.

[150] Les compagnies de tabac n'ont pas débattu cette question dans le pourvoi. Je suis d'avis de confirmer les conclusions des juges Wedge, Satanove et Hall, et de radier les demandes de jugement déclaratoire.

V. Conclusion

[151] Je conclus qu'il est manifeste et évident que les allégations des compagnies de tabac visant le Canada n'ont aucune possibilité raisonnable d'être retenues et doivent être radiées. Les appels interjetés par le Canada dans l'*Affaire du recouvrement des coûts* et l'*Affaire Knight* sont accueillis, et les appels incidents sont rejetés. Imperial est condamnée aux dépens devant toutes les cours dans l'*Affaire Knight*, et les compagnies de tabac sont condamnées aux dépens devant toutes les cours dans l'*Affaire du recouvrement des coûts*. Aucuns dépens ne sont adjugés contre la Colombie-Britannique ou en faveur de celle-ci dans l'*Affaire du recouvrement des coûts.*

Pourvois accueillis et pourvois incidents rejetés avec dépens.

Procureur des appelants/intimés au pourvoi incident (33559-33563) : Procureur général du Canada, Ottawa.

Procureurs de l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée

2011 SCC 42 (CanLII)

Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitors for the respondent Her Majesty the Queen in Right of British Columbia (33563): Bull, Housser & Tupper, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33563): Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondents/appellants on cross-appeal Rothmans, Benson & Hedges Inc. and Rothmans Inc. (33563): Affleck Hira Burgoyne, Vancouver.

Solicitors for the respondents/appellants on cross-appeal JTI-MacDonald Corp., R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc. (33563): Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondents/appellants on cross-appeal B.A.T. Industries p.l.c. and British American Tobacco (Investments) Limited (33563): Sugden, McFee & Roos, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Carreras Rothmans Limited (33563): Harper Grey, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris U.S.A. Inc. (33563): Davis & Company, Vancouver.

Solicitors for the respondent/appellant on cross-appeal Philip Morris International Inc. (33563): McCarthy Tétrault, Montréal.

Solicitor for the intervener the Attorney General of Ontario (33559-33563): Attorney General of Ontario, Toronto.

Solicitors for the intervener Her Majesty the Queen in Right of the Province of New Brunswick (33563): Bennett Jones, Toronto.

(33559) : Hunter Litigation Chambers Law Corporation, Vancouver.

Procureurs de l'intimée Sa Majesté la Reine du chef de la Colombie-Britannique (33563) : Bull, Housser & Tupper, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Imperial Tobacco Canada Limitée (33563) : Osler, Hoskin & Harcourt, Toronto.

Procureurs des intimées/appelantes au pourvoi incident Rothmans, Benson & Hedges Inc. et Rothmans Inc. (33563) : Affleck Hira Burgoyne, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident JTI-MacDonald Corp., R.J. Reynolds Tobacco Company et R.J. Reynolds Tobacco International Inc. (33563) : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intimées/appelantes au pourvoi incident B.A.T. Industries p.l.c. et British American Tobacco (Investments) Limited (33563) : Sugden, McFee & Roos, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Carreras Rothmans Limited (33563) : Harper Grey, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Philip Morris U.S.A. Inc. (33563) : Davis & Company, Vancouver.

Procureurs de l'intimée/appelante au pourvoi incident Philip Morris International Inc. (33563) : McCarthy Tétrault, Montréal.

Procureur de l'intervenant le procureur général de l'Ontario (33559-33563) : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante Sa Majesté la Reine du chef de la province du Nouveau-Brunswick (33563) : Bennett Jones, Toronto.

2011 SCC 42 (CanLII)

Solicitor for the intervener the Attorney General of British Columbia (33559-33563): Attorney General of British Columbia, Victoria.

Procureur de l'intervenant le procureur général de la Colombie-Britannique (33559-33563) : Procureur général de la Colombie-Britannique, Victoria.

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TAB 58

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Kodimyala,*
2020 BCCA 275

Date: 20201008
Docket: CA46496

Between:

Regina

Appellant

And

Rajesh Kodimyala

Respondent

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Fisher

On appeal from: An order of the Provincial Court of British Columbia, dated October 16, 2019 (*R. v. Kodimyala*, Surrey Docket 225774-1).

Counsel for the Appellant:	M. Richards
Counsel for the Respondent:	V. Larochelle
Place and Date of Hearing:	Vancouver, British Columbia September 9, 2020
Place and Date of Judgment:	Vancouver, British Columbia October 8, 2020

Written Reasons by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Mr. Justice Goepel

2020 BCCA 275 (CanLII)

Summary:

The appellant was convicted on a charge of fraud over $5,000, and the trial judge entered a suspended sentence with three years probation. The Crown appeals from this sentence on the basis that the judge erred in finding exceptional circumstances where none existed, resulting in an unfit sentence. Held: Appeal allowed, the suspended sentence is set aside and a substituted sentence of six months' imprisonment is entered. The trial judge made an error in principle when she considered the ordinary consequences of the offence as exceptional circumstances warranting a suspended sentence. The trial judge also erred by treating certain circumstances as mitigating when the circumstances did not relate to the gravity of the offence or the degree of responsibility of the offender.

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Reasons for Judgment of the Honourable Mr. Justice Groberman and the Honourable Madam Justice Fisher:

[1] Rajesh Kodimyala was convicted after a five-day trial on a charge of fraud over $5,000 contrary to s. 380(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge, acting under s. 731(1)(a) of the *Code*, suspended the passing of sentence. The Crown applies for leave to appeal the suspended sentence, contending that such a disposition was unfit. If leave is granted, it seeks, instead, the imposition of a custodial sentence of six to 12 months.

Circumstances of the Offence

[2] Mr. Kodimyala engaged in an unsophisticated "cheque kiting" scheme in November 2014. He deposited four cheques amounting to $113,300 into his bank account at Vancouver City Savings Credit Union. The cheques were drawn on a closed account and were worthless. Within four days after the first cheque was deposited, and before the credit union became aware that it would not clear, Mr. Kodimyala made numerous cash withdrawals and online payments from the account. His subsequent withdrawals and payments from the rest of the deposits were unsuccessful, as they were returned for insufficient funds. In the end, the credit union suffered a loss of $48,313.84.

[3] Mr. Kodimyala pleaded not guilty to the offence, and gave evidence that exonerated himself and placed the blame for the bogus cheques on business associates. He also claimed that many of the withdrawals were initiated by persons

other than himself. The judge rejected his evidence, and found that he was wholly responsible for both the deposits of the bogus cheques and for the withdrawal of funds.

Circumstances of the Offender

[4] Mr. Kodimyala was 41 years old at the time of sentencing. He had resided in Canada for approximately 16 years, and had no criminal record.

[5] The charge was not laid until some three years after the offence was committed. In the meantime, Mr. Kodimyala had obtained full-time employment with the IT department of a bank. He had re-married, and his wife had given birth to a daughter. The daughter was approaching two years old at the time of sentencing.

[6] Mr. Kodimyala also had a 10-year-old daughter from a previous marriage who lived with the child's mother. Although Mr. Kodimyala had a substantial salary, he also had significant debts, and, in addition to child support he paid to his ex-wife, was also providing support to his parents and relatives in India.

[7] From the pre-sentence period to the hearing itself, Mr. Kodimyala took no responsibility for his actions and expressed no remorse.

The Sentence Imposed

[8] The maximum sentence for fraud over $5,000 is fourteen years. Accordingly, under s. 742.1(c) of the *Criminal Code*, a conditional sentence order was unavailable.

[9] The Crown took the position that the ordinary range of sentence for this type of offence, at least for a first offender, was nine to 18 months imprisonment. It sought a sentence of 12 months, to be followed by 12 months of probation.

[10] Mr. Kodimyala argued that a suspended sentence was appropriate, and sought such a sentence with a two-year period of probation. The Crown contended that there were no exceptional circumstances that would justify a sentence lower than the range suggested above.

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[11] The judge accepted that the ordinary range of sentence for the offence was nine to 18 months. She considered as aggravating factors that there was some planning and premeditation to the offensive conduct, albeit an unsophisticated crime that occurred for a short duration, the conduct was not isolated, the amount obtained was "not insignificant", and there was an impact on the credit union. She did not consider that any of the statutory aggravating factors in s. 380.1(1) were present. In particular, she found that Mr. Kodimyala's reputation as a customer and businessman did not contribute to the offence.

[12] The judge considered as mitigating factors Mr. Kodimyala's lack of a criminal record, his pro-social life and efforts to rehabilitate himself, the stability provided by his second marriage and the birth of his daughter, the support from his family and friends, his success in maintaining lawful employment since 2015 with no offensive conduct, his stated intention and ability to pay restitution, his embarrassment, shame and loss of reputation, and the fact that he was not in a position of trust. She also considered as mitigating the period of pre-charge delay, concluding that the delay took this matter "into one of the rare cases that exceptional circumstances do exist" and "most significantly … in the context of Mr. Kodimyala's efforts to rehabilitate himself".

[13] The judge concluded that a custodial sentence was not necessary, summarizing her reasons as follows (at para. 123):

> In conclusion, in the circumstances of this case, including the lack of criminal record, the significant pro-social changes in Mr. Kodimyala's life which I outlined above including a stable family life and secure full-time employment, the support that he gives to the community including his extended family, and as I said, most importantly the significant time delay from the date of the offence to the date the charges were sworn, I am satisfied that the circumstances here are above and beyond the norm to justify a non-custodial sentence and I conclude that Mr. Kodimyala has truly turned his life around and the protection of the public is better served by a non-custodial sentence.

[14] Her view was that a suspended sentence was appropriate "so long as the conditions imposed satisfy all the principles of sentencing including the paramount principle of deterrence and the secondary principle of denunciation". She therefore

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suspended sentencing, and placed Mr. Kodimyala on three years of probation. Among the terms of the probation were the imposition of a curfew during the first nine months and a requirement to perform 80 hours of community service. The judge also imposed a restitution order, requiring Mr. Kodimyala to make payments to reimburse the credit union for the losses it suffered.

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The Crown Appeal

[15] On appeal, the Crown contends that the judge erred in finding exceptional circumstances where such circumstances did not exist, relying on pre-charge delay, and erroneously considering mitigating factors, all of which resulted in an unfit sentence.

[16] Mr. Kodimyala contends that there is no requirement for exceptional circumstances to justify a departure from a range of sentence. However, if there is, he says the judge's findings are entitled to deference from this court and the sentence was not demonstrably unfit, especially given the judge's conclusion that the public would be better served by a non-custodial sentence.

Analysis

1. Exceptional and mitigating circumstances

[17] The Crown submits that it is an error in principle to categorize the ordinary as exceptional, citing *R. v. Zenari*, 2012 ABCA 279; *R. v. Burnett*, 2017 MBCA 122 and *R. v. Murdoch*, 2015 NBCA 38. The Crown referred to *R. v. Voong*, 2015 BCCA 285 in respect of what may constitute exceptional circumstances but acknowledged that such circumstances do not oust the proportionality principle, citing *R. v. L.S.N.*, 2020 BCCA 109. The Crown also takes issue with the judge's description of certain circumstances as being mitigating.

[18] Mr. Kodimyala's submission concerns, in part, the application of *Voong*, and whether it continues to be good law in light of the subsequent decisions of the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64 and *R. v. Friesen*,

2020 SCC 9, both of which emphasize the limited basis for appellate intervention in sentencing.

[19] The judge considered that the issue before her was whether or not there were exceptional circumstances as contemplated in *Voong* to justify a departure from the range of sentence. She did not make an explicit finding of "exceptional circumstances", other than in relation to the pre-charge delay, but it is implicit in her reasons that she considered the mitigating circumstances she identified to be sufficiently "exceptional" so as to justify a sentence below the range she accepted as between nine and 18-months imprisonment.

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R. v. Voong

[20] Given Mr. Kodimyala's submission and the judge's approach in this case, it is important to begin the discussion with a consideration of what *Voong* decided.

[21] In *Voong*, this court considered both whether suspended sentences were available for drug trafficking offences, and what circumstances could justify such a sentence. *Voong* is a detailed and carefully reasoned judgment. It discusses principles of sentencing, and analyses the seriousness of drug trafficking as a crime. It discusses the historical range of sentences. Following the analysis, the judgment concludes that a custodial sentence will normally, though not always, be required for those found to have participated as traffickers in dial-a-dope operations:

> [59] In summary, absent exceptional circumstances, the sentence for a first offence or with a minimal criminal record, dial-a-dope drug seller will be in the range of six to eighteen months imprisonment, depending on the aggravating circumstances. Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. However, Parliament, while not removing a non-custodial sentence for this type of offence, has concluded that CSO sentences are not available. Thus, it will be the rare case where the standard of exceptional circumstances is met.

[22] *Lacasse* specifically rejected the idea that a sentence could be overturned on appeal simply because the trial judge imposed a sentence outside of the normal "range" for the offence. Wagner J. (as he then was), speaking for the majority, stated:

> [11] This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. Since they have, *inter alia*, the advantage of having heard and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.
>
> [12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts.

[23] The court further clarified the limited role of appeal courts on sentencing appeals in *Friesen*:

> [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

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[24] The court also clarified (at para. 112) that there is no requirement for there to be “rare or special circumstances” in order to impose a substantial sentence where it is proportionate, which we interpret as equally applicable to the imposition of a lenient sentence where one is proportionate. The Manitoba Court of Appeal echoed the same principle in *Burnett*, noting that the law does not require a sentencing judge to find exceptional circumstances to justify a sentence below a judicially created range: see paras. 25–26.

[25] In our view, *Voong* is not based on the idea that a departure from normal sentencing ranges requires justification. Rather, it is a case that discusses the reasons why the principle of proportionality will usually require a custodial sentence for drug traffickers in dial-a-dope cases, subject to there being circumstances that demonstrate that a lesser sentence will satisfy the principle. Understood in that light, it does not run afoul of the principles set out in *Lacasse* and *Friesen*.

[26] In the years following the judgment in *Voong*, submissions were made to this court in several cases that attempted to characterize the question of whether there were “exceptional circumstances” as a question of law. Such an approach has been rejected. In *R. v. Ruiz*, 2019 BCCA 323, the court said:

> [18] It is important to recognize that “exceptional circumstances” is not a term of art, but rather a generalized description intended to encompass circumstances of the offender and of the offence that call out for a sentence that is well below the generally accepted range. [The Court then quotes from para. 59 of *Voong*].
>
> [19] There is, in short, no litmus test for “exceptional circumstances”. Further, as Bennett J.A. recognized in *Voong*, at para. 102, there are degrees of “exceptional circumstances”. A sentencing judge, recognizing that suspended sentences may be imposed even for trafficking of drugs, must evaluate the circumstances of the offence and of the offender and decide whether the situation is such as to call for a sentence that is lighter than those usually imposed for trafficking offences.

[27] In *L.S.N.*, Fitch J.A., on behalf of the court, specifically discussed the relationship between “exceptional circumstances” and the proportionality principle:

> [50] Proportionality is the cardinal principle of sentencing: *Lacasse* at para. 12. All sentences must be proportionate to the gravity of the offence

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> and the degree of responsibility of the offender: *R. v. Proulx*, 2000 SCC 5 at para. 54; *Friesen* at para. 30.
>
> [51] Sentencing judges exercise a broad, case-specific discretion in determining the weight to be accorded to the sentencing principles set out in s. 718 and 718.2 of the *Code*. Sentencing judges also exercise a broad discretion in determining how those principles are best achieved in a particular case. But the resulting sentence must respect the fundamental principle of proportionality: *R. v. Nasogaluak*, 2010 SCC 6 at para. 40; *R. v. Ipeelee*, 2012 SCC 13 at para. 37.
>
> [52] Sentencing is, of course, an individualized process. Exceptional circumstances—often rooted in an offender's disadvantaged background—may inform the assessment of an offender's moral culpability. The moral culpability of a significantly disadvantaged offender may be attenuated in the face of circumstances a sentencing judge considers to be exceptional.
>
> …
>
> [54] Exceptional circumstances do not, however, oust the proportionality principle. They simply permit the taking into account of case-specific considerations that could conceivably justify departure from a conventional sentencing range in order to craft a proportionate sentence. As this Court noted in *R. v. Padda*, 2019 BCCA 351 at para. 36, characterizing an offender's circumstances as exceptional "is simply a shorthand means of identifying the kind of personal circumstances which justify going outside a conventional range in order to craft an appropriate individualised proportionate sentence."

[28] The judge in this case identified the issue as "whether or not there were exceptional circumstances as contemplated in *R. v. Voong* to justify a departure from the range of sentence", went on to assess the aggravating and mitigating factors, and concluded that the circumstances justified a non-custodial sentence. This court must show deference to her findings and conclusions absent any demonstrated error of principle.

Exceptional vs. ordinary

[29] As noted above, the Crown submits that the judge erred in principle by considering the ordinary exceptional. It says that many of the factors considered by the judge to justify the non-custodial sentence were nothing more than the normal consequences of the fraud offence and notes that such offenders frequently come

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before the court with no record and strong family support. This was addressed in *Zenari*, a case involving employee fraud:

> [8] While the sentencing judge correctly stated the principle [absent exceptional circumstances the goals of deterrence and denunciation demand a sentence of imprisonment for such crimes], she misapplied it. Many of the factors she found to be exceptional are merely the normal consequences of this type of crime. The consequences of a fraud conviction for a person of previous apparently good character are often the same: loss of reputation; loss of job; shame; financial ruin; loss of house; negative repercussions for the family; letters of surprise but continuing support from friends and family; concerns about who will support the family while the accused is in jail, etc. These are common features of many of the other reported decisions, and cannot be considered to be exceptional. If these are exceptional, then virtually every case like this is exceptional. It was an error of principle for the sentencing judge to categorize the ordinary as exceptional.

[30] See also *Murdoch* at para. 47 and *Burnett* at para. 31.

[31] We agree with the Crown that the factors the judge considered to be exceptional enough to justify a suspended sentence were not exceptional. As a first offender, Mr. Kodimyala had the support of his family and friends and suffered shame, embarrassment and loss of his reputation due to the nature of his crime. While he had left his risky business after the offence and secured full time employment, the pro-social changes referred to by the judge were not reflective of an accused who had turned his life around in a significant way. His life both before and after the offence was not markedly different. He was pro-social and married before and he re-married since, and he continued to support his immediate and extended family. Moreover, some of the circumstances the judge considered to be mitigating were not in fact mitigating, which brings us to the Crown's next submission.

Mitigating circumstances

[32] The Crown submits that the judge erred in treating certain circumstances as mitigating: the fact that Mr. Kodimyala did not occupy a position of trust, the pre-charge delay, and his stated intention to pay restitution.

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[33] Again, we agree with the Crown that these factors cannot properly be considered to be mitigating in the circumstances of this case.

[34] First, the fact that Mr. Kodimyala was not in a position of trust is simply the absence of an aggravating factor, which is neutral to the determination of sentence: see *R. v. Scofield*, 2019 BCCA 3 at para. 36.

[35] Second, mitigating factors are those related to the gravity of the offence or to the degree of responsibility of the offender: *R. v. Pham*, 2013 SCC 15 at para. 11. Pre-charge delay in and of itself, relates to neither, and it may only be a mitigating factor when it rises to the level of a *Charter* breach or causes prejudice to the offender, neither of which was raised or argued here: see *R. v. K.V.E.*, 2013 BCCA 521 at para. 30 and *R. v. Nasogaluak*, 2010 SCC 6 at paras. 53–55. The judge first determined that the delay "took this matter into one of the rare cases that exceptional circumstances do exist" on the basis of her own analysis of the conduct of the police investigation. She then related the delay to the context of Mr. Kodimyala's efforts to rehabilitate himself, but there was no evidence that the delay prejudiced Mr. Kodimyala; to the contrary, during this time period he was able to secure new employment, re-marry and have another child.

[36] Finally, in the context of Mr. Kodimyala's continued denial of responsibility for the offence, it is difficult to conceive how his stated intention to pay restitution in and of itself could have been considered a mitigating factor. A restitution order acceded to by an offender may be taken into account in mitigation as indicative of remorse: see *R. v. Chamczuk*, 2010 ABCA 380 at para. 14. However in this case, there was no expression of remorse, and as the Crown pointed out, Mr. Kodimyala's denial carried through the pre-sentence process to the hearing itself despite the judge's finding at trial that his evidence was not believable. While a lack of remorse is clearly not an aggravating circumstance, there was no indication from Mr. Kodimyala that he had come to realize the gravity of his conduct or to otherwise provide an explanation for it.

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Errors in principle

[37] For the forgoing reasons, we have concluded that the judge erred in principle by considering the normal consequences of the offence as exceptional and by treating some factors as mitigating when they were not. In essence, her conclusion that a non-custodial sentence was appropriate was based on Mr. Kodimyala's rehabilitation subsequent to the offence. While these positive steps are clearly important and may justify a more lenient sentence, the judge failed to properly assess whether a suspended sentence was proportionate to the gravity of the offence and the degree of responsibility of Mr. Kodimyala. These errors in our view impacted the sentence, and therefore this court may intervene to vary it.

2. What is a fit sentence?

[38] The Crown's position at sentencing, accepted by the judge, was that the range of sentence for fraud offences of this type is nine to 18 months, with the lower range at 12 months being appropriate in this case. It takes the same position on appeal, but at the hearing suggested a lesser sentence of six months to take into account the nine-month period of curfew Mr. Kodimyala served under his probation order.

[39] Mr. Kodimyala submits that the range of sentence for this kind of fraud is from a suspended sentence to 12 months. He says that the nine to 18-month range is appropriate only for fraud that involves a breach of trust. He seeks, as he did at sentencing, a suspended sentence with probation, or alternatively a 90-day sentence to be served intermittently. He also seeks an order staying the execution of any custodial sentence given the length of time since the offence.

[40] We see no error in the judge's acceptance of a range of sentence of nine to 18 months, with a sentence in the lower end of the range being appropriate here. She relied on cases that included similar cheque-kiting frauds, the most analogous being *R. v. Asgari*, [1997] B.C.J. No. 3149, and *R. v. Dolder*, [1985] B.C.J. No. 2638. *Asgari* involved three forged cheques totalling $132,000, with $82,000 being advanced to the offender. The scheme, while unsophisticated, was found to require

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a concentrated commitment of time and effort over a short period of time to make the withdrawals, and the offender was not remorseful. A 12-month sentence was imposed, along with a restitution order. In *Dolder,* a sentence of two years less a day was upheld where the loss was much less ($2,791), with the court commenting that a fit sentence for the cheque-kiting offences would have been 12 to 15 months. While these cases are dated, the ranges suggested continue to be appropriate today.

[41] That said, there are certainly cases where the sentences imposed for fraud offences were below this range, as cited by Mr. Kodimyala. Most of those cases involved guilty pleas where the offenders accepted responsibility and expressed genuine remorse for their conduct: see, for example, *R. v. Abdulahi-Sabet*, 2019 BCSC 1538 (8 months); *R. v. Steen*, 2018 BCPC 353 (4 months and two years probation); *R. v. Johal*, 2018 BCPC 360 (90 days intermittent and three years probation). In some cases, conditional sentence orders were imposed for terms between nine months and two years: *R. v. Truong*, 2017 BCPC 68 (nine months CSO, guilty plea); *R. v. Gonzalez-Urena*, 2011 BCSC 406 (15 months CSO); *R. v. Burkart*, 2006 BCCA 446 (18 months CSO, guilty plea) and *R. v. Offman*, 2017 BCPC 70 (two years less a day CSO, guilty plea). These latter cases have limited applicability, as a conditional sentence is no longer available for the offence of fraud over $5,000, but the length of the conditional sentences imposed is consistent with the range discussed above.

[42] As the judge recognized, the principles of denunciation and deterrence are paramount in fraud and dishonesty-related offences. Deterrence may be particularly important because these kinds of offences are often committed by otherwise law-abiding citizens like Mr. Kodimyala: see *R. v. Proulx*, 2000 SCC 5 at para. 129. However, it is our view that the judge gave these principles insufficient weight in concluding that they could be satisfied by imposing conditions under a probation order, in light of the circumstances of the offence and Mr. Kodimyala’s failure to take responsibility and to express any remorse. While a suspended sentence may have a deterrent effect, a probation order has primarily (but not exclusively) a rehabilitative

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objective, and optional conditions are usually directed to protecting the community and reintegrating the offender: see *Voong* at paras. 37–43. We do not see this as a case where a period of incarceration would unduly interfere with Mr. Kodimyala's rehabilitation and reintegration, nor do we see a suspended sentence having a sufficiently deterrent effect. In our view, a suspended sentence is not proportionate, and the paramountcy of the principles of denunciation and deterrence make it necessary in the public interest to impose a custodial sentence.

[43] We accept the judge's assessment of the aggravating factors: principally that the scheme, while unsophisticated, required some planning and premeditation given the numerous steps taken to make the deposits and withdrawals, and the loss was reasonably substantial and had some impact on the credit union.

[44] The mitigating factors are Mr. Kodimyala's lack of a record, his pro-social and stable family life, the support of his family and friends, and his successful efforts to rehabilitate himself over a substantial period of time.

[45] In these circumstances, we agree with the Crown that a sentence of 12 months would be appropriate, but should be reduced to six months to take into account the nine-month period of curfew and the community services hours that were completed under the terms of the probation order. The period of probation should also be reduced to two years, from the time of the original sentence.

[46] We would not accede to Mr. Kodimyala's request to stay the execution of the sentence. Stays have been granted in cases where the principles of denunciation and deterrence could be adequately served without further incarceration: see, for example, *R. v. Smickle*, 2014 ONCA 49, and *R. v. MacDonald*, 2014 NSCA 102. In both of those cases, the constitutionality of the three-year minimum sentence for firearms offences had been adjudicated prior to the appellate court considering the fitness of the sentences, resulting in considerable time delays where the offenders had long completed their sentences and had successfully rehabilitated and reintegrated in the community. We agree with the summary of the jurisprudence,

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primarily from Ontario, set out by the majority in *R. v. Dufour*, 2015 ONCA 426, as well as their cautious approach:

> [29] To summarize, this jurisprudence indicates that on a successful Crown appeal against sentence, where the seriousness of the offence does not require that an offender serve the sentence that should have been imposed, the appellate court can consider the length of the sentence to be served and the offender's post-sentence rehabilitative efforts in determining whether to stay the sentence. However, over-emphasis of post-sentencing rehabilitation has the potential to distort the sentencing process. Staying appropriate sentences may also introduce unwarranted disparities between similarly situated offenders where one is released from custody pending appeal and another is not.
>
> [Emphasis added.]

[47] While the offence in Mr. Kodimyala's case was committed almost six years ago, there has not been inordinate delay since his conviction (in July 2019) and sentencing (in October 2019). The circumstances today have not shown to be appreciably different from those that prevailed at the time of sentencing, so what was a fit sentence for the trial judge to impose remains a fit sentence today, subject to adjustment for the completion of probation conditions. Mr. Kodimyala has not served any time in prison, and we have already taken into account the fact that he completed the curfew and community service conditions in his probation order to reduce the sentence. We certainly appreciate his successful rehabilitative efforts, but that alone does not justify a stay of execution. In our view, the seriousness of the offence and Mr. Kodimyala's degree of moral culpability require that he serve his sentence.

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Disposition

[48] We would grant the Crown's application for leave to appeal sentence and we would allow the appeal. We would set aside the suspended sentence and substitute a sentence of six months' imprisonment. We would also reduce the period of probation to two years, effective from the date of the original sentence.

"The Honourable Mr. Justice Groberman"

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Goepel"

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TAB 59

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Her Majesty The Queen *Appellant*;

and

Samuel L. Olan, William H. Hudson and Thomas R. Hartnett III *Respondents.*

1978: January 30, 31; 1978: May 30.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Fraud — Elements of fraud — Directors' actions re assets of company — Absence of quid pro quo — Basis of evidence of fraud to go to jury — Criminal Code, R.S.C. 1970, c. C-34, s. 338(1).

In late 1971 Langley's Limited, a long-established dry-cleaning enterprise in Toronto, owned a substantial portfolio of "blue-chip" securities valued at $1,443,460. The control of the company, some 90 per cent of the common shares, was held by two estates and an individual represented by a chartered accountant, Leonard Johnston. Mr. Johnston was approached by one of the accused, Olan, President of First Montreal City Corporation Limited, to discuss the purchase of the controlling shares. It was agreed that the controlling common shares and certain preferred shares of Langley's would be acquired by First Montreal for approximately $1,485,000 payable in cash. Toward the end of the negotiations Mr. Johnston also met the other accused Hudson, President and Director of Beauport Holdings, and Hartnett, Vice-President and Director of Beauport Holdings and legal adviser to Hudson. Before closing First Montreal assigned its rights under the agreement to Beauport. Thereafter Hudson and Hartnett played the dominant roles aided by Olan who was to receive a finder's fee of approximately $67,000 for negotiating the sale. As at November 30, 1971 the total current assets of Beauport Holdings were $149,968.30 and the total assets $738,966.87. The closing date for the purchase of the Langley's shares was to have been December 2, 1971, but, as the purchasers did not have the necessary money, was postponed. A series of financial manœuvres followed. A bank account had been opened in name of Beauport Holdings on December 8, 1971, and the accused met with the bank manager concerning the certification of a cheque for $1,025,000 to be drawn on the account. There were no funds in the account but the manager was advised that a deposit of $488,000 was available and would be deposited later the same day. At a second meeting the manager agreed to

Sa Majesté La Reine *Appelante*;

et

Samuel L. Olan, William H. Hudson et Thomas R. Hartnett III *Intimés.*

1978: 30 et 31 janvier; 1978: 30 mai.

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

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Fraude — Eléments de la fraude — Utilisation par les administrateurs de l'actif de la compagnie — Absence de contrepartie — Elément de base de la preuve de fraude soumise au jury — Code criminel, S.R.C. 1970, chap. C-34, par. 338(1).

A la fin de 1971, Langley's Limited, une entreprise de nettoyage à sec établie de longue date à Toronto, possédait un portefeuille considérable de valeurs de premier ordre, évalué à $1,443,460. La participation majoritaire dans la compagnie, pour environ 90 pour cent des actions ordinaires, était détenue par deux successions et un particulier représentés par un comptable agréé, Leonard Johnston. Un des accusés, Olan, président de La compagnie des Grandes Premières de Montréal, est entré en contact avec M. Johnston afin de négocier l'achat de la participation majoritaire. Une entente fut conclue aux termes de laquelle La compagnie des Grandes Premières de Montréal achèterait les actions ordinaires majoritaires de Langley et certaines de ses actions privilégiées pour un montant de $1,485,000 payable comptant. A la fin des négociations, M. Johnston a aussi rencontré les deux autres accusés, Hudson, président et administrateur de Beauport Holdings, et Hartnett, vice-président et administrateur de Beauport Holdings et conseiller juridique de Hudson. Avant la signature, La compagnie des Grandes Premières de Montréal a cédé tous ses droits découlant de l'entente à Beauport Holdings. Par la suite, Hudson et Hartnett ont joué un rôle de premier plan, aidés par Olan qui devait recevoir des honoraires d'environ $67,000 pour avoir négocié la vente. Le 30 novembre 1971, les disponibilités de Beauport Holdings s'élevaient à $149,968.30 et son actif total à $738,966.87. La signature de l'achat des actions de Langley devait se faire le 2 décembre 1971 mais les acheteurs n'ayant pas les fonds nécessaires, la date de signature fut différée. Une série d'opérations financières s'ensuivirent. Un compte en banque au nom de Beauport Holdings avait été ouvert le 8 décembre 1971 et les accusés ont rencontré le gérant de la banque au sujet de la certification d'un chèque de $1,025,000 à tirer sur le

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the certification but only on conditions—he was to be present at the closing and retain possession of the cheque until the purchase of Langley's was completed, when the accused would take possession of Langley's portfolio, sell the securities and with the proceeds cause Langley's to buy another company owned by them. On December 10, 1971, the accused completed through Beauport Holdings the purchase of approximately 90 per cent of Langley's common shares; the preferred shares were purchased later. The vendors received the certified cheque for $1,025,000 drawn on the account of Beauport Holdings plus $246,545 being the proceeds of a loan to Beauport Holdings.

Another company, Beauport Financial Corporation Limited, had been incorporated by Hudson and Hartnett on November 23, 1971. Immediately after the purchase of the Langley's shares a meeting of the new Board of Directors of Langley's was convened which authorized the sale of all securities owned by Langley's, the purchase of 11,000 shares of Gibraltar Mines Ltd. for $49,500, the purchase from First Montreal of the outstanding shares of a Quebec company, Advertising Associates, for $400,000, and the subscription by Langley's for 10,000 shares in Beauport Financial at $10 per share. Further steps were taken and as a result Beauport Financial received from Langley's $790,000 which it loaned to Beauport Holdings to complete by Beauport Holdings the purchase of Langley's. The issues were whether the $790,000 was expended in furtherance of the *bona fide* business interests of Langley's, or merely in advancing the personal interests of the accused, and whether Langley's suffered deprivation as a result of this action. The accused were tried and convicted of defrauding Langley's of money and valuable securities to a value of $1,190,000 contrary to s. 338 of the *Criminal Code*, however the Court of Appeal set aside the conviction. Leave was granted to appeal to the Supreme Court on the question as to whether the Court of Appeal had erred in holding that there was no evidence of fraud to go to the jury and in its consideration of the applicability and scope of the principles of law in *Cox and Paton v. The Queen*, [1963] S.C.R. 500, as they related to each accused.

compte en question. Le compte n'était pas approvisionné mais on a informé le gérant qu'un dépôt de $488,000 était disponible et que le solde serait déposé plus tard le même jour. Lors d'une deuxième rencontre, le gérant a accepté de certifier le chèque à la condition cependant que le chèque soit signé en sa présence et qu'il le conserve jusqu'à la conclusion de l'achat de Langley; à ce moment, les accusés prendraient possession du portefeuille de Langley, vendraient les titres et, avec les profits, feraient acheter par Langley une autre compagnie qu'ils possédaient. Le 10 décembre 1971, les accusés ont conclu, par l'intermédiaire de Beauport Holdings, l'achat d'environ 90 pour cent des actions ordinaires de Langley; les actions privilégiées ont été achetées plus tard. Les vendeurs ont reçu en paiement le chèque visé de $1,025,000 tiré sur le compte de Beauport Holdings, et $246,545, soit le produit d'un prêt consenti à Beauport Holdings.

Le 23 novembre 1971, Hudson et Hartnett avaient constitué la compagnie Beauport Financial Corporation Limited. Immédiatement après l'achat des actions de Langley, les nouveaux administrateurs de Langley se sont réunis et ont autorisé la vente de toutes les valeurs détenues par Langley, l'achat de 11,000 actions du capital de Gibraltar Mines Ltd., au prix de $49,500, l'achat à La compagnie des Grandes Premières de Montréal des actions en circulation d'une compagnie québécoise, Advertising Associates Limited, pour $400,000 et la souscription par Langley des 10,000 actions du actions du capital de Beauport Financial, à $10 l'action. D'autres opérations ont été effectuées et le résultat final atteint est le suivant: Beauport Financial a reçu $790,000 de Langley qu'elle a prêtés à Beauport Holdings pour permettre à cette dernière d'acheter Langley. Il s'agit de déterminer si le montant de $790,000 provenant de l'actif de Langley et utilisé pour l'achat d'actions de Beauport Financial a été dépensé pour servir les véritables intérêts financiers de Langley ou, au contraire, les intérêts personnels des accusés. Il faut également décider si Langley a subi une privation à la suite de cette opération commerciale. Les accusés ont subi leur procès et ont été déclarés coupables d'avoir frustré Langley d'argent et de valeurs totalisant $1,190,000, en contravention de l'art. 338 du *Code criminel*. La Cour d'appel de l'Ontario a cependant infirmé la condamnation. L'autorisation d'interjeter appel à la Cour suprême a été accordée sur la question de savoir si la Cour d'appel a commis une erreur en décidant qu'il n'y avait aucune preuve de fraude à soumettre au jury et en examinant, relativement à chaque accusé, l'applicabilité et la portée des principes de droit énoncés dans l'arrêt *Cox et Paton c. La Reine*, [1963] R.C.S. 500.

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Held: The appeal should be allowed.

From *Cox and Paton* it is apparent that proof of deceit is not essential to support a conviction under s. 338(1). Where it is alleged that a corporation has been defrauded by its directors deception is not an essential element of the offence. The words "other fraudulent means" in s. 338(1) include means which are not in the nature of a falsehood or a deceit and they encompass all other means which can properly be stigmatized as dishonest. While the courts have been loath to attempt an exhaustive definition of "defraud" one can say that two elements are essential, "dishonesty" and "deprivation". Using the assets of the corporation for personal purposes rather than *bona fide* for the benefit of the corporation can constitute dishonesty in a case of alleged fraud by directors of the corporation. Deprivation is satisfied on proof of detriment, prejudice or risk of prejudice; it is not essential that there be actual loss. On the facts it was here open to the jury to find that the exchange of the Langley portfolio for a loan was something other than a *quid pro quo*. The Court of Appeal erred in its consideration of the applicability and scope of the principles of law in *Cox and Paton v. The Queen* as they related to each accused and in holding that there was no evidence of fraud to go to the jury.

Cox and Paton v. The Queen, [1963] S.C.R. 500; *R. v. Lemire*, [1965] S.C.R. 174; *R. v. Renard* (1974), 17 C.C.C. (2d) 355; *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819; *R. v. Sinclair*, [1968] 1 W.L.R. 1246; *R. v. Allsop* (1976), 64 Cr. App. R. 29; *R. v. Smith*, [1963] 1 C.C.C. 68; *Welham v. D.P.P.*, [1960] 1 All E.R. 805; *R. v. Knelson and Baran* (1962), 133 C.C.C. 210; *R. v. McKay*, [1954] S.C.R. 3 applied.

APPEAL from a judgment of the Court of Appeal for Ontario setting aside convictions under s. 338 of the *Code* by judge and jury and entering verdicts of acquittal. Appeal allowed, new trial directed.

D. Ewart, for the appellant.

D. K. Laidlaw, Q.C., and *Colin Campbell*, for the respondent, Hudson.

R. P. Armstrong and *S. R. Block*, for the respondent, Hartnett.

Arrêt: Le pourvoi doit être accueilli.

Il ressort de l'arrêt *Cox et Paton* que la preuve de la supercherie n'est pas essentielle pour pouvoir prononcer une condamnation en vertu du par. 338(1). Quand on allègue que les administrateurs ont fraudé leur compagnie, la supercherie ne constitue pas un élément essentiel de l'infraction. Les mots «autres moyens dolosifs» au par. 338(1) couvrent les moyens qui ne sont ni des mensonges ni des supercheries; ils comprennent tous les autres moyens qu'on peut proprement qualifier de malhonnêtes. Les tribunaux ont de bonnes raisons d'hésiter à définir de façon exhaustive le mot «frauder» (frustrer), mais on peut sans crainte dire que deux éléments sont essentiels: la «malhonnêteté» et la «privation». L'utilisation des biens d'une compagnie à des fins personnelles plutôt qu'à l'avantage de celle-ci peut constituer un acte malhonnête si l'on accuse des administrateurs de fraude. On établit la privation si l'on prouve un dommage, un préjudice ou un risque de préjudice; il n'est pas essentiel que la fraude mène à une perte pécuniaire réelle. D'après les faits, le jury pouvait conclure qu'il y avait une nette disproportion dans l'échange du portefeuille de Langley contre le prêt. La Cour d'appel a commis une erreur en examinant, relativement à chaque accusé, l'applicabilité et la portée des principes de droits énoncés dans l'arrêt *Cox et Paton c. La Reine* et en décidant qu'il n'y avait aucune preuve de fraude à soumettre au jury.

Jurisprudence: *Cox et Paton c. La Reine*, [1963] R.C.S. 500; *R. c. Lemire*, [1965] R.C.S. 174; *R. v. Renard* (1974), 17 C.C.C. (2d) 355; *Scott v. Metropolitan Police Commissioner*, [1975] A.C. 819; *R. v. Sinclair*, [1968] 1 W.L.R. 1246; *R. v. Allsop* (1976), 64 Cr. App. R. 29; *R. v. Smith*, [1963] 1 C.C.C. 68; *Welham v. D.P.P.*, [1960] 1 All E.R. 805; *R. v. Knelson and Baran* (1962), 133 C.C.C. 210; *R. v. McKay*, [1954] R.C.S. 3, appliqués.

POURVOI à l'encontre d'un arrêt de la Cour d'appel de l'Ontario qui a infirmé des déclarations de culpabilité en vertu de l'art. 338 du *Code* par un un juge et un jury et a prononcé des verdicts d'acquittement. Pourvoi accueilli, nouveau procès ordonné.

D. Ewart, pour l'appelante.

D. K. Laidlaw, c.r., et *Colin Campbell*, pour l'intimé, Hudson.

R. P. Armstrong et *S. R. Block*, pour l'intimé, Hartnett.

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The judgment of the Court was delivered by

DICKSON J.—The respondents were tried and convicted before judge and jury on the charge of defrauding Langley's Limited, between December 1, 1971, and December 31, 1971, of money and valuable securities having an aggregate value of $1,190,000, more or less, contrary to s. 338 of the *Criminal Code*. Section 338(1) makes it a crime to defraud the public or any person of any property, money or valuable security by deceit, falsehood or other fraudulent means. The word "defraud" is not defined.

The Court of Appeal for Ontario set aside the conviction and entered a verdict of acquittal. This Court granted leave to appeal from the order of the Court of Appeal for Ontario upon the following question of law:

Did the Ontario Court of Appeal err in holding that there was no evidence of fraud to go to the jury and, in that connection, did it err in its consideration of the applicability and scope of the principles of law in *Cox and Paton v. The Queen*, [1963] S.C.R. 500 as they related to each accused?

The judgment in *Cox and Paton* is helpful in considering the substantive offence of fraud although the relevant count under discussion in that case was conspiracy to commit fraud and not the substantive offence itself. In *Cox and Paton*, the accused had entered into an option agreement for the purchase from the principal shareholder, one Donaldson, of all of his shares in the capital stock of a company known as Brandon Packers Limited. The option agreement declared the stated intention of the optionee (the accused) to procure that Brandon Packers Limited would issue bonds to the extent of $400,000 for sale, and the optionor, Donaldson, agreed to use his best endeavours to promote the sale of the bonds. The option was exercised. Prior to closing, about $275,000 of the bonds had been sold. At closing, numerous steps were taken, including a daylight loan from a chartered bank, but essentially what occurred was this: (i) Donaldson caused Brandon Packers to subscribe for preference shares of the value of $200,000 in the capital stock of Fropak Limited, a company controlled by the accused; (ii) with the

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Les intimés ont subi leur procès devant juge et jury et ont été déclarés coupables d'avoir, entre le 1er et le 31 décembre 1971, frustré Langley's Limited d'argent et de valeurs totalisant approximativement $1,190,000, en contravention de l'art. 338 du *Code criminel*. Aux termes du par. 338(1), commet un acte criminel quiconque frustre le public ou toute personne de quelque bien, argent ou valeur par supercherie, mensonge ou autres moyens dolosifs. Le verbe «frustrer» n'y est pas défini.

La Cour d'appel de l'Ontario a infirmé la condamnation et a prononcé un verdict d'acquittement. Cette Cour a autorisé le pourvoi contre cet arrêt sur la question de droit suivante:

La Cour d'appel de l'Ontario a-t-elle commis une erreur de droit en décidant qu'il n'y avait aucune preuve de fraude à soumettre au jury et, à cet égard, a-t-elle commis une erreur de droit en examinant, relativement à chaque accusé, l'applicabilité et la portée des principes de droit énoncés dans l'arrêt *Cox et Paton c. La Reine*, [1963] R.C.S. 500?

L'arrêt *Cox et Paton* est utile aux fins de l'analyse de l'infraction en cause, même si cet arrêt porte sur un chef d'accusation de complot en vue de frauder et non sur l'infraction de fraude proprement dite. Dans l'affaire *Cox et Paton*, les accusés avaient conclu une entente à option, pour l'achat à l'actionnaire principal, un nommé Donaldson, de toutes ses actions dans le capital actions d'une compagnie appelée Brandon Packers Limited. L'entente faisait état de l'intention déclarée des cessionnaires (les accusés) de prendre les mesures nécessaires pour que Brandon Packers Limited émette $400,000 d'obligations à vendre, et le cédant, Donaldson, consentait à faire tout son possible pour en promouvoir la vente. L'option fut levée. Avant la date limite, on avait vendu $275,000 d'obligations. A la date de clôture, on prit plusieurs mesures dont un prêt d'un jour consenti par une banque à charte, mais voici essentiellement ce qui se produisit: (i) Donaldson fit souscrire à Brandon Packers $200,000 d'actions privilégiées du capital actions de Fropak Limited, une compagnie contrôlée par les accusés; (ii) avec l'ar-

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monies received upon such subscription, Fropak advanced $183,560 to two personal holding corporations owned and controlled by the accused; (iii) the personal corporations paid Donaldson $183,-560 for, and took delivery of, his shares in Brandon Packers Limited; (iv) Fropak received promissory notes from the two personal corporations totalling $183,560. In the result, Donaldson received in cash the purchase price of his shares. The accused, through their personal corporations, acquired those shares. Brandon Packers Limited had expended $200,000 for preference shares of Fropak Limited, and Fropak was left with promissory notes of the two personal holding corporations in the amount of $183,560, plus $6,440. In substance, Brandon Packers Limited became the source of the funds used by the accused to purchase Donaldson's shares and acquire control of Brandon Packers Limited.

The Test for Fraud

The paragraph in *Cox and Paton* which particularly concerns us in the present appeal is to be found in the judgment of Cartwright J., speaking for the Court, at pp. 512-513, reading:

> In the course of argument on this branch of the appeal counsel for the appellants submitted that there was no evidence that the appellants defrauded Brandon Packers Limited or that they intended to do so because, as it was said, there was no evidence of any false representation made to the company or of any official of the company having been deceived into parting with the moneys referred to in the particulars furnished. Assuming, without deciding, that there was a dissent on this point within the meaning of s. 597(1) of the *Criminal Code*, I would reject this argument, I will examine it only in connection with the transaction relating to the $200,000 which is the first item in the particulars. I have already indicated my agreement with the statement of Freedman J.A. that "implicit in the entire transaction was the representation of the accused that this was a legitimate *bona fide* investment for Brandon Packers Limited to make" and with his view that there was ample evidence to warrant a finding that this representation was false to the knowledge of the accused. If it deceived Donaldson, who was still nominally at least in control of the company, into paying over the $200,000 to Fropak that would be a fraud on the company. If, on the other hand, it is suggested that Donaldson was not deceived but paid the money over knowing that the

gent de cette souscription, Fropak avança $183,-560 à deux compagnies personnelles de gestion, dans lesquelles les accusés avaient une participation majoritaire; (iii) les compagnies personnelles versèrent $183,560 à Donaldson en contrepartie de ses actions de Brandon Packers Limited; (iv) Fropak reçut des deux compagnies personnelles des billets à ordre au montant de $183,560. Donaldson a donc reçu comptant le prix d'achat de ses actions. Les accusés ont acheté ces actions par l'intermédiaire de leurs compagnies personnelles. Brandon Packers Limited avait dépensé $200,000 pour des actions privilégiées de Fropak Limited et Fropak s'est retrouvée avec des billets à ordre des deux compagnies personnelles de gestion au montant de $183,560, plus $6,440. Au fond, Brandon Packers Limited a fourni aux accusés les fonds utilisés pour acheter les actions de Donaldson et prendre le contrôle de Brandon Packers Limited.

Le critère de la fraude

Voici l'extrait pertinent de l'arrêt *Cox et Paton*, tiré des motifs du juge Cartwright, parlant au nom de la Cour, aux pp. 512 et 513:

> [TRADUCTION] Dans sa plaidoirie relative à cet aspect du pourvoi, l'avocat des appelants a prétendu que rien dans la preuve ne révèle que les appelants ont fraudé Brandon Packers Limited ni qu'ils ont eu cette intention, parce que, a-t-il souligné, rien dans la preuve n'indique qu'ils ont fait des déclarations mensongères à la compagnie ni trompé un dirigeant de cette dernière pour l'inciter à se départir des fonds en question. A supposer, sans me prononcer sur ce point, qu'il y ait une dissidence sur cette question, au sens du par. 597(1) du *Code criminel*, je suis d'avis de rejeter ce moyen; je ne l'étudierai que dans le cadre de l'opération relative aux $200,000, qui fait l'objet du premier point des détails fournis. J'ai déjà indiqué que je souscris à la déclaration du juge Freedman, de la Cour d'appel, selon laquelle «les accusés ont laissé entendre que l'opération représentait un investissement régulier et légitime pour Brandon Packers Limited» et je partage son opinion que la preuve permettait nettement de conclure que les accusés savaient qu'il s'agissait de déclarations mensongères. Si celles-ci ont induit en erreur Donaldson, qui détenait encore, nominalement du moins, le contrôle de la compagnie, et l'ont incité à verser les $200,000 à Fropak, on peut dire que la compagnie a été fraudée. Par contre, si l'on suggère que Donaldson n'a pas été induit en erreur

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transaction was not *bona fide*, that the Fropak shares were worthless and that their purchase was merely a step in a scheme to enable the accused to buy the shares of Brandon Packers Limited with his own money, that would simply be to say that Donaldson was *particeps criminis*. If all the directors of a company should join in using its funds to purchase an asset which they knew to be worthless as part of a scheme to divert those funds to their own use they would, in my opinion, be guilty under s. 323(1) of defrauding the company of those funds. Even supposing it could be said that, the directors being "the mind of the company" and well knowing the true facts, the company was not deceived (a proposition which I should find it difficult to accept), I think it clear that in the supposed case the directors would have defrauded the company, if not by deceit or falsehood, by "other fraudulent means".

mais a versé l'argent tout en sachant que l'opération n'était pas régulière, que les actions de Fropak n'avaient aucune valeur et que leur achat n'était qu'une étape d'un plan visant à permettre aux accusés d'acheter les actions de Brandon Packers Limited avec son argent, cela revient à dire que Donaldson est complice. Quand tous les administrateurs d'une compagnie se liguent pour utiliser les fonds de cette dernière en vue d'acheter un actif qu'ils savent sans valeur, en exécution d'un plan élaboré pour détourner ces fonds à leur profit, ils sont, à mon avis, coupables aux termes du par. 323(1), d'avoir frustré la compagnie de cet argent. En outre, à supposer que l'on puisse dire que la compagnie n'a pas été trompée puisque les administrateurs en sont «l'âme dirigeante» et sont donc parfaitement au courant des faits (argument que je trouve difficile à accepter), il est à mon avis évident, dans cette hypothèse, que les administrateurs auraient alors fraudé la compagnie, sinon par supercherie ou mensonge, par d'«autres moyens dolosifs».

In *Cox and Paton* the guilt of the accused rested essentially on the conclusion that the investment of $200,000 in the shares of Fropak was not a legitimate *bona fide* investment for Brandon Packers. It is apparent from the quoted passage that proof of deceit is not essential to support a conviction under s. 338(1). Where it is alleged that a corporation has been defrauded by its directors, deception of the corporation is not an essential element of the offence. The words "other fraudulent means" in s. 338(1) include means which are not in the nature of a falsehood or a deceit; they encompass all other means which can properly be stigmatized as dishonest.

Dans *Cox et Paton*, la culpabilité des accusés reposait essentiellement sur la conclusion que l'investissement de $200,000 dans les actions de Fropak ne représentait pas un investissement régulier et légitime pour Brandon Packers. Il ressort de l'extrait cité que la preuve de la supercherie n'est pas essentielle pour pouvoir prononcer une condamnation en vertu du par. 338(1). Quand on allègue que les administrateurs ont fraudé leur compagnie, la supercherie ne constitue pas un élément essentiel de l'infraction. Les mots «autres moyens dolosifs» couvrent les moyens qui ne sont ni des mensonges ni des supercheries; ils comprennent tous les autres moyens qu'on peut proprement qualifier de malhonnêtes.

In *R. v. Lemire*[1], the accused was charged with having defrauded the public through the submission of fictitious expense accounts. Mr. Justice Martland, writing for the majority of this Court, dealt with the argument that no one was deceived by the expense accounts because they did not contain a detailed list of the expenditures as contemplated by the form used in making a claim. He said, pp. 185-186: "Whether or not they deceived the people who saw them, they were the necessary means used to obtain the payments and without

Dans l'affaire *R. c. Lemire*[1], l'accusé était inculpé d'avoir fraudé le public en remettant des comptes de dépenses fictifs. Le juge Martland, parlant au nom de la majorité de cette Cour, a examiné l'argument selon lequel les comptes n'avaient trompé personne parce qu'ils n'énuméraient pas les dépenses, comme l'exigeait la formule de demande de remboursement. Il a déclaré, aux pp. 185 et 186: [TRADUCTION] «Qu'ils aient ou non induit en erreur les personnes qui les ont vus, c'étaient les moyens qu'il fallait nécessaire-

[1] [1965] S.C.R. 174.

[1] [1965] R.C.S. 174.

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them the payments would not have been made. They were fraudulent." See also *R. v. Renard*[2], at p. 358.

In *Scott v. Metropolitan Police Commissioner*[3], the House of Lords held that in the common law offence of conspiracy to defraud, deceit is not a necessary ingredient, although in a great many cases the fraud may have been perpetrated by deceit. In the course of his speech, Viscount Dilhorne, with whom Lord Reid, Lord Simon of Glaisdale and Lord Kilbrandon agreed, after referring to the Criminal Law Revision Committee's Eighth Report on "Theft and Related Offences," 1966 (Cmnd. 2977) had this to say, at p. 839:

If, as I think, and as the Criminal Law Revision Committee appears to have thought "fraudulently" means "dishonestly", then "to defraud" ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled.

Lord Diplock spoke to the same effect, at p. 841:

The intended means by which the purpose is to be achieved must be dishonest. They need not involve fraudulent misrepresentation such as is needed to constitute the civil tort of deceit. Dishonesty of any kind is enough.

In the earlier English case of *R. v. Sinclair*[4], the defendants were charged with conspiring to cheat and defraud a company, its shareholders and creditors by fraudulently using its assets for purposes other than those of the company, and by fraudulently concealing such use. The judge directed the jury as to fraud, saying, at p. 1249:

To prove fraud it must be established that the conduct was deliberately dishonest. In the circumstances of this case what sort of test should be applied as to whether the conduct was dishonest? It is fraud if it is proved that there was the taking of a risk which there was no right to take which would cause detriment or prejudice to another.

[2] (1974), 17 C.C.C. (2d) 355.
[3] [1975] A.C. 819.
[4] [1968] 1 W.L.R. 1246.

ment utiliser pour se faire payer et sans lesquels il n'y aurait pas eu de paiement. Ils étaient frauduleux.» Voir aussi *R. v. Renard*[2], à la p. 358.

Dans *Scott v. Metropolitan Police Commissioner*[3], la Chambre des lords a jugé qu'en *common law* la supercherie ne constitue pas un élément essentiel de l'infraction de complot en vue de frauder même si, dans la plupart des cas, c'est par ce moyen que la fraude est commise. Dans son exposé, auquel ont souscrit les lords Reid, Simon of Glaisdale et Kilbrandon, le vicomte Dilhorne écrit, à la p. 839, à propos du [TRADUCTION] *Huitième rapport du Comité de réforme du droit relatif aux «Vol et Infractions connexes»* 1966 (Cmnd. 2977):

[TRADUCTION] Si, comme je le pense et à l'instar semble-t-il du Comité de réforme du droit, «frauduleusement» signifie «malhonnêtement», alors «frauder» signifie, dans le langage courant, priver malhonnêtement une personne de quelque chose qui lui appartient ou de quelque chose à laquelle elle a, aurait ou pourrait avoir droit, n'eut été la perpétration de la fraude.

Lord Diplock a tenu des propos semblables, à la p. 841:

[TRADUCTION] Les moyens utilisés intentionnellement pour parvenir au but doivent être malhonnêtes. Il n'est pas nécessaire qu'il y ait des déclarations mensongères comme c'est le cas pour le dol au civil. La malhonnêteté, quelle qu'elle soit, suffit.

Dans une cause anglaise plus ancienne, *R. v. Sinclair*[4], les défendeurs étaient accusés d'avoir comploté de voler et frauder une compagnie, ses actionnaires et ses créanciers par l'utilisation frauduleuse et clandestine de ses biens à d'autres fins que celles qu'elle poursuivait. Voici les directives du juge au jury quant à la fraude (à la p. 1249):

[TRADUCTION] Pour prouver la fraude, il faut établir que la conduite des accusés était délibérément malhonnête. Dans les circonstances de la présente affaire, quel critère doit-on appliquer pour décider s'il y a eu conduite malhonnête? Il y a fraude si la preuve révèle qu'on a pris un risque, sans en avoir le droit, au détriment ou au préjudice d'autrui.

[2] (1974), 17 C.C.C. (2d) 355.
[3] [1975] A.C. 819.
[4] [1968] 1 W.L.R. 1246.

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The defendants were convicted and appealed. The Court of Appeal, in upholding the convictions, had this to say, at p. 1250:

To cheat and defraud is to act with deliberate dishonesty to the prejudice of another person's proprietary right. In the context of this case the alleged conspiracy to cheat and defraud is an agreement by a director of a company and others dishonestly to take a risk with the assets of the company by using them in a manner which was known to be not in the best interests of the company and to be prejudicial to the minority shareholders.

The general direction as to fraud in the summing-up commences by stating that to amount to fraud the conduct must be deliberately dishonest. That is plainly right.

Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of "defraud" but one may safely say, upon the authorities, that two elements are essential, "dishonesty" and "deprivation". To succeed, the Crown must establish dishonest deprivation.

Using the assets of the corporation for personal purposes rather than *bona fide* for the benefit of the corporation can constitute dishonesty in a case of alleged fraud by directors of a corporation. This proposition finds full support in *Cox and Paton*.

The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud. The following passages from the English Court of Appeal judgment in *R. v. Allsop*[5] in my view correctly state the law on the role of economic loss in fraud, at pp. 31, 32:

Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated. If the deceit which is employed imperils the economic interest of the person deceived, this is sufficient to constitute fraud even though in the event no actual loss is suffered and notwithstanding that the deceiver did not desire to bring about an actual loss.

[5] (1976), 64 Cr. App. R. 29.

Les défendeurs ont été déclarés coupables et ont interjeté appel. La Cour d'appel a confirmé la condamnation et a déclaré (à la p. 1250):

[TRADUCTION] Voler et frauder, c'est agir de façon délibérément malhonnête, au préjudice du droit de propriété d'une autre personne. Dans la présente affaire, le complot de vol et de fraude aurait consisté dans une entente malhonnête entre un administrateur d'une compagnie et d'autres personnes en vue de prendre un risque avec les biens de la compagnie, soit de les utiliser sciemment à l'encontre des meilleurs intérêts de cette dernière et au détriment des actionnaires minoritaires.

On déclare au début des directives générales relatives à la fraude que pour qu'il y ait fraude, il faut que la conduite soit délibérément malhonnête. C'est tout à fait exact.

Les tribunaux ont de bonnes raisons d'hésiter à définir de façon exhaustive le mot «frauder» (frustrer), mais on peut sans crainte dire que, selon la jurisprudence, deux éléments sont essentiels: la «malhonnêteté» et la «privation». Pour avoir gain de cause, le ministère public doit donc prouver la privation malhonnête.

L'utilisation des biens d'une compagnie à des fins personnelles plutôt qu'à l'avantage de celle-ci peut constituer un acte malhonnête si l'on accuse ses administrateurs de fraude. L'arrêt *Cox et Paton* appuie ce principe.

On établit la privation si l'on prouve que les intérêts pécuniaires de la victime ont subi un dommage ou un préjudice ou qu'il y a risque de préjudice à leur égard. Il n'est pas essentiel que la fraude mène à une perte pécuniaire réelle. L'extrait suivant, tiré de l'arrêt de la Cour d'appel d'Angleterre, *R. v. Allsop*[5], décrit bien, à mon avis, l'état du droit sur le rôle de la perte pécuniaire dans la fraude (aux pp. 31 et 32):

[TRADUCTION] En général, un fraudeur veut avant tout se procurer un avantage. Le tort causé à sa victime est secondaire et incident. Il n'est «intentionnel» que parce qu'il fait partie du résultat prévu de la fraude. Si la supercherie met en péril les intérêts pécuniaires de la personne induite en erreur, cela suffit pour constituer une fraude, même s'il n'en résulte aucune perte réelle et même si le fraudeur n'a pas eu l'intention de causer une perte réelle.

[5] (1976), 64 Cr. App. R. 29.

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We see nothing in Lord Diplock's speech [in *Scott*] to suggest a different view. "Economic loss" may be ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists it may be measured in terms of money . . .

Interests which are imperilled are less valuable in terms of money than those same interests when they are secure and protected. Where a person intends by deceit to induce a course of conduct in another which puts that other's economic interests in jeopardy he is guilty of fraud even though he does not intend or desire that actual loss should ultimately be suffered by that other in this context.

See also *R. v. Smith*[6]; *Welham v. Director of Public Prosecutions*[7] and *R. v. Knelson and Baran*[8].

The Facts

One of the dangers in this case is the risk of being overwhelmed by factual minutiae. Superficially, the facts are complicated. Stripped of unessentials, it is clear what took place. I do not propose a detailed recital as, in my opinion, the appeal should be allowed and a new trial ordered, but to answer the question upon which leave to appeal has been granted it is necessary to sketch the relevant transactions. In late 1971, when the impugned events took place, Langley's Limited was a dry-cleaning enterprise, long-established in the City of Toronto, owning a substantial portfolio of "blue-chip" securities valued at $1,443,460. The controlling interest in the company, comprising some 90% of the common shares, was owned by two estates and an individual represented by a chartered accountant, Mr. Leonard Johnston. In the autumn of 1971, Mr. Johnston was approached by one of the accused, Mr. Olan, President of First Montreal City Corporation Limited, for the purpose of discussing purchase of the controlling shares. The negotiations which followed led to an agreement under which the controlling common shares, and certain preferred shares, of Langley's would be purchased by First Montreal for approximately $1,485,000 payable in cash. Toward the end of the negotiations, Mr. Johnston also met the

[6] [1963] 1 C.C.C. 68.
[7] [1960] 1 All E.R. 805.
[8] (1962), 133 C.C.C. 210.

A notre avis, rien dans les motifs de lord Diplock [dans *Scott*] ne suggère une opinion différente. La «perte pécuniaire» peut être éphémère et temporaire ou éventuelle sans être réelle, mais même une simple menace de préjudice financier, pendant qu'elle existe, peut être évaluée monétairement . . .

Des intérêts mis en péril ont moins de valeur en termes monétaires que des intérêts protégés et en sécurité. Quiconque a l'intention d'inciter par une supercherie une autre personne à agir de manière à compromettre ses intérêts pécuniaires se rend coupable de fraude même s'il ne prévoit, ni ne veut que l'autre subisse finalement une perte réelle.

Voir aussi *R. v. Smith*[6]; *Welham v. Director of Public Prosecutions*[7] et *R. v. Knelson and Baran*[8].

Les faits

Un des dangers dans cette affaire est de se perdre dans des détails infimes. De prime abord, les faits sont compliqués, mais si l'on s'en tient à l'essentiel, on comprend bien ce qui s'est produit. Comme je suis d'avis d'accueillir le pourvoi et d'ordonner un nouveau procès, je n'ai pas l'intention de relater tous les faits en détail, mais pour répondre à la question posée dans l'autorisation d'appel, je vais décrire les opérations pertinentes. A la fin de 1971, époque des actes reprochés, Langley's Limited, une entreprise de nettoyage à sec établie de longue date à Toronto, possédait un portefeuille considérable de valeurs de premier ordre, évalué à $1,443,460. La participation majoritaire dans la compagnie, pour environ 90% des actions ordinaires, était détenue par deux successions et un particulier représentés par un comptable agréé, M. Leonard Johnston. A l'automne 1971, un des accusés, M. Olan, président de La compagnie des Grandes Premières de Montréal, est entré en contact avec M. Johnston afin de négocier l'achat de la participation majoritaire. Les négociations qui suivirent ont mené à une entente aux termes de laquelle La compagnie des Grandes Premières de Montréal achèterait les actions ordinaires majoritaires de Langley, et certaines de ses actions privilégiées, pour un montant

[6] [1963] 1 C.C.C. 68.
[7] [1960] 1 All E.R. 805.
[8] (1962), 133 C.C.C. 210.

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other two accused, Mr. Hudson, President and Director of Beauport Holdings, and Mr. Hartnett, Vice-President and Director of Beauport Holdings and legal adviser to Mr. Hudson. Before the actual closing, First Montreal assigned all of its rights under the agreement to Beauport Holdings. Thereafter, Hudson and Hartnett played the dominant roles, aided in some respects by Olan, who, it was agreed, would receive a finder's fee of approximately $67,000 for negotiating the sale. As at November 30, 1971, total current assets of Beauport Holdings amounted to $149,968.30 and total assets of the company amounted to $738,966.87. The closing of the purchase of the Langley's shares was to have taken place on December 2, 1971, but the purchasers did not then have the money with which to close. Closing date was postponed.

Mr. Leslie Smith, Manager of a branch of Toronto-Dominion Bank located in Toronto, testified that in the month of December, 1971, he had two separate discussions with the three accused concerning the certification of a cheque in the amount of $1,025,000 to be drawn on the account of Beauport Holdings in that bank. The account had been opened on December 8, 1971. On the first occasion, there were no funds in the account, but Smith was advised that there was a deposit of $488,000 available and that the balance of the funds would be deposited later the same day. Smith refused to certify the cheque, as his modest credit limits of $10,000 unsecured and $20,000 secured did not permit him to authorize an overdraft in the amount of the shortfall of $537,000. On the second meeting, the respondents asked for certification of a $1,025,000 cheque on conditions which proved to be acceptable to Smith. It was agreed that he would be present at the closing and retain possession of the cheque until such time as the purchase of Langley's had been completed, at which time the accused would take possession of the Langley's portfolio, sell the securities, and with the proceeds cause Langley's to buy another company they owned.

de $1,485,000, payable comptant. A la fin des négociations, M. Johnston a aussi rencontré les deux autres accusés, M. Hudson, président et administrateur de Beauport Holdings, et M. Hartnett, vice-président et administrateur de Beauport Holdings et conseiller juridique de M. Hudson. Avant la signature, La compagnie des Grandes Premières de Montréal a cédé tous ses droits découlant de l'entente à Beauport Holdings. Par la suite, Hudson et Hartnett ont joué un rôle de premier plan, aidés à certains égards par Olan qui, selon les faits admis, devait recevoir des honoraires d'environ $67,000 pour avoir négocié la vente. Le 30 novembre 1971, les disponibilités de Beauport Holdings s'élevaient à $149,968.30 et son actif total à $738,966.87. La signature de l'achat des actions de Langley devait se faire le 2 décembre 1971, mais les acheteurs n'avaient pas les fonds nécessaires pour conclure la transaction. La date de signature fut donc différée.

M. Leslie Smith, gérant d'une succursale de la Banque Toronto-Dominion à Toronto, a témoigné qu'à deux reprises en décembre 1971, il avait discuté avec les trois accusés de la certification d'un chèque de $1,025,000 à tirer sur le compte de Beauport Holdings à cette banque. Le compte était ouvert depuis le 8 décembre 1971. A la première rencontre, le compte n'était pas approvisionné, mais on a informé Smith qu'un dépôt de $488,000 était disponible et que le solde serait déposé plus tard le même jour. Smith a refusé de viser le chèque car il ne pouvait accorder un découvert que jusqu'à concurrence de $10,000 sans garantie et à $20,000 avec garantie; il n'était donc pas en mesure d'autoriser un découvert de $537,000, soit le solde non payé. A la deuxième rencontre, les intimés ont demandé et obtenu un chèque visé de $1,025,000, Smith ayant jugé les conditions acceptables. Il fut convenu que le chèque serait signé en sa présence et qu'il le conserverait jusqu'à la conclusion de l'achat de Langley. A ce moment, les accusés prendraient possession du portefeuille de Langley, vendraient les titres et, avec le produit, feraient acheter par Langley une autre compagnie qu'ils possédaient.

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On December 10, 1971, the accused completed, through Beauport Holdings, the purchase of approximately 90% of the Langley's common shares; the preferred shares were purchased later. In satisfaction, the vendors received the certified cheque for $1,025,000, drawn on the account of Beauport Holdings, plus $246,545, being the proceeds of a loan from one Orenstein to Beauport Holdings. Upon payment being tendered, the accused were handed a briefcase containing all of the stocks and bonds owned by Langley's. The briefcase was immediately turned over to two representatives of a brokerage firm who, accompanied by Smith and Hudson, and possibly Olan, went to the office of the brokerage firm where a cheque in the amount of $500,000 was issued, payable to Langley's. This cheque represented the first instalment of the proceeds from sale of the securities.

Le 10 décembre 1971, les accusés ont conclu, par l'intermédiaire de Beauport Holdings, l'achat d'environ 90% des actions ordinaires de Langley. Les actions privilégiées ont été achetées plus tard. Les vendeurs ont reçu en paiement le chèque visé de $1,025,000 tiré sur le compte de Beauport Holdings, et $246,545, soit le produit d'un prêt consenti par un nommé Orenstein à Beauport Holdings. En contrepartie du paiement, les accusés ont reçu un porte-documents contenant toutes les actions et obligations détenues par Langley. Le porte-documents a immédiatement été remis à deux représentants d'une maison de courtage qui, accompagnés de Smith et de Hudson, et peut-être d'Olan, se sont rendus au bureau de la maison de courtage pour y recevoir un chèque de $500,000 à l'ordre de Langley. Ce chèque représentait le premier acompte sur le produit de la vente des valeurs.

I should here mention that, prior to the closing, the respondents Hudson and Hartnett caused to be incorporated, on November 23, 1971, a company under the name of Beauport Financial Corporation Limited, of which Hartnett became President and Director. Immediately following the purchase of the Langley's shares from the former owners on December 10, a meeting of the new directors of Langley's, namely Hudson, one Teeter, and one Joseph, was convened at which four items of business were transacted. The first, headed "Sale of Securities," involved the passage of a resolution authorizing Hudson to sell all the securities owned by Langley's. The actual resolution was preceded by these few words:

Je dois mentionner ici que le 23 novembre 1971, avant la signature, les intimés Hudson et Hartnett ont constitué la compagnie Beauport Financial Corporation Limited, dont Hartnett est devenu président et administrateur. Immédiatement après l'achat des actions de Langley à leurs anciens propriétaires le 10 décembre, les nouveaux administrateurs de Langley, Hudson, un nommé Teeter et un nommé Joseph, se sont réunis pour régler quatre points à l'ordre du jour de la réunion. Le premier, intitulé «vente des valeurs,» nécessitait une résolution qui autorise Hudson à vendre toutes les valeurs détenues par Langley. La résolution en question était précédée de ces quelques mots:

> The Chairman suggested that in view of certain plans which he had for the Corporation it would be advisable that its investment portfolio be liquidated.

> [TRADUCTION] Le président suggère que pour réaliser certains projets qu'il entretient pour la compagnie, il serait judicieux de réaliser le portefeuille de valeurs.

The second item authorized the purchase from Beauport Holdings of 11,000 shares in the capital of Gibraltar Mines Ltd. for $49,500. The third item involved the purchase from First Montreal of the outstanding shares of a Quebec company, Advertising Associates Limited, for $400,000. The final item authorized Langley's to subscribe for 10,000 shares in the capital of Beauport Financial at a price of $10 per share.

Le deuxième point autorisait l'achat à Beauport Holdings de 11,000 actions du capital de Gibraltar Mines Ltd., au prix de $49,500. Le troisième point portait sur l'achat à La compagnie des Grandes Premières de Montréal des actions en circulation d'une compagnie québécoise, Advertising Associates Limited, pour $400,000. Le dernier point autorisait Langley à souscrire 10,000 actions du capital de Beauport Financial, à $10 l'action.

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Later the same afternoon, at a meeting of the board of directors of Beauport Financial, attended by Hartnett and Teeter, it was explained that when the Corporation was organized it was intended to be a wholly-owned subsidiary of Langley's. A resolution was passed authorizing issuance to Langley's of up to a maximum of 99,997 shares of Beauport Financial at a price of $10 per share. Another resolution was passed authorizing the officers of the corporation to make loans to Beauport Holdings. By the end of the day Langley's had become a subsidiary of Beauport Holdings and Beauport Financial had become a subsidiary of Langley's. Beauport Holdings thus became the top company in the corporate structure.

The money used by Beauport Holdings to take over Langley's, according to Hartnett, came from:

—a deposit of $88,000 into the account of Beauport Holdings,
—a loan of $400,000 from Hudson,
—a loan of $400,000 from First Montreal,
—a loan of $100,000 from Beauport Financial,
—the sale of 11,000 shares of Gibraltar Mines by Beauport Holdings to Langley's for $49,500.

These monies were sufficient to meet the certified cheque for $1,025,000. Additionally, there was the loan from Orenstein.

In response to a demand for particulars the Crown alleged that the $1,190,000 referred to in the charge was made up as follows:

(1) Payment by Langley's Limited to the First Montreal City Corporation on or about December 10, 1971, in the amount of four hundred thousand dollars ($400,000.00);

(2) Payment by Langley's Limited to Beauport Financial Corporation Limited on or about December 10, 1971, in the amount of one hundred thousand dollars ($100,000.00);

(3) Payment by Langley's Limited to Beauport Financial Corporation Limited on or about December 14, 1971, in the amount of two hundred and ninety thousand dollars ($290,000.00);

(4) Payment by Langley's Limited to Beauport Financial Corporation Limited on or about December 27,

Plus tard, le même après-midi, au cours d'une réunion du conseil d'administration de Beauport Financial à laquelle assistaient Hartnett et Teeter, on annonça que la compagnie avait été constituée pour devenir une filiale en propriété exclusive de Langley. Une résolution autorisa l'émission en faveur de Langley d'actions de Beauport Financial, à $10 l'action, jusqu'à concurrence de 99,997 actions. Une autre résolution autorisa les administrateurs de la compagnie à consentir des prêts à Beauport Holdings. A la fin de la journée, Langley était devenue une filiale de Beauport Holdings et Beauport Financial une filiale de Langley. Beauport Holdings était donc devenue la compagnie-mère du groupe.

Voici, selon Hartnett, les sources des fonds utilisés par Beauport Holdings pour prendre le contrôle de Langley:

—le dépôt de $88,000 au compte de Beauport Holdings,
—le prêt de $400,000 de Hudson,
—le prêt de $400,000 de La compagnie des Grandes Premières de Montréal,
—le prêt de $100,000 de Beauport Financial,
—la vente de 11,000 actions de Gibraltar Mines par Beauport Holdings à Langley, pour $49,500.

Ces fonds suffisaient pour permettre la certification du chèque de $1,025,000. En plus, il y avait le prêt consenti par Orenstein.

En réponse à une demande de détails, le ministère public a prétendu que le montant de $1,190,000 mentionné à l'acte d'accusation provenait:

[TRADUCTION] (1) Du paiement par Langley's Limited à La compagnie des Grandes Premières de Montréal, le 10 décembre 1971, ou vers cette date, d'un montant de quatre cent mille dollars ($400,000);

(2) Du paiement par Langley's Limited à Beauport Financial Corporation Limited, le 10 décembre 1971, ou vers cette date, d'un montant de cent mille dollars ($100,000);

(3) Du paiement par Langley's Limited à Beauport Financial Corporation Limited, le 14 décembre 1971, ou vers cette date, d'un montant de deux cent quatre-vingt-dix mille dollars ($290,000);

(4) Du paiement par Langley's Limited à Beauport Financial Corporation Limited, le 27 décembre

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1971, in the amount of four hundred thousand dollars ($400,000.00).

The purchase of the shares of Advertising Associates no longer seems to be regarded by the Crown as being the subject of fraudulent acquisition. The case, therefore, turns on items (2), (3), and (4). Item (2) refers to the share subscription by Langley's for shares in Beauport Financial. Item (3) arose in these circumstances. On December 14, 1971, the sum of $290,000 was paid by Langley's to Beauport Financial and a like sum was paid by Beauport Financial to First Montreal. At trial, it was common ground that the price paid by Langley's for the shares of Advertising Associates had been later reduced to $350,000 from $400,000. Olan, through First Montreal, had earlier purchased the shares of Advertising Associates for $300,000, with a $10,000 deposit. It was the Crown's contention that the $290,000 paid by Langley's to Beauport Financial to First Montreal on December 14 was in payment of the Advertising Associates' shares and that the $400,000 paid by Langley's to First Montreal on December 10, following sale of the Langley's portfolio, and loaned on the same day by First Montreal to Beauport Holdings, was for the purpose of putting Beauport Holdings in funds wherewith to complete the purchase of the Langley's shares and not in payment of the shares of Advertising Associates. Item (4) relates to the repayment out of funds originating in Langley's of the loan of $400,000 by Hudson to Beauport Holdings. As a result of transactions (2), (3) and (4), Beauport Financial received from Langley's the sum of $790,000 which it in turn loaned to Beauport Holdings enabling Beauport Holdings to complete the purchase of Langley's.

The conflict in this case is essentially very narrow. It centres simply on whether there was evidence upon which a jury properly instructed could find beyond reasonable doubt that Langley's suffered deprivation from dishonest action of respondents. To show this narrowness of the dis-

1971, ou vers cette date, d'un montant de quatre cent mille dollars ($400,000).

Il semble que le ministère public ne considère plus l'achat des actions d'Advertising Associates comme une acquisition frauduleuse. L'affaire porte donc sur les par. (2), (3) et (4). Le paragraphe (2) renvoie à la souscription par Langley des actions de Beauport Financial. Le paragraphe (3) se rapporte à l'opération suivante: le 14 décembre 1971, Langley a versé à Beauport Financial un montant de $290,000 et Beauport Financial a remis à La compagnie des Grandes Premières de Montréal le même montant. Au procès, les parties ont admis que le prix payé par Langley pour les actions d'Advertising Associates avait par la suite été réduit de $400,000 à $350,000. Par l'intermédiaire de La compagnie des Grandes Premières de Montréal, Olan s'était préalablement porté acquéreur des actions d'Advertising Associates pour un montant de $300,000, avec $10,000 de dépôt. Le ministère public a soutenu que les $290,000 payés par Langley à Beauport Financial qui les a versés à La compagnie des Grandes Premières de Montréal, le 14 décembre, représentaient le paiement des actions d'Advertising Associates et que les $400,000 payés par Langley à La compagnie des Grandes Premières de Montréal le 10 décembre, après la vente du portefeuille de Langley, et prêtés le même jour par La compagnie des Grandes Premières de Montréal à Beauport Holdings visaient à fournir à cette dernière les fonds nécessaires pour conclure l'achat des actions de Langley et ne se rapportaient pas au paiement des actions d'Advertising Associates. Le paragraphe (4) se rapporte au remboursement à même les fonds de Langley du prêt de $400,000 consenti par Hudson à Beauport Holdings. A la suite des opérations mentionnées aux par. (2), (3) et (4), Beauport Financial a reçu de Langley la somme de $790,000 qu'elle a à son tour prêtée à Beauport Holdings, lui permettant ainsi de conclure l'achat de Langley.

La question litigieuse dans cette affaire est très étroite. Elle est centrée sur le point de savoir si la preuve fournie permettait à un jury ayant reçu les instructions appropriées de conclure, hors de tout doute raisonnable, que les actes malhonnêtes des intimés ont infligé une privation à Langley. Pour

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pute, it is necessary only to quote the argument of the accused respondents. First, the respondent Hartnett:

73. It is respectfully submitted that the Crown failed to prove any deprivation of Langley's. The respondent does not take issue with the appellant's submission that economic loss is not a necessary ingredient in the offence of fraud. It is respectfully submitted, however, that in a case where no economic loss is shown, the Crown must establish other facts to show that the victim of a fraud was dishonestly deprived of something. The evidence adduced in the present case does not establish such deprivation. The appellant says deprivation was shown in two ways. First, it submits that corporate assets were used for personal purposes and were therefore not available for corporate purposes such as other investments or maintaining a stable financial base. It is submitted that in fact, the Crown proved at trial that Langley's portfolio had been turned into other investments and that at the date of those investments, there was no evidence that such investments would fail to provide a stable financial base.

Secondly, the appellant has submitted that deprivation was shown in that the corporate assets were put at risk. The risk taken, according to the appellant arose from the exchange of $1,190,000.00 in liquid assets for $49,500.00 worth of Gibraltar shares, $350,000.00 of Advertising Associates shares and $790,000.00 of shares of Beauport Financial. The evidence shows that the shares of Gibraltar and Advertising Associates were valuable assets. Further, the evidence establishes that the purchase of $790,000.00 worth of shares in Beauport Financial and Beauport Financial's loan of $790,000.00 to Beauport Holdings were proper business transactions and that at the time of the loan from Beauport Financial to Beauport Holdings, Beauport Holdings had substantial assets sufficient to cover the amount of the loan.

Next, the respondent Hudson:

16. Consistent with its application of *Cox and Paton v. The Queen* to the facts of this case the Court of Appeal for Ontario held that the Crown in the case at bar had failed to satisfy the onus on it of showing the dubious nature of the promissory notes given to Beauport Financial, and further held that there was no evidence to go to the jury from which they could conclude that the value of those notes was so tenuous and illusory as to taint the whole transaction with fraud.

17. At the very best, even on the test proposed by the appellant some prejudice or risk of prejudice must be conclusively provided in order to result in a finding of

bien montrer à quel point cette question est étroite, il suffit de citer un extrait de l'argumentation des accusés intimés. Premièrement, l'intimé Hartnett:

[TRADUCTION] 73. Nous soutenons respectueusement que le ministère public n'a pas prouvé que Langley a subi une privation. L'intimé ne conteste pas la prétention de l'appelante selon laquelle une perte pécuniaire ne constitue pas un élément essentiel de l'infraction de fraude. Par contre, nous soutenons respectueusement que dans un cas où il n'y a pas de perte pécuniaire, le ministère public doit établir d'autres faits pour prouver que la victime d'une fraude a été malhonnêtement privée de quelque chose, ce qui n'est pas le cas de la preuve présentée en l'espèce. L'appelante prétend avoir établi la privation de deux manières. Premièrement, elle soutient que l'actif de la compagnie a servi à des fins personnelles et que la compagnie n'en disposait plus pour investir ou simplement maintenir sa stabilité financière. Nous prétendons qu'en fait, la preuve du ministère public révèle que le portefeuille de Langley a servi à d'autres placements et que rien dans la preuve n'indique qu'à l'époque de ces placements, on pouvait dire qu'ils n'assureraient pas la stabilité financière recherchée.

Deuxièmement, l'appelante soutient avoir démontré la privation en prouvant que l'actif de la compagnie a été mis en péril. Selon l'appelante, le risque consiste en l'échange d'un actif liquide de $1,190,000, pour des actions de Gibraltar valant $49,500, des actions d'Advertising Associates valant $350,000 et des actions de Beauport Financial valant $790,000. La preuve révèle que les actions de Gibraltar et d'Advertising Associates étaient des biens de valeur. Elle révèle aussi que l'achat des actions de Beauport Financial pour un montant de $790,000 et le prêt du même montant consenti par cette dernière à Beauport Holdings constituaient des opérations commerciales régulières et qu'à l'époque du prêt de Beauport Financial à Beauport Holdings, l'actif de cette dernière était suffisant pour couvrir le montant du prêt.

Puis l'intimé Hudson:

[TRADUCTION] 16. La Cour d'appel de l'Ontario a appliqué l'arrêt *Cox et Paton c. La Reine* aux faits de l'espèce et a jugé que, dans la présente affaire, le ministère public ne s'était pas acquitté de la charge de prouver le caractère douteux des billets à ordre donnés à Beauport Financial et a en outre estimé qu'il n'y avait aucune preuve à soumettre au jury pour lui permettre de conclure que la valeur de ces billets était infime et illusoire, au point d'entacher toute l'opération de fraude.

17. Au mieux, même selon le critère défini par l'appelante, il faut apporter la preuve d'un préjudice ou d'un risque de préjudice pour conclure à la malhonnêteté.

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dishonesty. When a charge arises in circumstances where all the directors of the corporation are said to have defrauded the corporation there must be proof that the corporation was deprived of something to which it was entitled without having obtained something in return which could be reasonably regarded as *quid pro quo*.

The issues are whether the $790,000 of Langley's' assets used to purchase shares in Beauport Financial were expended in furtherance of the *bona fide* business interests of Langley's, or expended in advancing the personal interests of the accused, and whether Langley's suffered deprivation, in the sense described above, as a result of this action. There can be no doubt that the purchase of the controlling block of Langley's shares could not have been effected without utilization of the Langley's' portfolio. But this is not decisive. Beauport Holdings would appear to have contributed from its own assets the sum of $88,000, plus the shares of Gibraltar Mines worth $49,500. Again, this is not decisive. The question is whether there was evidence that the accused dishonestly deprived Langley's for personal ends. Was the investment of $790,000 by Langley's in its subsidiary, Beauport Financial, with that money to be loaned by Beauport Financial to Beauport Holdings to enable Beauport Holdings to acquire control of Langley's, a legitimate investment for Langley's to make? Did this investment cause detriment, prejudice, or risk of prejudice to Langley's?

The principal asset, indeed almost the only asset, of Beauport Financial was the indebtedness to it of Beauport Holdings. Therefore, the worth of the investment by Langley's in Beauport Financial is determined by the ability of the ultimate recipient of the funds, Beauport Holdings, to repay the moneys loaned. It should be noted that this loan was by way of unsecured demand notes. The issue thus resolves into an examination of the ability of Beauport Holdings to repay on demand the loan of $790,000 made to it by Beauport Financial.

It was not necessary for the Crown to establish that the investment in Beauport Financial was "worthless", to use the term of Cartwright J. in *Cox and Paton*, or of "negligible worth", to use

Dans le cas où l'on accuse tous les administrateurs d'une compagnie de l'avoir fraudée, la preuve doit établir que la compagnie a été privée de quelque chose à quoi elle avait droit sans obtenir quoi que ce soit qui puisse raisonnablement constituer une contrepartie.

Il faut déterminer si le montant de $790,000 provenant de l'actif de Langley et utilisé pour l'achat d'actions de Beauport Financial a été dépensé pour servir les véritables intérêts financiers de Langley ou, au contraire, les intérêts personnels des accusés. Il faut également décider si Langley a subi une privation, au sens indiqué plus haut, à la suite de cette opération commerciale. Il ne fait aucun doute que l'achat d'une participation majoritaire dans Langley ne pouvait se faire sans utiliser le portefeuille de cette dernière. Mais cet argument n'est pas concluant. Il semble que Beauport Holdings ait contribué $88,000, tirés de son propre actif, plus les actions de Gibraltar Mines, valant $49,500. Cela non plus n'est pas concluant. La question est de savoir si la preuve permettait de conclure que les accusés ont malhonnêtement privé Langley à des fins personnelles. Les $790,000 investis par Langley dans sa filiale, Beauport Financial, qui a prêté ces fonds à Beauport Holdings pour permettre à cette dernière de prendre le contrôle de Langley, constituaient-ils, pour Langley, un investissement régulier? Cet investissement a-t-il causé des dommages ou un préjudice à Langley ou y a-t-il eu risque de préjudice?

L'actif principal, en fait le seul avoir de Beauport Financial, était sa créance sur Beauport Holdings. En conséquence, la valeur de l'investissement de Langley dans Beauport Financial dépend de la capacité du dernier bénéficiaire des fonds, Beauport Holdings, de rembourser l'argent prêté. Je souligne que ce prêt avait été consenti contre des billets à demande non garantis. La question revient donc à examiner la capacité de Beauport Holdings de payer à demande le prêt de $790,000 consenti par Beauport Financial.

Le ministère public n'avait pas à prouver que l'investissement dans Beauport Financial n'avait «aucune valeur», pour reprendre les termes du juge Cartwright dans *Cox et Paton*, ou n'avait qu'une

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the words of Freedman J.A. in the same case. I do not think that Cartwright J. intended to lay down the proposition that in order to sustain a charge of fraud, it must be shown that the victim of the fraud was caused to exchange something of worth for something entirely without worth. On the evidence in *Cox and Paton*, it was open to the jury to conclude, in the opinion of Cartwright J., that Fropak Limited had no assets of any value. In that case, the detriment was plain and entire. The question to be determined in each case is rather whether there was deprivation caused in furtherance of personal ends. The Crown contends that the case of *Cox and Paton* and the case at bar are on all fours, that there are minor points of difference, but essentially the cases are symmetrical. In *Cox and Paton*, the victim, Brandon Packers, was caused to buy shares of Fropak, a company revived for the purpose of the transaction, which loaned the funds to the private companies of the accused, enabling those companies to purchase the controlling shares of Brandon Packers. In the case at bar, the alleged victim, Langley's, was caused to buy shares in Beauport Financial, a company incorporated for the purpose of the transaction, which loaned funds to Beauport Holdings, with which at least two of the accused were closely associated, enabling Beauport Holdings to purchase the controlling shares of Langley's. In *Cox and Paton*, it was open to the jury to find that the promissory notes given by the two personal holding companies of the accused to Fropak were of little or no worth. Yet those companies would appear to have ended up with the shares earlier owned by Donaldson and, to that extent, could not be said to be worthless. In the present case, Beauport Holdings ended up with the controlling shares of Langley's. To that extent, there is a further similarity in the two cases.

In *Cox and Paton*, there was evidence that the covenant to repay given by the personal corporations was of little value. In the case at bar, the ability of Beauport Holdings to repay on demand a loan in the amount of $790,000 is the critical issue. Ability to repay is not determined by asset value alone, but rather by an appraisal of the entire financial position of the debtor, including both

«valeur infime», selon l'expression du juge Freedman dans la même affaire en Cour d'appel. Je ne pense pas que le juge Cartwright voulait poser en règle que, pour prouver la fraude, il faut démontrer que la victime a été amenée à échanger un bien de valeur contre un autre sans aucune valeur. Vu la preuve soumise dans *Cox et Paton*, le jury pouvait conclure, selon le juge Cartwright, que Fropak n'avait aucun actif de valeur. Dans ce cas, le préjudice était total et absolu. La question à trancher dans chaque cas est plutôt de savoir si la poursuite d'intérêts personnels a causé une privation. Le ministère public soutient que, sous réserve de différences mineures, *Cox et Paton* et la présente affaire coïncident et qu'elles sont essentiellement semblables. Dans *Cox et Paton*, on a fait acheter à la victime, Brandon Packers, des actions de Fropak, une compagnie réanimée aux fins de l'opération, qui à son tour a prêté l'argent aux compagnies privées des accusés afin de permettre à celles-ci d'acheter une participation majoritaire dans Brandon Packers. En l'espèce, on a fait acheter à Langley, la victime présumée, des actions de Beauport Financial, une compagnie constituée aux fins de l'opération, qui à son tour a prêté l'argent à Beauport Holdings, avec laquelle au moins deux des accusés avaient des liens étroits, afin de permettre à cette dernière d'acheter une participation majoritaire dans Langley. Dans *Cox et Paton*, le jury pouvait conclure que les billets à ordre donnés par les deux compagnies personnelles de gestion des accusés à Fropak avaient peu de valeur, sinon aucune. Il semble toutefois que ces compagnies aient reçu en contrepartie les actions ayant appartenu à Donaldson et, en ce sens, on ne peut dire qu'elles n'avaient pas de valeur. En l'espèce, Beauport Holdings a reçu en contrepartie une participation majoritaire dans Langley. Dans cette mesure, c'est un autre point commun entre les deux affaires.

Dans *Cox et Paton*, la preuve indiquait que l'engagement de remboursement pris par les compagnies personnelles avait peu de valeur. En l'espèce, la capacité de Beauport Holdings de payer à demande un prêt de $790,000 est au cœur du litige. La capacité de rembourser ne dépend pas de la seule valeur de l'actif, mais d'une évaluation de la situation financière globale du débiteur, c'est-à-

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assets and liabilities. As we are here concerned with a demand loan, the relationship between current assets and current liabilities is of particular importance.

The jury had before it, as Exhibit 3, the audited balance sheet of Beauport Holdings as at December 31, 1971 which showed, as at that date, current assets of $16,953 and current liabilities of $1,164,415. The asset side of the balance sheet consisted of (i) the current assets ($16,953); (ii) an investment, being the down-payment on an option to purchase the shares of another company ($250,000); (iii) the investment in Langley's ($1,378,810); (iv) mining claims situated in the Northwest Territories ($250,000); (v) deferred pre-production expenditures ($19,691), and (vi) organization expenses ($4,613). The current liabilities of $1,164,415 included the demand notes payable to Beauport Financial ($793,205) and the Orenstein note payable February 8, 1972 ($250,000). Included also under liabilities were shareholders equity represented by capital stock ($805,648), contingency reserve ($12,500) and deficit ($62,496). According to the financial statement, Beauport Holdings sustained a net operating loss during the nine months ended December 31, 1971 in the amount of $278,020. Current liabilities exceeded current assets by $1,147,462. It was open to the jury faced with this evidence, and with no evidence that the value of the mining claims exceeded book value, to find that the net worth of Beauport Holdings was such that it would have been quite impossible for the company to have repaid on demand the loan of $790,000, or even any substantial part of this amount. It was thus open to the jury to find that the investment of $790,000 in the shares of Beauport Financial was made to the clear detriment of Langley's. It was open to the jury to ask this question—what possible legitimate business reason could have prompted the disposal by Langley's of a portfolio of high quality securities and, in effect, the substitution therefor, as to $790,000, of unsecured demand promissory notes of a company with a working capital deficit of over $1,100,000 and over which company Langley's had no control?

dire l'actif et le passif. Comme il est question d'un billet à demande, le rapport entre les disponibilités et le passif exigible est d'une importance particulière.

Le jury avait devant lui le bilan vérifié de Beauport Holdings, daté du 31 décembre 1971 (pièce 3). A cette date, les disponibilités s'élevaient à $16,953 et le passif exigible à $1,164,415. Au bilan, les montants suivants figurent à l'actif: (i) les disponibilités ($16,953); (ii) un placement, soit un acompte sur une option d'achat des actions d'une autre compagnie ($250,000); (iii) le placement dans Langley ($1,378,810); (iv) des concessions minières dans les Territoires du Nord-Ouest ($250,000); (v) le report de dépenses antérieures à la production ($19,691) et (vi) des dépenses d'organisation ($4,613). Le passif de $1,164,415 comprenait les billets à demande à l'ordre de Beauport Financial ($793,205) et le billet d'Orenstein, exigible le 8 février 1972 ($250,000). Le passif comprenait en outre, au poste de l'avoir des actionnaires, le capital actions ($805,648), une réserve pour éventualités ($12,500) et un déficit ($62,496). D'après les états financiers, Beauport Holdings a accusé durant la période de neuf mois se terminant le 31 décembre 1971 une perte nette d'exploitation de $278,020. Le passif exigible excédait de $1,147,462 les disponibilités. Vu cette preuve et en l'absence de preuve que la valeur des concessions minières excédait leur valeur comptable, le jury pouvait conclure que l'actif net de Beauport Holdings ne lui permettait pas de payer à demande le prêt de $790,000, ni même une partie importante de cette somme. Le jury pouvait donc conclure que le placement de $790,000 dans les actions de Beauport Financial était nettement fait au détriment de Langley. Il pouvait se demander quel motif commercial légitime avait pu inciter Langley à céder son portefeuille de valeurs de grande qualité pour l'échanger, à concurrence de $790,000, contre des billets à demande non garantis d'une compagnie dont le fonds de roulement accusait un déficit supérieur à $1,100,000 et sur laquelle Langley n'exerçait aucun contrôle.

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There is further evidence which bears upon Beauport Holdings' ability to repay. The resolution passed by the Board of Beauport Financial, authorizing loans to Beauport Holdings, and the discussion which preceded it, read as follows:

Loan to Beauport Holdings Limited

The chairman then presented an application of Beauport Holdings Limited for a line of credit and loans from this Corporation. Unaudited financial statements of Beauport Holdings Limited, one immediately before and one immediately after the acquisition of 13,453 shares of common stock of Langley's Limited were presented and examined. It was pointed out that Beauport Holdings Limited now owns approximately 90% of the voting stock of Langley's Limited and Langley's Limited in turn owns all of the issued and outstanding shares of this Corporation. There followed a lengthy discussion particularly as to how Beauport Holdings Limited proposes to repay any loans to it by this Corporation. It was pointed out that the 13,453 common shares of Langley's Limited will be free and clear when Beauport Holdings pays the loan from Charles Orenstein In Trust in full; that a loan from a bank at a lower interest rate is probably feasible with said 13,453 shares as collateral because Langley's Limited owns valuable real property free and clear of any liens and in view of the earning power of Langley's Limited. As an alternative Langley's Limited can declare substantial dividends to its stockholders the proceeds of which can be used by Beauport Holdings Limited to pay its indebtedness to this Corporation. Mr. Hartnett pointed out that he is a director of Beauport Holdings Limited and therefore disqualified himself from voting. Upon motion duly made and seconded, it was unanimously:

RESOLVED that the officers of this Corporation be and they hereby are authorized, from time to time, to make loans in such amounts and on such terms as they deem to be in the best interest of the Corporation to Beauport Holdings Limited.

It was open to the jury to find to be false the statement that the 13,453 common shares of Langley's Limited would be free and clear when Beauport Holdings paid the loan from Charles Orenstein In Trust in full. At the date of the meeting Beauport Holdings was also in debt to Hudson in the amount of $400,000 and in debt to First Montreal City Corporation in the amount of $400,000. Equally, it was open to the jury to find

Il existe d'autres preuves relatives à la capacité de paiement de Beauport Holdings. Voici le texte de la résolution adoptée par le conseil d'administration de Beauport Financial pour autoriser les prêts à Beauport Holdings et la discussion qui l'a précédée:

[TRADUCTION] *Prêt à Beauport Holdings Limited*

Le président expose ensuite une demande de crédit et de prêts que nous présente Beauport Holdings Limited. Des états financiers non vérifiés de Beauport Holdings Limited, l'un précédant immédiatement l'achat de 13,453 actions ordinaires de Langley's Limited et l'autre le suivant immédiatement, sont examinés. On souligne que Beauport Holdings Limited détient maintenant approximativement 90% des actions de Langley's Limited donnant droit de vote et que cette dernière est, en retour, propriétaire de toutes les actions en circulation de cette compagnie-ci. La discussion s'attarde alors sur la façon dont Beauport Holdings Limited entend rembourser le prêt que lui consentirait cette compagnie-ci. On indique que les 13,453 actions ordinaires de Langley's Limited seront libres de toute charge sur remboursement complet par Beauport Holdings du prêt consenti par Charles Orenstein, en fiducie; qu'on peut probablement obtenir un prêt bancaire à un taux d'intérêt plus faible, en donnant les 13,453 actions en garantie, compte tenu de la capacité de gain de Langley's Limited et du fait qu'elle est propriétaire de biens immeubles importants, libres de toute charge. Comme autre possibilité, Langley's Limited peut déclarer des dividendes considérables à ses actionnaires, ce qui permettrait à Beauport Holdings Limited de rembourser le prêt dû à cette compagnie-ci. M. Hartnett, à titre d'administrateur de Beauport Holdings Limited, souligne qu'il doit s'abstenir de voter. Sur une proposition dûment présentée et appuyée, il est unanimement:

RÉSOLU que les administrateurs de la Compagnie sont par les présentes autorisés à consentir, à l'occasion, à Beauport Holdings Limited des prêts dont ils établiront les montants et modalités dans le meilleur intérêt de la Compagnie.

Le jury pouvait conclure qu'il était mensonger de déclarer que les 13,453 actions ordinaires de Langley's Limited seraient libres de toute charge sur remboursement complet par Beauport Holdings du prêt consenti par Charles Orenstein, en fiducie. A l'époque de la réunion, Beauport Holdings était aussi endettée envers Hudson et envers La compagnie des Grandes Premières de Montréal d'un montant de $400,000 respectivement. En outre, le

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in the quoted passage, expressing the views of the participants themselves, cogent evidence of the kind of assets Langley's acquired in substitution for its investment in high quality marketable securities. It would appear that, when the loans were made, the only way in which those controlling Beauport Financial could see Beauport Holdings fulfilling its loan obligation, owed in substance to Langley's, was either in effect (i) by mortgaging the property and business of Langley's itself, or (ii) by Langley's paying the money to itself by declaring a dividend to Beauport Holdings which would then pay Beauport Financial which would then pay Langley's. On this evidence, it seems to me that a jury could find that the loan was other than a stable, secure and *bona fide* investment for Langley's. If Langley's should have encountered financial difficulties, it should have been able to call in the loan immediately for an injection of additional working capital. Before the accused came into the picture, with its portfolio intact, a substantial fund of liquid assets was available to Langley's. The loan to Beauport Holdings could only be realized by Langley's placing its own property at risk, or paying itself money which it clearly would not have in a situation of financial difficulty. In short, in my opinion, it was open to a jury to find that the exchange of the portfolio for the loan was something other than a *quid pro quo*.

I wish to turn now to the judgment of the Court of Appeal for Ontario. That Court was of the view that *Cox and Paton v. The Queen* was distinguishable on a number of grounds. Briefly these were: (i) for its cash assets, Brandon Packers obtained shares whose value was negligible; (ii) implicit in the transaction was the representation that the investment in shares of Fropak was a legitimate *bona fide* investment for Brandon Packers to make; (iii) the two private companies of Cox and of Paton, which obtained the shares of Brandon Packers, gave promissory notes to Fropak to repay Fropak for moneys advanced to the two companies to buy the controlling shares of Brandon Packers from Donaldson; (iv) in *Cox and Paton* it was the Crown's theory at trial that Brandon Packers had made loans to companies controlled by Cox and

jury pouvait trouver dans l'extrait du procès-verbal précité, qui relate les opinions des participants eux-mêmes, une preuve convaincante du genre de biens que Langley a reçu à la place de ses titres de grande valeur marchande. Il ressort que lorsque les prêts ont été consentis, ceux qui dirigeaient Beauport Financial voyaient que Beauport Holdings ne parviendrait à rembourser son emprunt, dont Langley était le principal créancier, que par les moyens suivants (i) hypothéquer les immeubles et l'entreprise de Langley elle-même ou (ii) faire en sorte que Langley se rembourse elle-même en versant un dividende à Beauport Holdings qui rembourserait Beauport Financial qui, à son tour, rembourserait Langley. A mon avis, cette preuve permettait au jury de conclure que le prêt n'était pas un placement solide, sûr et régulier pour Langley. Si Langley avait eu à faire face à des difficultés financières, elle aurait dû être en mesure d'exiger le remboursement immédiat du prêt afin d'augmenter son fonds de roulement. Avant que les accusés n'entrent en scène, alors que son portefeuille était encore intact, Langley disposait d'importantes liquidités. Beauport Holdings ne pouvait effectuer l'emprunt que si Langley mettait en péril ses propres biens ou se payait à elle-même des montants qu'elle n'aurait plus, advenant des difficultés financières. En somme, je suis d'avis que le jury pouvait conclure qu'il y avait une nette disproportion dans l'échange du portefeuille contre le prêt.

J'en viens maintenant à l'arrêt de la Cour d'appel de l'Ontario. Selon cette cour, *Cox et Paton c. La Reine* se distingue de la présente affaire pour plusieurs motifs. En bref, les voici: (i) en échange de son argent comptant, Brandon Packers a reçu des actions dont la valeur était négligeable; (ii) il était implicite dans l'opération que le placement dans les actions de Fropak représentait pour Brandon Packers un investissement régulier et légitime; (iii) les deux compagnies privées de Cox et de Paton, qui ont reçu les actions de Brandon Packers, ont remis à Fropak des billets à ordre afin de rembourser à cette dernière l'argent avancé aux deux compagnies pour acheter à Donaldson une participation majoritaire dans Brandon Packers; (iv) dans *Cox et Paton*, le ministère public a plaidé au procès que Brandon Packers avait consenti des

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Paton which were not only unauthorized, but without any intention that they should be repaid; in the instant case, not only was there abundant evidence of authorization but, also, there was no evidence that the accused did not intend that Beauport Holdings should repay to Beauport Financial the loans which had been made to Beauport Holdings; (v) in *Cox and Paton* the Crown alleged that the accused had caused Brandon Packers to pay $208,750 in alleged management fees for negligible services.

Point (i) refers to value, as to which I will have more to say in a moment. With respect, point (ii) is not distinguishing, as implicit in the case at bar is the representation that the investment by Langley's in Beauport Financial and the loan by Beauport Financial to Beauport Holdings of the moneys so invested was a legitimate *bona fide* investment for Langley's to make. In the minute book itself, appears the statement that this investment would be advisable "in view of certain plans which he [the Chairman—Hudson] had for the Corporation". But that is all that appears. The evidence is silent as to justification. Why was it a legitimate *bona fide* investment? What was the reason for liquidating Langley's portfolio? In my opinion, it was proper for the judge at trial to leave it to the jury to decide whether the respondents honestly believed that the disposal of the portfolio and re-investment of the proceeds was in the best interests of Langley's. Point (iii), in my opinion, does not raise any distinguishing feature. In the instant case, Beauport Holdings (of which Hudson and Hartnett were President and Vice-President, respectively), gave promissory notes to Beauport Financial (Fropak in the *Cox and Paton* case) to "repay" (the word used by the Court of Appeal for Ontario) Beauport Financial for moneys advanced to Beauport Holdings to buy the controlling shares of Langley's. Point (iv) raises the question of intention to repay. In *Cox and Paton*, this Court did not find it necessary to deal with the point. In any event, an intention to repay has never been of avail in the past in negating fraud if the conduct of the accused is otherwise shown to involve dishonest deprivation for personal ends. An intention to repay might, at most, be relevant at sentencing. Point (v) also, in my view, fails to distinguish. It

prêts aux compagnies contrôlées par Cox et Paton sans autorisation et sans la moindre intention qu'ils soient remboursés alors qu'en l'espèce, non seulement l'autorisation a été prouvée, mais rien dans la preuve n'indique que les accusés n'entendaient pas faire rembourser à Beauport Holdings les prêts consentis par Beauport Financial; (v) dans *Cox et Paton*, le ministère public a soutenu que les accusés avaient fait payer à Brandon Packers $208,750 en honoraires de gestion pour des services négligeables.

Le motif (i) a trait à la valeur et j'en discuterai plus loin. Avec égards, le point (ii) ne peut servir d'élément de distinction, car il est implicite en l'espèce que l'investissement de Langley dans Beauport Financial, suivi du prêt de ces fonds par cette dernière à Beauport Holdings, représentait pour Langley un placement régulier et légitime. Dans le procès-verbal même, il est déclaré qu'il s'agit d'un placement judicieux [TRADUCTION] «pour réaliser certains projets qu'il [le président—Hudson] entretient pour la compagnie». Le procès-verbal n'en dit pas plus. La preuve n'en révèle pas la raison. Pourquoi s'agissait-il d'un placement régulier et légitime? Pour quelle raison réaliser le portefeuille de Langley? A mon avis, le juge de première instance a eu raison de laisser au jury le soin de décider si les intimés croyaient sincèrement que la liquidation du portefeuille, dont le produit était réinvesti, était conforme aux meilleurs intérêts de Langley. Le point (iii) ne peut, à mon avis, servir d'élément de distinction. En l'espèce, Beauport Holdings (dont Hudson et Hartnett étaient respectivement président et vice-président) a remis à Beauport Financial (Fropak dans l'affaire *Cox et Paton*) des billets à ordre pour «rembourser» (le terme employé par la Cour d'appel de l'Ontario) à Beauport Financial l'argent prêté par Beauport Holdings pour acheter une participation majoritaire dans Langley. Le motif (iv) soulève la question de l'intention de rembourser. Dans *Cox et Paton*, cette Cour n'a pas jugé nécessaire d'analyser cet élément. Quoi qu'il en soit, l'intention de rembourser n'a jamais permis d'excuser une fraude si la preuve révèle que la conduite de l'accusé a donné lieu à un détournement malhonnête à des fins personnelles. Au mieux, l'intention de rembourser serait retenue pour mitiger la sentence. Le

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may have been an aggravating feature in *Cox and Paton*, but as noted in the judgment of the Court of Appeal for Ontario in the case at bar, the Court of Appeal in the *Cox and Paton* case did not find it necessary to pass upon the question of whether the evidence was sufficient to justify the theory of the Crown in respect of the management fees.

After discussing the points which, in his opinion, distinguished this case from *Cox and Paton*, Mr. Justice Arnup, writing for the Court, accurately stated the question to be answered by that Court, as follows:

> . . . was there evidence of an intention by the appellants to cheat Langley's, and to transfer for fraudulent purposes the liquid investment portfolio of Langley's for the benefit of the appellants?

To answer that question, the Court of Appeal considered it necessary to make some examination, as I have attempted to do, of the financial position of Beauport Holdings. In doing so, the Court first rejected the proposition advanced by counsel for Hudson, that having regard to the financial statement of Beauport Holdings before the transaction took place, it was in a position to purchase, for the price which was paid, the shares of Langley's. The Court then conceded that "undoubtedly the investment, indirect as it was, in Beauport Holdings was much more speculative than the shares sold out of the investment portfolio of Langley's". If that is so, it would seem to me to go some considerable distance in supporting the contentions of the Crown that it was proper to leave the case to the jury. Where there was this sort of evidence and no evidence in justification, the question of whether the exchange of a secure investment for one "much more speculative", constituted detriment in the circumstances was one for the jury alone to answer.

The Ontario Court of Appeal made three findings: (i) in no way could it be said that the assets of Beauport Holdings were worthless, or even of negligible value; (ii) its assets were of substantial value; (iii) there was no evidence fit to go to the jury that the value of the asset was so tenuous and illusory as to taint the whole transaction with fraud. In my opinion, with great respect, the Court

point (v) ne peut plus servir à établir une distinction. Il pouvait s'agir d'une circonstance aggravante dans *Cox et Paton* mais, comme l'a souligné la Cour d'appel de l'Ontario en l'espèce, la Cour d'appel dans cette dernière affaire n'a pas jugé nécessaire de déterminer si la preuve était suffisante pour justifier la thèse du ministère public relativement aux honoraires de gestion.

Après une analyse des motifs qui, à son avis, permettaient de distinguer la présente affaire de *Cox et Paton*, le juge Arnup, qui a écrit au nom de la Cour, a bien posé la question à laquelle elle devait répondre:

> [TRADUCTION] . . . la preuve révèle-t-elle que les appelants avaient l'intention de tromper Langley et de transférer à des fins frauduleuses et à leur bénéfice le portefeuille de valeurs disponibles de Langley?

Pour répondre à cette question, la Cour d'appel a jugé nécessaire d'examiner, comme j'ai tenté de le faire, la situation financière de Beauport Holdings. Ce faisant, elle a d'abord rejeté la prétention de l'avocat de Hudson selon laquelle, compte tenu des états financiers de Beauport Holdings avant l'opération, cette dernière avait les moyens d'acheter, au prix payé, les actions de Langley. La Cour a ensuite concédé que [TRADUCTION] «il ne fait pas de doute que le placement, même indirect, dans Beauport Holdings était de nature beaucoup plus spéculative que ne l'étaient les actions du portefeuille de valeurs de Langley qui ont été vendues». Si c'est le cas, il me semble que cela vient appuyer les prétentions du ministère public selon lesquelles il appartenait au jury de trancher la question. Etant donné le genre de preuve soumise et vu l'absence de preuve justificative, il appartenait au jury seul de décider si l'échange de valeurs sûres pour des valeurs de nature «beaucoup plus spéculative» a causé un préjudice dans les circonstances.

La Cour d'appel de l'Ontario a conclu en trois points: (i) on ne peut dire en aucune façon que l'actif de Beauport Holdings était sans valeur ou de valeur négligeable; (ii) son actif avait une valeur considérable; (iii) il n'y avait pas de preuve à soumettre au jury qui lui aurait permis de conclure que la valeur de l'actif était infime et illusoire, au point de donner à toute l'opération un

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of Appeal erred in these findings. First, it erred in law in applying a test of "worthless" or "negligible". The proper question was whether there was detriment or prejudice to Langley's. Second, it erred in its assessment of the asset position of Beauport Holdings which, apart from the Langley's shares, consisted of a $250,000 deposit, committed to another project, and some mining claims. None of those assets could be regarded as a current asset readily available for payment of a demand loan. Third, it erred in ignoring the liability position of Beauport Holdings and, in particular, the current liabilities which exceeded $1,160,000. In assessing ability to pay, the liabilities of the debtor are of equal or perhaps greater importance than the assets.

In my opinion, in answer to the question of law referred to this Court, the Court of Appeal for Ontario erred in holding that there was no evidence of fraud to go to the jury and in its consideration of the applicability and scope of the principles of law in *Cox and Paton* v. *The Queen* as they related to each accused. In my view, there was evidence to be left to the jury as to each of the accused.

Although not raised in any of the factums, an oral argument was advanced to the effect that this Court lacked jurisdiction to hear the present appeal because, as I understand the argument, we were concerned only with sufficiency of evidence and sufficiency of evidence raises only a question of fact, not appealable to this Court. In my view, the Court has jurisdiction. The question is not one of sufficiency of evidence but whether there is any evidence to go to the jury. This is a question of law: see *R. v. McKay*[9]. In the present case, the judgment of the Ontario Court of Appeal reads in part:

As I have indicated, it is our conclusion that at the end of the Crown's case the trial Judge ought to have ruled that there was no evidence to go to the jury on

[9] [1954] S.C.R. 3.

caractère frauduleux. Avec égards, j'estime que ces conclusions sont erronées. Premièrement, la Cour d'appel a commis une erreur de droit en appliquant le critère de «l'absence de valeur» ou de «la valeur négligeable». La bonne question est de se demander si Langley a subi un préjudice ou un dommage. Deuxièmement, elle a commis une erreur dans son évaluation de l'actif de Beauport Holdings qui, à part les actions de Langley, comprenait seulement un dépôt de $250,000, engagé dans un autre projet, et quelques concessions minières. On ne peut considérer aucun de ces éléments d'actif comme un actif disponible et réalisable à court terme pour payer un prêt à demande. Troisièmement, elle a commis une erreur en n'accordant pas d'importance au passif de Beauport Holdings et, en particulier, à son passif exigible à court terme qui excédait $1,160,000. Pour évaluer la capacité de payer, l'ensemble des dettes du débiteur est tout aussi important, sinon plus, que l'actif.

En réponse à la question de droit soumise à cette Cour, j'estime donc que la Cour d'appel de l'Ontario a commis une erreur en décidant qu'il n'y avait aucune preuve de fraude à soumettre au jury et en examinant, relativement à chaque accusé, l'applicabilité et la portée des principes de droit énoncés dans l'arrêt *Cox et Paton c. La Reine*. Au contraire, à mon avis, il y avait des éléments de preuve à soumettre au jury relativement à chaque accusé.

Bien que ce moyen n'ait pas été soulevé dans les factums, on a plaidé que cette Cour n'était pas compétente pour entendre le présent pourvoi parce que la question posée ne porte que sur la suffisance de la preuve et qu'il s'agit là d'une question de fait qui ne peut faire l'objet d'un pourvoi. A mon avis, la Cour est compétente. Il ne s'agit pas de déterminer si la preuve est suffisante mais de savoir s'il existe une preuve à soumettre au jury. C'est une question de droit: voir *R. c. McKay*[9]. En l'espèce, le jugement de la Cour d'appel de l'Ontario déclare:

[TRADUCTION] Comme je l'ai indiqué, nous concluons que lorsque le ministère public a déclaré sa preuve close, le juge de première instance aurait dû

[9] [1954] R.C.S. 3.

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Count 1, and should have directed the jury that they were to bring in a verdict of not guilty on all three counts of the indictment and not merely counts 2 and 3.

Additionally, it is the duty of this Court to give the judgment which the Court below should have given.

I would accordingly allow the appeal, set aside the judgment of the Court of Appeal and direct a new trial. Apart from the issue here under consideration, the Court of Appeal found errors in the trial judge's charge to the jury warranting a new trial. Leave to appeal to this Court was limited to the one issue set forth earlier in these reasons. The other issues which, in the opinion of the Court of Appeal, warranted a new trial, were not canvassed before this Court.

Appeal allowed, new trial directed.

Solicitor for the appellant: F. W. Callaghan, Toronto.

Solicitor for the respondent Olan: David D. K. Rose, Toronto.

Solicitors for the respondent Hudson: McCarthy & McCarthy, Toronto.

Solicitors for the respondent Hartnett: Tory, Tory, Toronto.

décider qu'il n'y avait aucune preuve à soumettre au jury sur le premier chef, et imposer au jury un verdict d'acquittement sur les trois chefs de l'acte d'accusation et pas seulement sur les chefs 2 et 3.

En outre, cette Cour a le devoir de rendre le jugement que la cour d'instance inférieure aurait dû rendre.

Je suis donc d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel et d'ordonner un nouveau procès. Indépendamment de la question en litige en l'espèce, la Cour d'appel a conclu que l'exposé du juge de première instance contenait des erreurs justifiant un nouveau procès. L'autorisation de se pourvoir devant cette Cour a été restreinte à la seule question énoncée au début des présents motifs. Les autres motifs qui, de l'avis de la Cour d'appel, justifiaient un nouveau procès n'y ont pas été débattus.

Pourvoi accueilli, nouveau procès ordonné.

Procureur de l'appelante: F. W. Callaghan, Toronto.

Procureur de l'intimé Olan: David D. K. Rose, Toronto.

Procureurs de l'intimé Hudson: McCarthy & McCarthy, Toronto.

Procureurs de l'intimé Hartnett: Tory, Tory, Toronto.

TAB 60

Robert Théroux *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: R. *v.* THÉROUX

File No.: 22249.

1992: November 3; 1993: April 8.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Fraud — Elements of offence — Mens rea — Accused directing mind of company involved in residential construction — Deposits taken from potential purchasers on false representation that deposits were insured — Project not completed following company's insolvency — Accused honestly believing that project would be completed and deposits not lost — Whether accused guilty of fraud — Criminal Code, R.S.C., 1985, c. C-46, s. 380(1).

The accused, the directing mind of a company involved in residential construction, was charged with fraud. The company entered into agreements with a number of individuals for the purchase of residences. The contracts were made and the deposits taken on the basis of a false representation by the company that the deposits were insured. The representation was made orally and backed up by a certificate of participation in the insurance program. In addition, a brochure describing the program was distributed to most of the depositors. In fact, the company never paid the premiums due on a first application for participation in the insurance program and a second application was never completed. The company became insolvent, the project was not completed and most of the depositors lost their money. The trial judge found that the accused, as directing mind of the company, was responsible for the misrepresentations. The accused knew at the time that the deposits were not guaranteed but nevertheless made misrepresentations to induce potential home purchasers to sign a contract and give a deposit. The trial judge also found that the accused sincerely believed that the residential project would be completed and hence that the deposits

Robert Théroux *Appelant*

c.

Sa Majesté la Reine *Intimée*

RÉPERTORIÉ: R. *c.* THÉROUX

N° du greffe: 22249.

1992: 3 novembre; 1993: 8 avril.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Fraude — Éléments de l'infraction — Mens rea — L'accusé était l'âme dirigeante d'une compagnie engagée dans la construction domiciliaire — Perception de dépôts auprès d'acheteurs éventuels sur la foi de fausses déclarations selon lesquelles les dépôts étaient garantis — Projet non mené à terme en raison de l'insolvabilité de la compagnie — Accusé croyant sincèrement que le projet serait mené à terme et que les dépôts ne seraient pas perdus — L'accusé est-il coupable de fraude? — Code criminel, L.R.C. (1985), ch. C-46, art. 380(1).

L'accusé, qui était l'âme dirigeante d'une compagnie engagée dans la construction domiciliaire, a été inculpé de fraude. La compagnie a conclu des contrats de vente de résidences avec un certain nombre de personnes. Les contrats ont été conclus et les dépôts perçus sur la foi d'une fausse déclaration de la compagnie selon laquelle les dépôts étaient garantis. Cette déclaration, faite verbalement, était appuyée par une attestation de participation au plan de garantie. En outre, une brochure décrivant ce plan était remise à la plupart des déposants. En réalité, la compagnie n'a jamais payé les primes dues à la suite d'une première demande de participation au plan de garantie et une deuxième demande n'a jamais été remplie. La compagnie est devenue insolvable, le projet n'a pas été mené à terme et la plupart des déposants ont perdu leur dépôt. Le juge du procès a conclu que l'accusé, à titre d'âme dirigeante de la compagnie, était responsable des fausses déclarations. L'accusé savait à l'époque que les dépôts n'étaient pas garantis, mais il a tout de même fait ces fausses déclarations en vue d'amener les acheteurs de maison éventuels à conclure un contrat et à verser un dépôt. Le juge du procès a également conclu que l'accusé croyait sincèrement que le

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would not be lost. The accused was convicted of fraud pursuant to s. 380(1)(*a*) of the *Criminal Code* and the Court of Appeal upheld the conviction. The issue in this appeal is whether the fact that the accused honestly believed that the project would be completed negates the *mens rea* of the offence of fraud.

Held: The appeal should be dismissed.

Per La Forest, Gonthier, Cory and McLachlin JJ.: The *actus reus* of fraud is established by proof of a prohibited act, be it an act of deceit, falsehood or other fraudulent means, and by proof of deprivation caused by the prohibited act (which may consist in actual loss or the placing of the victim's pecuniary interests at risk). Just as what constitutes a falsehood or a deceitful act for the purpose of the *actus reus* is judged on the objective facts, the *actus reus* of fraud by "other fraudulent means" is determined objectively, by reference to what a reasonable person would consider to be a dishonest act. Correspondingly, the *mens rea* of fraud is established by proof of subjective knowledge of the prohibited act, and by proof of subjective knowledge that the performance of the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk). In certain cases, the subjective knowledge of the risk of deprivation may be inferred from the act itself, barring some explanation casting doubt on such inference. Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the deprivation or was reckless as to whether it would occur. The accused's belief that the conduct is not wrong or that no one will in the end be hurt affords no defence to a charge of fraud. While the scope of the offence may encompass a broad range of dishonest commercial dealings, the proposed definition of *mens rea* will not catch conduct which does not warrant criminalization. Only the deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk will constitute fraud. The requirement of intentional fraudulent action excludes mere negligent misrepresentation, or sharp business practice.

In this case, it is clear from the trial judge's findings that the offence of fraud is made out. The *actus reus* is established: the accused committed deliberate falsehood projet de construction domiciliaire serait réalisé et, par conséquent, que les dépôts ne seraient pas perdus. L'accusé a été déclaré coupable de fraude conformément à l'al. 380(1)*a*) du *Code criminel* et la Cour d'appel a maintenu cette déclaration de culpabilité. Il s'agit en l'espèce de déterminer si le fait que l'accusé croyait honnêtement que le projet serait réalisé efface la *mens rea* de l'infraction de fraude.

Arrêt: Le pourvoi est rejeté.

Les juges La Forest, Gonthier, Cory et McLachlin: L'*actus reus* de l'infraction de fraude sera établi par la preuve d'un acte prohibé, qu'il s'agisse d'une supercherie, d'un mensonge ou d'un autre moyen dolosif, et par la preuve de la privation causée par l'acte prohibé (qui peut consister en une perte véritable ou dans le fait de mettre en péril les intérêts pécuniaires de la victime). Tout comme ce qui constitue un mensonge ou une supercherie pour les fins de l'*actus reus* est déterminé en fonction des faits objectifs, l'*actus reus* de la fraude par un «autre moyen dolosif» est déterminé objectivement, selon ce qu'une personne raisonnable considérerait comme un acte malhonnête. De même, la *mens rea* de la fraude est établie par la preuve de la connaissance subjective de l'acte prohibé et par la preuve de la connaissance subjective que l'accomplissement de l'acte prohibé pourrait causer une privation à autrui (laquelle privation peut consister en la connaissance que les intérêts pécuniaires de la victime sont mis en péril). Dans certains cas, la connaissance subjective du risque de privation peut être déduite de l'acte lui-même, sous réserve de quelque explication qui vient mettre en doute cette déduction. Si la conduite et la connaissance requises par ces définitions sont établies, l'accusé est coupable peu importe qu'il ait effectivement souhaité la privation ou qu'il lui était indifférent qu'elle survienne ou non. La conviction de l'accusé que sa conduite n'est pas mauvaise ou que personne ne sera lésé en fin de compte ne constitue pas un moyen de défense opposable à une accusation de fraude. Si l'infraction de fraude peut viser une large gamme d'activités commerciales malhonnêtes, la définition proposée de la *mens rea* ne visera pas une conduite ne justifiant pas la criminalisation. Seuls les actes frauduleux accomplis délibérément qui, à la connaissance de l'accusé, mettent vraiment en péril le bien d'autrui, constituent une fraude. L'exigence d'un acte frauduleux intentionnel exclut la simple déclaration inexacte faite par négligence ou la pratique commerciale déloyale.

En l'espèce, il ressort nettement des conclusions du juge du procès qu'il y a eu fraude. L'*actus reus* est établi: l'accusé a menti délibérément et ses mensonges ont

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hoods which caused or gave rise to deprivation. First, the depositors did not get the insurance protection they were told they would get and, second, the money they gave to the accused's company was put at risk, a risk which in most cases materialized. The *mens rea* too is established: the accused told the depositors that they had insurance protection when he knew this to be false. By this act he was knowingly depriving the depositors of something they thought they had, namely insurance protection. It may also be inferred from his knowledge that insurance protection was not in place that the accused knew that he was subjecting the depositors' money to risk. The fact that he sincerely believed that the houses would be built, and that the deposits would not be lost, was no defence to the crime.

Per Lamer C.J. and Sopinka J.: Subject to the following reservations, McLachlin J.'s analysis of the law of fraud was generally agreed with. First, while the accused's belief that an act is honest will not avail if it is objectively dishonest as determined by reasonable persons, it is critical to distinguish this from the accused's belief in facts that, if true, would deprive the act of its dishonest character. Secondly, *mens rea* is not typically concerned with the consequences of the prohibited *actus reus*. The *actus reus* often includes the consequences, and, frequently, more serious offences are distinguished from less serious offences by the consequences without any additional mental element. Thirdly, the general proposition that "[r]ecklessness presupposes knowledge of the likelihood of the prohibited consequences" is applicable in the case of fraud but not necessarily for other offences.

In this case, the trial judge's finding that the accused deliberately lied to his customers determines both the *actus reus* and *mens rea* of deceit. If the sole issue were whether the accused's conduct created a risk that the depositors might be deprived of their deposits by reason of the non-completion of the project, the appeal should be allowed. Where the risk of deprivation is dependent on some future event not happening but the accused honestly believes that the future event will happen and there will be no deprivation, a trial judge who accepts this evidence should acquit. Here, the trial judge found there was no insurance in place, however, and therefore even if the project were eventually completed, there would have been a deprivation or risk thereof during the uninsured period. The trial judge, having made all the findings of fact which constitute a deprivation, ought to have found that this element had been made out. Failure

causé une privation. Premièrement, les déposants n'ont pas obtenu la garantie qui leur était promise et, deuxièmement, l'argent qu'ils ont versé à la compagnie de l'accusé a été exposé à un risque qui, dans la plupart des cas, s'est concrétisé. La *mens rea* est également établie: l'accusé a dit aux déposants qu'ils bénéficiaient d'une garantie alors qu'il savait que c'était faux. Par ce geste, il a privé sciemment les déposants d'une chose dont ils croyaient bénéficier, soit une garantie. On peut également déduire de sa connaissance de l'absence de garantie que l'accusé savait qu'il exposait à un risque l'argent des déposants. Le fait qu'il croyait sincèrement que les résidences seraient construites et que les dépôts ne seraient pas perdus ne constituait pas un moyen de défense opposable au crime commis.

Le juge en chef Lamer et le juge Sopinka: L'analyse que le juge McLachlin fait du droit de la fraude est acceptée de manière générale, à l'exception des réserves suivantes. Premièrement, même si la conviction de l'accusé qu'un acte est honnête ne sera guère utile si cet acte est, aux yeux d'une personne raisonnable, objectivement malhonnête, il est essentiel d'établir une distinction entre une telle conviction et celle de l'accusé à l'égard de faits qui, s'ils étaient avérés, dépouilleraient l'acte de son caractère malhonnête. Deuxièmement, la *mens rea* ne porte pas habituellement sur les conséquences de l'*actus reus* prohibé. Il arrive fréquemment que l'*actus reus* inclue les conséquences et que des infractions plus graves se distinguent d'infractions moins graves par leurs conséquences indépendamment de tout élément moral additionnel. Troisièmement, la proposition générale selon laquelle «[l]'insouciance présuppose la connaissance de la vraisemblance des conséquences prohibées» s'applique au cas de fraude, mais non nécessairement à d'autres infractions.

En l'espèce, la conclusion du juge du procès que l'accusé a délibérément menti à ses clients détermine à la fois l'*actus reus* et la *mens rea* de la supercherie. S'il s'était agi uniquement de déterminer si la conduite de l'accusé créait un risque que les déposants se voient privés de leurs dépôts en raison de la non-réalisation du projet, il y aurait lieu d'accueillir le pourvoi. Si le risque de privation dépend de la non-réalisation d'un événement ultérieur, mais que l'accusé croit honnêtement que cet événement se produira et qu'il n'y aura aucune privation, le juge du procès qui accepte cette preuve doit prononcer un verdict d'acquittement. En l'espèce, toutefois, le juge du procès a conclu qu'aucune garantie n'existait et que, par conséquent, même si le projet avait été éventuellement mené à terme, il y aurait eu privation ou risque de privation au cours de la période pendant laquelle aucune garantie n'existait. Après avoir tiré

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to make such a determination would be an error of law and would entitle this Court to affirm the conviction and dispose of the case on this basis.

Per L'Heureux-Dubé J.: Subject to the second and third reservations expressed by Sopinka J., the reasons of McLachlin J. were generally agreed with.

Cases Cited

By McLachlin J.

Not followed: *R. v. Landy*, [1981] 1 All E.R. 1172; *R. v. Ghosh*, [1982] 2 All E.R. 689; **approved:** *R. v. Long* (1990), 61 C.C.C. (3d) 156; **disapproved:** *R. v. Bobbie* (1988), 43 C.C.C. (3d) 187; *Lacroix v. La Reine*, [1989] R.J.Q. 812; *R. v. Daigle* (1987), 9 Q.A.C. 140; *R. v. Sebe* (1987), 35 C.C.C. (3d) 97; *R. v. Mugford* (1990), 58 C.C.C. (3d) 172; **referred to:** *R. v. Olan*, [1978] 2 S.C.R. 1175; *R. v. Doren* (1982), 36 O.R. (2d) 114; *R. v. Kirkwood* (1983), 42 O.R. (2d) 65; *R. v. Black and Whiteside* (1983), 5 C.C.C. (3d) 313; *R. v. Shaw* (1983), 4 C.C.C. (3d) 348; *R. v. Wagman* (1981), 60 C.C.C. (2d) 23; *R. v. Rosen* (1979), 55 C.C.C. (2d) 342; *R. v. Côté and Vézina (No. 2)* (1982), 3 C.C.C. (3d) 557; *R. v. Hansen* (1983), 25 Alta. L.R. (2d) 193; *R. v. Geddes* (1979), 52 C.C.C. (2d) 230; *R. v. Currie*; *R. v. Bruce* (1984), 5 O.A.C. 280; *Welham v. Director of Public Prosecutions*, [1961] A.C. 103; *R. v. Melnyk* (1947), 90 C.C.C. 257; *R. v. Rodrigue, Ares and Nantel* (1973), 17 C.C.C. (2d) 252; *R. v. Allsop* (1976), 64 Cr. App. R. 29; *R. v. Huggett* (1978), 42 C.C.C. (2d) 198; *Lafrance v. The Queen*, [1975] 2 S.C.R. 201; *R. v. Lemire*, [1965] S.C.R. 174.

By Sopinka J.

Referred to: *R. v. Zlatic*, [1993] 2 S.C.R. 29; *R. v. DeSousa*, [1992] 2 S.C.R. 944.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1927, c. 36, s. 444 [rep. & sub. 1948, c. 39, s. 13].
Criminal Code, R.S.C. 1970, c. C-34, s. 338(1) [rep. & sub. 1974-75-76, c. 93, s. 32; 1985, c. 19, s. 55].
Criminal Code, R.S.C., 1985, c. C-46, s. 380(1) [rep. & sub. c. 27 (1st Supp.), s. 54].
Theft Act, 1968 (U.K.), 1968, c. 60, ss. 1, 15(1).

toutes les conclusions de fait qui constituent une privation, le juge du procès aurait dû conclure que cet élément avait été établi. L'omission de tirer cette conclusion constituerait une erreur de droit et habiliterait notre Cour à confirmer la déclaration de culpabilité et à trancher l'affaire en conséquence.

Le juge L'Heureux-Dubé: Les motifs du juge McLachlin sont acceptés d'une manière générale, à l'exception des deuxième et troisième réserves exprimées par le juge Sopinka.

Jurisprudence

Citée par le juge McLachlin

Arrêts non suivis: *R. c. Landy*, [1981] 1 All E.R. 1172; *R. c. Ghosh*, [1982] 2 All E.R. 689; **arrêt approuvé:** *R. c. Long* (1990), 61 C.C.C. (3d) 156; **arrêts critiqués:** *R. c. Bobbie* (1988), 43 C.C.C. (3d) 187; *Lacroix c. La Reine*, [1989] R.J.Q. 812; *R. c. Daigle* (1987), 9 Q.A.C. 140; *R. c. Sebe* (1987), 35 C.C.C. (3d) 97; *R. c. Mugford* (1990), 58 C.C.C. (3d) 172; **arrêts mentionnés:** *R. c. Olan*, [1978] 2 R.C.S. 1175; *R. c. Doren* (1982), 36 O.R. (2d) 114; *R. c. Kirkwood* (1983), 42 O.R. (2d) 65; *R. c. Black and Whiteside* (1983), 5 C.C.C. (3d) 313; *R. c. Shaw* (1983), 4 C.C.C. (3d) 348; *R. c. Wagman* (1981), 60 C.C.C. (2d) 23; *R. c. Rosen* (1979), 55 C.C.C. (2d) 342; *R. c. Côté and Vézina (No. 2)* (1982), 3 C.C.C. (3d) 557; *R. c. Hansen* (1983), 25 Alta. L.R. (2d) 193; *R. c. Geddes* (1979), 52 C.C.C. (2d) 230; *R. c. Currie*; *R. c. Bruce* (1984), 5 O.A.C. 280; *Welham c. Director of Public Prosecutions*, [1961] A.C. 103; *R. c. Melnyk* (1947), 90 C.C.C. 257; *R. c. Rodrigue, Ares and Nantel* (1973), 17 C.C.C. (2d) 252; *R. c. Allsop* (1976), 64 Cr. App. R. 29; *R. c. Huggett* (1978), 42 C.C.C. (2d) 198; *Lafrance c. La Reine*, [1975] 2 R.C.S. 201; *R. c. Lemire*, [1965] R.C.S. 174.

Citée par le juge Sopinka

Arrêts mentionnés: *R. c. Zlatic*, [1993] 2 R.C.S. 29; *R. c. DeSousa*, [1992] 2 R.C.S. 944.

Lois et règlements cités

Code criminel, L.R.C. (1985), ch. C-46, art. 380(1) [abr. & rempl. ch. 27 (1er suppl.), art. 54].
Code criminel, S.R.C. 1927, ch. 36, art. 444 [abr. & rempl. 1948, ch. 39, art. 13].
Code criminel, S.R.C. 1970, ch. C-34, art. 338(1) [abr. & rempl. 1974-75-76, ch. 93, art. 32; 1985, ch. 19, art. 55].
Theft Act, 1968 (R.-U.), 1968, ch. 60, art. 1, 15(1).

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Authors Cited

Ewart, J. Douglas. *Criminal Fraud.* Toronto: Carswell, 1986.

Williams, Glanville. *Textbook of Criminal Law*, 2nd ed. London: Stevens & Sons, 1983.

APPEAL from a judgment of the Quebec Court of Appeal, [1991] R.J.Q. 79, 61 C.C.C. (3d) 525, dismissing the accused's appeal from his conviction for fraud. Appeal dismissed.

Jean-Claude Hébert and *Eric Downs*, for the appellant.

Marcel Patenaude and *Léopold Goulet*, for the respondent.

The reasons of Lamer C.J. and Sopinka J. were delivered by

SOPINKA J. —I have had the benefit of reading the reasons for judgment of McLachlin J. herein and I agree with much of her analysis and the conclusion she reaches. With respect to the meaning to be ascribed to "other fraudulent means" in s. 380(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, I agree that the objective dishonesty test should be applied rather than the subjective approach adopted in the English cases. Although this issue does not arise in this case, it is crucial to the decision in *R. v. Zlatic*, [1993] 2 S.C.R. 29, which is released herewith. There are several issues in my colleague's analysis of the law of fraud with which I have difficulty, and since I will elaborate on them in *Zlatic* I will content myself with simply mentioning them here.

First, while I agree that the accused's belief that an act is honest will not avail if it is objectively dishonest as determined by reasonable persons, it is critical to distinguish this from the accused's belief in facts that, if true, would deprive the act of its dishonest character. Secondly, I cannot agree with the statement that "[t]ypically, *mens rea* is concerned with the consequences of the prohibited *actus reus*." The *actus reus* often includes the consequences, and, frequently, more serious offences are distinguished from less serious offences by the

Doctrine citée

Ewart, J. Douglas. *Criminal Fraud.* Toronto: Carswell, 1986.

Williams, Glanville. *Textbook of Criminal Law*, 2nd ed. London: Stevens & Sons, 1983.

POURVOI contre un arrêt de la Cour d'appel du Québec, [1991] R.J.Q. 79, 61 C.C.C. (3d) 525, qui a rejeté l'appel interjeté par l'accusé contre sa déclaration de culpabilité de fraude. Pourvoi rejeté.

Jean-Claude Hébert et *Eric Downs*, pour l'appelant.

Marcel Patenaude et *Léopold Goulet*, pour l'intimée.

Version française des motifs du juge en chef Lamer et du juge Sopinka rendus par

LE JUGE SOPINKA—J'ai pris connaissance des motifs de jugement du juge McLachlin et je souscris en grande partie à son analyse et à la conclusion à laquelle elle arrive. En ce qui concerne le sens à donner à l'expression «autre moyen dolosif» du par. 380(1) du *Code criminel*, L.R.C. (1985), ch. C-46, je conviens que le critère de la malhonnêteté objective devrait être appliqué plutôt que l'approche subjective adoptée dans les décisions anglaises. Même si cette question ne se pose pas en l'espèce, elle est cruciale dans l'arrêt *R. c. Zlatic*, [1993] 2 R.C.S. 29, rendu simultanément. Il m'est difficile d'être d'accord avec plusieurs points que ma collègue soulève dans son analyse du droit de la fraude mais, puisque je vais les expliquer de façon détaillée dans l'arrêt *Zlatic*, je me contenterai ici de les mentionner.

Premièrement, même si je conviens que la conviction de l'accusé qu'un acte est honnête ne sera guère utile si cet acte est, aux yeux d'une personne raisonnable, objectivement malhonnête, il est essentiel d'établir une distinction entre une telle conviction et celle de l'accusé à l'égard de faits qui, s'ils étaient avérés, dépouilleraient l'acte de son caractère malhonnête. Deuxièmement, je ne puis souscrire à l'affirmation voulant que «[h]abituellement, la *mens rea* porte sur les conséquences de l'*actus reus* prohibé.» Il arrive fréquemment

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consequences without any additional mental element. See *R. v. DeSousa*, [1992] 2 S.C.R. 944. Thirdly, I have reservations about the statement that "[r]ecklessness presupposes knowledge of the likelihood of the prohibited consequences" as a general proposition. This is the subjective definition of recklessness which I agree is applicable in the case of fraud but not necessarily in all cases. For instance, recklessness in the definition of criminal negligence may arguably be made out if there is objective foresight of risk. This is an issue which we have yet to resolve.

In this case, the trial judge's finding that the appellant deliberately lied to his customers that their deposits were insured determines both the *actus reus* and *mens rea* of deceit which is the first element in the definition of fraud. That leaves for consideration the issue of deprivation or risk thereof which is the second element. The trial judge found that there was no insurance in place but that the appellant believed that there was no risk to the depositors because the project would be completed and the depositors would obtain the homes in respect of which the deposits were placed. If the sole issue were whether the conduct of the appellant created a risk of deprivation to the depositors of their deposits by reason of the non-completion of the project, I would have allowed the appeal. If the risk of deprivation is dependent on some future event not happening but the accused honestly believes that the future event will happen and there will be no deprivation, a trial judge who accepts this evidence should acquit. The Crown will not have proved *mens rea* with respect to deprivation. In this case, however, the trial judge found there was no insurance in place and, therefore, even if the project were eventually completed, there would have been a deprivation or risk of deprivation during the uninsured period. The trial judge, having made all the findings of fact which constitute a deprivation, ought to have found that this element had been made out. While the trial judge may not have made this specific

que l'*actus reus* inclue les conséquences et que des infractions plus graves se distinguent d'infractions moins graves par leurs conséquences indépendamment de tout élément moral additionnel. Voir *R. c. DeSousa*, [1992] 2 R.C.S. 944. Troisièmement, j'éprouve des doutes à l'égard de l'affirmation, posée comme principe général, selon laquelle «[l]'insouciance présuppose la connaissance de la vraisemblance des conséquences prohibées.» Il s'agit là de la définition subjective de l'insouciance qui, je le reconnais, s'applique au cas de fraude, mais non nécessairement à tous les cas. Ainsi, on pourrait soutenir que, selon la définition de négligence criminelle, il y a insouciance s'il y a prévision objective du risque. C'est là une question que nous n'avons pas encore résolue.

En l'espèce, la conclusion du juge du procès que l'appelant a délibérément menti à ses clients en leur disant que leurs dépôts étaient garantis détermine à la fois l'*actus reus* et la *mens rea* de la supercherie qui est le premier élément de la définition de fraude. Reste la question de la privation, ou du risque de privation, qui en est le deuxième élément. Le juge du procès a conclu qu'aucune garantie n'existait, mais que l'appelant croyait que les déposants ne risquaient rien puisque le projet serait réalisé et que les déposants obtiendraient les résidences pour lesquelles les dépôts ont été versés. S'il s'était agi uniquement de déterminer si la conduite de l'appelant créait un risque que les déposants se voient privés de leurs dépôts en raison de la non-réalisation du projet, j'aurais accueilli le pourvoi. Si le risque de privation dépend de la non-réalisation d'un événement ultérieur, mais que l'accusé croit honnêtement que cet événement se produira et qu'il n'y aura aucune privation, le juge du procès qui accepte cette preuve doit prononcer un verdict d'acquittement. Le ministère public n'aura pas établi la *mens rea* à l'égard de la privation. En l'espèce, toutefois, le juge du procès a conclu qu'aucune garantie n'existait et que, par conséquent, même si le projet avait été éventuellement mené à terme, il y aurait eu privation ou risque de privation au cours de la période pendant laquelle aucune garantie n'existait. Après avoir tiré toutes les conclusions de fait qui constituent une privation, le juge du procès aurait dû conclure que

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determination, failure to do so would be an error of law and we are entitled to affirm the conviction and dispose of the case on this basis. I would dismiss the appeal.

The judgment of La Forest, Gonthier, Cory and McLachlin JJ. was delivered by

MCLACHLIN J.—This appeal requires the Court to consider the elements of the offence of fraud, and in particular the mental element or *mens rea* necessary to sustain a conviction for fraud. The question is whether a belief that, in the end, a dishonest practice will not result in loss to the victims of that practice, negates the guilty mind necessary to establish the offence of fraud.

I — Facts

The appellant, Robert Théroux, was a businessman involved in residential construction in the province of Quebec. He operated through a company called Les Habitations Co-Hab Inc. Although a personal bankruptcy prevented him from serving as a director of Co-Hab, Théroux was the directing mind, or *âme dirigeante*, of the company.

The charges arise out of two residential housing projects Co-Hab undertook through its subsidiaries, one in Laprairie and one in St-Catherine. Sales to prospective home buyers were solicited from a trailer located on the Laprairie site. Co-Hab's representative at this site entered into agreements for the purchase of the residences with a number of individuals, collecting deposits from them.

The contracts were made and the deposits taken on the basis of a representation by Co-Hab that the deposits were insured by the Fédération de construction du Québec. The representation was made orally. It was backed up by a certificate of participation in the insurance program posted on the trailer wall, which had been furnished to Co-Hab

cet élément avait été établi. Même s'il se peut que le juge du procès n'ait pas a tiré cette conclusion précise, l'omission de le faire constituerait une erreur de droit et nous sommes en droit de confirmer la déclaration de culpabilité et de trancher l'affaire en conséquence. Je suis d'avis de rejeter le pourvoi.

Version française du jugement des juges La Forest, Gonthier, Cory et McLachlin rendu par

LE JUGE MCLACHLIN—En l'espèce, la Cour est appelée à examiner les éléments de l'infraction de fraude et, en particulier, l'élément moral ou la *mens rea* nécessaire à une déclaration de culpabilité de fraude. Il s'agit de savoir si la conviction qu'en définitive une pratique malhonnête ne causera aucune perte aux victimes de cette pratique efface l'intention coupable nécessaire à l'infraction de fraude.

I — Les faits

L'appelant, Robert Théroux, était un homme d'affaires engagé dans la construction domiciliaire au Québec. Il exploitait une compagnie appelée Les Habitations Co-Hab Inc. Même si, en raison d'une faillite personnelle, il ne pouvait agir comme administrateur de Co-Hab, Théroux était l'âme dirigeante de la compagnie.

Les accusations ont été portées relativement à deux projets de construction domiciliaire, l'un à Laprairie et l'autre à Ste-Catherine, mis sur pied par Co-Hab par l'entremise de ses filiales. Les acheteurs de maison éventuels étaient sollicités depuis une remorque située au chantier de Laprairie. Le représentant de Co-Hab, à cet endroit, a conclu des contrats de vente de résidences avec un certain nombre de personnes et a perçu des dépôts auprès de ces dernières.

Les contrats ont été conclus et les dépôts perçus sur la foi d'une déclaration de Co-Hab selon laquelle les dépôts étaient garantis par la Fédération de construction du Québec. Cette déclaration, faite verbalement, était appuyée par une attestation de participation au plan de garantie affichée au mur de la remorque, qui avait été remise à Co-Hab

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before it completed the application process. In addition, a brochure describing the insurance program was distributed to most of the depositors.

In fact, the representations that the deposits were insured were false. Co-Hab never paid the premiums due on a first application for participation in the insurance program; a second application was never completed. The trial judge found that Théroux, as the directing mind of Co-Hab, was responsible for these misrepresentations.

The company which was to have built the residences became insolvent and could not complete the project. Some of the depositors got their money back, but most lost the entire amount.

II — Judgments Below

The trial judge found that the appellant Théroux was responsible for the misrepresentations that the deposits were guaranteed, and that he had made them for the purpose of obtaining the depositors' signatures and deposits. He found that Théroux had made these misrepresentations without any reasonable assurance that the residential construction project would be completed, although he sincerely believed that it would be completed:

[TRANSLATION] So it was these false representations, . . . one cannot at some point sell real estate by saying: "I will deliver it on such and such a date", without being assured, like any reasonable man should be, that it can be done.

The trial judge convicted Théroux of thirteen of the eighteen counts of fraud with which he stood charged pursuant to s. 380(1)(*a*) of the *Criminal Code*, R.S.C., 1985, c. C-46 (formerly R.S.C. 1970, c. C-34, s. 338(1)(*a*)).

The Court of Appeal upheld the convictions: (1990), 61 C.C.C. (3d) 525, [1991] R.J.Q. 79. Dubé J.A. held that all that was required for a conviction was a dishonest act which had as a consequence that someone was deprived of something; the fact that Théroux honestly believed that the

avant qu'elle complète le processus de demande. En outre, une brochure décrivant le plan de garantie était remise à la plupart des déposants.

En réalité, les déclarations selon lesquelles les dépôts étaient garantis étaient fausses. Co-Hab n'a jamais payé les primes dues à la suite d'une première demande de participation au plan de garantie; une deuxième demande n'a jamais été remplie. Le juge du procès a conclu qu'à titre d'âme dirigeante de Co-Hab Théroux était responsable de ces fausses déclarations.

La compagnie qui aurait dû construire les résidences est devenue insolvable, et n'a pu mener le projet à terme. Si certains déposants ont été remboursés, la plupart ont perdu le montant total de leur dépôt.

II — Les juridictions inférieures

Le juge du procès a conclu que l'appelant Théroux était responsable des fausses déclarations selon lesquelles les dépôts étaient garantis, et qu'il les avait faites dans le but d'obtenir la signature et les dépôts des déposants. Il a statué que Théroux avait fait ces fausses déclarations sans être raisonnablement certain que le projet de construction domiciliaire serait réalisé, même s'il croyait sincèrement qu'il le serait:

Alors c'est des fausses représentations, on ne peut pas à un moment donné vendre des immeubles en disant: «Je vais vous les livrer à telle date», sans s'être assuré, comme tout homme raisonnable devrait le faire, qu'on peut le réaliser.

Le juge du procès a déclaré Théroux coupable relativement à treize des dix-huit chefs d'accusation de fraude qui avaient été portés contre lui conformément à l'al. 380(1)*a*) du *Code criminel*, L.R.C. (1985), ch. C-46 (auparavant S.R.C. 1970, ch. C-34, al. 338(1)*a*)).

La Cour d'appel a confirmé les déclarations de culpabilité: [1991] R.J.Q. 79. Le juge Dubé a conclu qu'il suffisait, pour prononcer une déclaration de culpabilité, qu'un acte malhonnête ait eu pour effet de priver quelqu'un de quelque chose; le fait que Théroux croyait sincèrement que les résí-

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residences would be built, and that the deposits would not be lost, was no defence to the crime. Proulx J.A. held that the *mens rea* of fraud requires proof of subjective dishonesty: there must be a dishonest act on the part of the accused and that act must be thought, subjectively, to be dishonest. Proulx J.A. held, however, that this did not mean that Théroux should be acquitted because of his belief that the project would be completed. It was open to the trial judge to conclude that the Crown had proved a subjective dishonest intention to defraud even if the accused initially intended to repay, or, in this case, honour the deposits of, his victims. Proulx J.A. concluded that although Théroux's primary intention may not have been to perpetrate a fraud, Théroux [TRANSLATION] "could not take refuge behind the *hope* of completing the project if moreover "he had no guarantee that he could complete it" ". (Emphasis in original.) He suggested that the intention to defraud arose later, when the project ran into difficulties (at p. 537 C.C.C.):

[TRANSLATION] What caused problems for the appellant arose not in the elaboration of his residential project, but in its execution.

III — Legislation

Criminal Code

Prior to December 4, 1985, s. 380(1) (then s. 338(1)) read:

338. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,

(*a*) is guilty of an indictable offence and is liable to imprisonment for ten years, where the subject-matter of the fraud is a testamentary instrument or where the value thereof exceeds two hundred dollars; or

(*b*) is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or

(ii) of an offence punishable on summary conviction,

dences seraient construites et que les dépôts ne seraient pas perdus ne constituait pas un moyen de défense opposable au crime commis. Le juge Proulx a conclu que la *mens rea* de la fraude nécessite la preuve d'une malhonnêteté subjective: l'accusé doit avoir accompli un acte malhonnête que, subjectivement, il croit malhonnête. Selon le juge Proulx, cela ne signifiait toutefois pas que Théroux devait être acquitté parce qu'il croyait que le projet serait réalisé. Le juge du procès pouvait conclure que le ministère public avait établi l'existence d'une intention malhonnête subjective de frauder même si l'accusé avait l'intention, au départ, de rembourser ses victimes ou, en l'espèce, d'honorer les dépôts qu'elles avaient versés. Le juge Proulx a conclu que, même s'il se pouvait qu'il n'ait pas été animé de l'intention de frauder au départ, Théroux «ne pouvait pas se retrancher derrière l'*espoir* de réaliser le projet si, par ailleurs, «il n'avait aucune garantie qu'il pouvait le réaliser»». (En italique dans l'original.) Il a affirmé que l'intention de frauder était apparue plus tard, au moment où le projet a connu des difficultés (à la p. 87):

Ce qui cause problème à l'appelant est survenu non pas dans l'élaboration de son projet domiciliaire, mais dans son exécution.

III — Les dispositions législatives

Code criminel

Avant le 4 décembre 1985, le par. 380(1) (alors le par. 338(1)) était ainsi rédigé:

338. (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, argent ou valeur

a) est coupable d'un acte criminel et passible d'un emprisonnement de dix ans si l'objet de la fraude est un titre testamentaire ou si la valeur de ce dont est frustré le public ou toute personne dépasse deux cents dollars; ou

b) est coupable

(i) d'un acte criminel et passible d'un emprisonnement de deux ans, ou

(ii) d'une infraction punissable sur déclaration sommaire de culpabilité,

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where the value of the property of which the public or any person is defrauded does not exceed two hundred dollars.

It now reads:

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,

(*a*) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or where the value of the subject-matter of the offence exceeds one thousand dollars; or

(*b*) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed one thousand dollars.

IV — Issue

There is no doubt that the appellant deliberately practised a deceitful act, constituting the *actus reus* of the offence of fraud. The issue is whether the fact that he honestly believed that the projects would be completed negates the guilty mind or *mens rea* of the offence. This requires this Court to examine the question of what constitutes the *mens rea* for the offence of fraud.

V — Discussion

1. *Introduction*

Fraud, as a substantive offence, was introduced in Canada only in 1948. Before this date, conspiracy to defraud was a criminal offence, but fraud committed by one person was not. In 1948 (S.C. 1948, c. 39, s. 13), s. 444 of the *Criminal Code*, R.S.C. 1927, c. 36, was amended to delete the "conspiracy" requirement and create the general offence of fraud. In the years following, there have been only minor amendments to the section.

si la valeur du bien dont est frustré le public ou toute personne ne dépasse pas deux cents dollars.

Maintenant, il se lit ainsi:

380. (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, argent ou valeur:

a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse mille dollars;

b) est coupable:

(i) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans,

(ii) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire,

si la valeur de l'objet de l'infraction ne dépasse pas mille dollars.

IV — La question en litige

Il n'y a pas de doute que l'appelant a délibérément eu recours à la supercherie qui constitue l'*actus reus* de l'infraction de fraude. Il s'agit de déterminer si le fait qu'il croyait honnêtement que les projets seraient réalisés efface l'intention coupable ou la *mens rea* de l'infraction. Notre Cour doit donc déterminer ce qui constitue la *mens rea* de l'infraction de fraude.

V — Analyse

1. *Introduction*

La fraude, en tant qu'infraction matérielle précise, n'est apparue au Canada qu'en 1948. Auparavant, le complot en vue de frauder était une infraction criminelle, alors que la fraude commise par une seule personne ne l'était pas. En 1948 (S.C. 1948, ch. 39, art. 13), l'art. 444 du *Code criminel*, S.R.C. 1927, ch. 36, a été modifié de manière à supprimer l'exigence de «complot» et à créer l'infraction générale de fraude. Au cours des années qui ont suivi, l'article n'a subi que des modifications mineures.

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It has been said that a single precept underlies the offence of fraud: "commercial affairs are to be conducted honestly" (J. D. Ewart, *Criminal Fraud* (1986), at p. 9). The courts, in the decades since the adoption of the new offence, have moved to develop a jurisprudence which conforms to this central tenet. Nevertheless, the generality of the language of the section coupled with the lack of jurisprudential antecedents created uncertainty as to the elements of the offence. In 1978, this Court provided a comprehensive definition of the *actus reus* of the offence in *R. v. Olan*, [1978] 2 S.C.R. 1175. But uncertainty remained about what was required to establish the *mens rea* of the offence, the issue raised in this case. Is the test for guilty mind objective or subjective? More particularly, does an honest belief that no one will be harmed establish the absence of *mens rea*? Again, must the accused subjectively believe that his or her act is dishonest before he or she will have the required *mens rea*?

On a dit que l'infraction de fraude repose sur un principe unique: [TRADUCTION] «les activités commerciales doivent se dérouler honnêtement» (J. D. Ewart, *Criminal Fraud* (1986), à la p. 9). Au cours des décennies qui ont suivi l'adoption de la nouvelle infraction, les tribunaux ont entrepris de développer une jurisprudence conforme à ce principe fondamental. Néanmoins, le caractère général du texte de l'article, conjugué à l'absence de précédents jurisprudentiels, a engendré une incertitude quant aux éléments de l'infraction. En 1978, notre Cour a donné une définition exhaustive de l'*actus reus* de l'infraction dans *R. c. Olan*, [1978] 2 R.C.S. 1175. Toutefois, l'incertitude est demeurée quant à la question de savoir ce qui est requis pour établir la *mens rea* de l'infraction, laquelle question est soulevée en l'espèce. Le critère applicable à l'intention coupable est-il objectif ou subjectif? Plus précisément, la conviction sincère que personne ne subira un préjudice démontre-t-elle l'absence de *mens rea*? Encore une fois, pour avoir la *mens rea* nécessaire, l'accusé doit-il subjectivement croire que son acte est malhonnête?

2. *The Actus Reus of Fraud*

Since the *mens rea* of an offence is related to its *actus reus*, it is helpful to begin the analysis by considering the *actus reus* of the offence of fraud. Speaking of the *actus reus* of this offence, Dickson J. (as he then was) set out the following principles in *Olan*:

> (i) the offence has two elements: dishonest act and deprivation;
>
> (ii) the dishonest act is established by proof of deceit, falsehood or "other fraudulent means";
>
> (iii) the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act.

Olan marked a broadening of the law of fraud in two respects. First, it overruled previous authority which suggested that deceit was an essential element of the offence. Instead, it posited the general concept of dishonesty, which might manifest itself

2. *L'actus reus de la fraude*

Étant donné que la *mens rea* d'une infraction est liée à son *actus reus*, il est utile d'entamer l'analyse par l'étude de l'*actus reus* de l'infraction de fraude. Au sujet de l'*actus reus* de cette infraction, le juge Dickson (plus tard Juge en chef) a énoncé les principes suivants dans l'arrêt *Olan*:

> (i) l'infraction compte deux éléments: l'acte malhonnête et une privation;
>
> (ii) l'acte malhonnête est établi par la preuve d'une supercherie, d'un mensonge ou d'un «autre moyen dolosif»;
>
> (iii) l'élément de privation est établi si l'on prouve qu'en raison de l'acte malhonnête, les intérêts pécuniaires de la victime ont subi un dommage ou un préjudice ou qu'il y a risque de préjudice à leur égard.

L'arrêt *Olan* a marqué un élargissement du droit de la fraude à deux égards. Il a d'abord renversé la jurisprudence antérieure qui laissait entendre que la supercherie était un élément essentiel de l'infraction. Il a plutôt énoncé le concept général de la

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in deceit, falsehood or some other form of dishonesty. Just as what constitutes a lie or a deceitful act for the purpose of the *actus reus* is judged on the objective facts, so the "other fraudulent means" in the third category is determined objectively, by reference to what a reasonable person would consider to be a dishonest act. Second, *Olan* made it clear that economic loss was not essential to the offence; the imperilling of an economic interest is sufficient even though no actual loss has been suffered. By adopting an expansive interpretation of the offence, the Court established fraud as an offence of general scope capable of encompassing a wide range of dishonest commercial dealings.

Subsequent cases followed *Olan*'s lead, fleshing out the elements of the offence set out in *Olan* in a broad and purposive manner. One of the first questions which arose was whether the third type of dishonest conduct, "other fraudulent means", was a super-added element which the Crown must prove in addition to proving either deceit or falsehood. This was rejected in *R. v. Doren* (1982), 36 O.R. (2d) 114 (C.A.); see also *R. v. Kirkwood* (1983), 42 O.R. (2d) 65 (C.A.). In a number of subsequent cases, courts have defined the sort of conduct which may fall under this third category of other fraudulent means to include the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property: *R. v. Black and Whiteside* (1983), 5 C.C.C. (3d) 313 (Ont. C.A.); *R. v. Shaw* (1983), 4 C.C.C. (3d) 348 (N.B.C.A.); *R. v. Wagman* (1981), 60 C.C.C. (2d) 23 (Ont. C.A.); *R. v. Rosen* (1979), 55 C.C.C. (2d) 342 (Ont. Co. Ct.); *R. v. Côté and Vézina (No. 2)* (1982), 3 C.C.C. (3d) 557 (Que. C.A.); *R. v. Hansen* (1983), 25 Alta. L.R. (2d) 193 (C.A.); *R. v. Geddes* (1979), 52 C.C.C. (2d) 230 (Man. C.A.); *R. v. Currie*; *R. v. Bruce* (1984), 5 O.A.C. 280, and *R. v. Kirkwood*, *supra*. As noted above, where it is alleged that the *actus reus* of a particular fraud is "other fraudulent means", the existence of such means will be determined by what reasonable peo-

malhonnêteté, qui pourrait se manifester dans la supercherie, le mensonge ou une autre forme de malhonnêteté. Tout comme ce qui constitue un mensonge ou une supercherie pour les fins de l'*actus reus* est déterminé en fonction des faits objectifs, l'«autre moyen dolosif» de la troisième catégorie est déterminé objectivement, selon ce qu'une personne raisonnable considérerait comme un acte malhonnête. L'arrêt *Olan* a ensuite précisé que la perte économique n'était pas essentielle à l'infraction; la mise en péril d'un intérêt pécuniaire est suffisante, même si aucune perte véritable n'est subie. En adoptant une interprétation libérale de l'infraction, la Cour a fait de la fraude une infraction de portée générale susceptible d'englober une large gamme d'activités commerciales malhonnêtes.

Dans des affaires subséquentes, on a suivi l'exemple de l'arrêt *Olan* pour étoffer les éléments de l'infraction énoncés dans l'arrêt *Olan* d'une manière générale et fondée sur l'objet visé. L'une des premières questions qui se posait était de savoir si le troisième genre de conduite malhonnête, soit l'«autre moyen dolosif», était un élément surajouté que le ministère public doit établir en sus de la supercherie ou du mensonge. Cette hypothèse a été rejetée dans l'arrêt *R. c. Doren* (1982), 36 O.R. (2d) 114 (C.A.); voir également *R. c. Kirkwood* (1983), 42 O.R. (2d) 65 (C.A.). Les tribunaux ont, dans un certain nombre d'affaires subséquentes, défini le genre de conduite qui peut tomber dans cette troisième catégorie de l'autre moyen dolosif, comme incluant l'utilisation des ressources financières d'une compagnie à des fins personnelles, la dissimulation de faits importants, l'exploitation de la faiblesse d'autrui, le détournement non autorisé de fonds et l'usurpation non autorisée de fonds ou de biens: *R. c. Black and Whiteside* (1983), 5 C.C.C. (3d) 313 (C.A. Ont.); *R. c. Shaw* (1983), 4 C.C.C. (3d) 348 (C.A.N.-B.); *R. c. Wagman* (1981), 60 C.C.C. (2d) 23 (C.A. Ont.); *R. c. Rosen* (1979), 55 C.C.C. (2d) 342 (C. cté Ont.); *R. c. Côté and Vézina (No. 2)* (1982), 3 C.C.C. (3d) 557 (C.A. Qué.); *R. c. Hansen* (1983), 25 Alta. L.R. (2d) 193 (C.A.); *R. c. Geddes* (1979), 52 C.C.C. (2d) 230 (C.A. Man.); *R. c. Currie*; *R. c. Bruce* (1984), 5 O.A.C. 280, et *R. c.*

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ple consider to be dishonest dealing. In instances of fraud by deceit or falsehood, it will not be necessary to undertake such an inquiry; all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not.

A further question, whether it was necessary for the accused to have profited by the fraud, had been uniformly answered in the negative prior to *Olan*: *Welham v. Director of Public Prosecutions*, [1961] A.C. 103 (H.L.); *R. v. Melnyk* (1947), 90 C.C.C. 257 (B.C.C.A.); *R. v. Rodrigue, Ares and Nantel* (1973), 17 C.C.C. (2d) 252 (Que. C.A.); *R. v. Allsop* (1976), 64 Cr. App. R. 29, and *R. v. Huggett* (1978), 42 C.C.C. (2d) 198 (Ont. C.A.). In *Olan*, this Court affirmed this rule at pp. 1182-83.

3. *The Mens Rea of Fraud*

(i) Doctrinal Considerations

This brings us to the *mens rea* of fraud. What is the guilty mind of fraud? At this point, certain confusions inherent in the concept of *mens rea* itself become apparent. It is useful initially to distinguish between the mental element or elements of a crime and the *mens rea*. The term *mens rea*, properly understood, does not encompass all of the mental elements of a crime. The *actus reus* has its own mental element; the act must be the voluntary act of the accused for the *actus reus* to exist. *Mens rea*, on the other hand, refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent—those who do not understand or intend the consequences of their acts. Typically, *mens rea* is concerned with the consequences of the prohibited *actus reus*. Thus in the crimes of homicide, we speak of the consequences of the voluntary act—intention to cause death, or reckless and wilfully blind persistence in conduct which one knows is likely to cause death. In other

Kirkwood, précité. Tel que mentionné plus haut, lorsqu'on allègue que l'*actus reus* d'une fraude particulière est un «autre moyen dolosif», l'existence d'un tel moyen sera déterminée en fonction de ce qu'une personne raisonnable considère comme une activité malhonnête. Dans les cas de fraude par supercherie ou mensonge, il ne sera pas nécessaire d'entreprendre une telle analyse: il suffit de déterminer si l'accusé a effectivement déclaré qu'une situation était d'une certaine nature alors qu'en réalité elle ne l'était pas.

Une autre question, celle de savoir s'il était nécessaire que l'accusé ait tiré profit de la fraude, avait constamment reçu une réponse négative avant l'arrêt *Olan*: *Welham c. Director of Public Prosecutions*, [1961] A.C. 103 (H.L.); *R. c. Melnyk* (1947), 90 C.C.C. 257 (C.A.C.-B.); *R. c. Rodrigue, Ares and Nantel* (1973), 17 C.C.C. (2d) 252 (C.A. Qué.); *R. c. Allsop* (1976), 64 Cr. App. R. 29, et *R. c. Huggett* (1978), 42 C.C.C. (2d) 198 (C.A. Ont.). Dans l'arrêt *Olan*, notre Cour a confirmé cette règle, aux pp. 1182 et 1183.

3. *La mens rea de la fraude*

(i) Considérations doctrinales

Nous en arrivons à la *mens rea* de la fraude. Quelle est l'intention coupable de la fraude? À ce stade, certaines confusions inhérentes au concept de la *mens rea* lui-même se manifestent. Il convient d'abord de distinguer entre l'élément moral ou les éléments moraux d'un crime et la *mens rea*. Le terme *mens rea*, interprété correctement, n'inclut pas tous les éléments moraux d'un crime. L'*actus reus* comporte son propre élément moral; pour qu'il y ait *actus reus*, l'acte de l'accusé doit être volontaire. Par ailleurs, la *mens rea* renvoie à l'intention coupable, illégale, de l'accusé. En droit criminel, son rôle consiste à éviter que la personne moralement innocente—qui ne comprend ni ne souhaite les conséquences de ses actes—soit déclarée coupable. Habituellement, la *mens rea* porte sur les conséquences de l'*actus reus* prohibé. Ainsi, en matière d'homicide, il s'agit des conséquences de l'acte volontaire, soit l'intention de causer la mort ou le fait de persister, par insouciance ou ignorance volontaire, à se conduire

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offences, such as dangerous driving, the *mens rea* may relate to the failure to consider the consequences of inadvertence.

This brings me to the question of whether the test for *mens rea* is subjective or objective. Most scholars and jurists agree that, leaving aside offences where the *actus reus* is negligence or inadvertence and offences of absolute liability, the test for *mens rea* is subjective. The test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused subjectively appreciated those consequences at least as a possibility. In applying the subjective test, the court looks to the accused's intention and the facts as the accused believed them to be: G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at pp. 727-28.

Two collateral points must be made at this juncture. First, as Williams underlines, this inquiry has nothing to do with the accused's system of values. A person is not saved from conviction because he or she believes there is nothing wrong with what he or she is doing. The question is whether the accused subjectively appreciated that certain consequences would follow from his or her acts, not whether the accused believed the acts or their consequences to be moral. Just as the pathological killer would not be acquitted on the mere ground that he failed to see his act as morally reprehensible, so the defrauder will not be acquitted because he believed that what he was doing was honest.

The second collateral point is the oft-made observation that the Crown need not, in every case, show precisely what thought was in the accused's mind at the time of the criminal act. In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference. The fact that such an inference is made does not detract from the subjectivity of the test.

d'une façon que l'on sait de nature à causer la mort. Dans le cas d'autres infractions, comme celle de la conduite dangereuse, la *mens rea* peut avoir trait au défaut de considérer les conséquences de l'inattention.

Ceci m'amène à la question de savoir si le critère applicable à la *mens rea* est subjectif ou objectif. La plupart des auteurs de doctrine et des juristes conviennent qu'à l'exception des infractions dont l'*actus reus* est la négligence ou l'inattention et des infractions de responsabilité absolue, le critère applicable à la *mens rea* est subjectif. Il s'agit non pas de savoir si une personne raisonnable aurait prévu les conséquences de l'acte prohibé, mais si l'accusé était subjectivement conscient que ces conséquences étaient à tout le moins possibles. Dans l'application du critère subjectif, le tribunal examine l'intention de l'accusé et les faits tels que ce dernier croyait qu'ils étaient: G. Williams, *Textbook of Criminal Law* (2e éd. 1983), aux pp. 727 et 728.

Il importe, à ce stade, de faire deux remarques accessoires. Premièrement, comme le souligne Williams, la présente analyse n'a rien à voir avec l'échelle des valeurs de l'accusé. Une personne n'échappe pas à une déclaration de culpabilité pour le motif qu'elle croit qu'elle ne fait rien de mal. Il s'agit de savoir si l'accusé était subjectivement conscient que certaines conséquences résulteraient de ses actes, et non pas s'il croyait que ses actes ou leurs conséquences étaient moraux. Tout comme un meurtrier pathologique ne serait pas acquitté pour le seul motif qu'il ne considérait pas que son acte était moralement répréhensible, le fraudeur ne sera pas acquitté pour le motif qu'il croyait que ce qu'il faisait était honnête.

Deuxièmement, il y a l'observation fréquente selon laquelle le ministère public n'a pas à démontrer précisément, dans tous les cas, ce que l'accusé avait à l'esprit au moment où il a commis l'acte criminel. Dans certains cas, la conscience subjective des conséquences peut être déduite de l'acte lui-même, sous réserve de quelque explication qui vient mettre en doute cette déduction. Le fait qu'une telle déduction soit faite ne diminue en rien le caractère subjectif du critère.

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Having ventured these general comments on *mens rea*, I return to the offence of fraud. The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another's property at risk. The *mens rea* would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete. The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence. To put it another way, following the traditional criminal law principle that the mental state necessary to the offence must be determined by reference to the external acts which constitute the *actus* of the offence (see Williams, *supra*, c. 3), the proper focus in determining the *mens rea* of fraud is to ask whether the accused intentionally committed the prohibited acts (deceit, falsehood, or other dishonest act) knowing or desiring the consequences proscribed by the offence (deprivation, including the risk of deprivation). The personal feeling of the accused about the morality or honesty of the act or its consequences is no more relevant to the analysis than is the accused's awareness that the particular acts undertaken constitute a criminal offence.

This applies as much to the third head of fraud, "other fraudulent means", as to lies and acts of deceit. Although other fraudulent means have been broadly defined as means which are "dishonest", it is not necessary that an accused personally consider these means to be dishonest in order that he or she be convicted of fraud for having undertaken them. The "dishonesty" of the means is relevant to the determination whether the conduct falls within the type of conduct caught by the offence of fraud; what reasonable people consider dishonest assists in the determination whether the *actus reus* of the offence can be made out on particular facts. That established, it need only be determined that an

Ces commentaires généraux sur la *mens rea* étant faits, je reviens à l'infraction de fraude. L'acte prohibé est la supercherie, le mensonge ou quelque autre acte malhonnête. La conséquence prohibée consiste à priver quelqu'un de ce qui est ou devrait être sien, ce qui peut, comme nous l'avons vu, consister simplement à mettre le bien d'autrui en péril. La *mens rea* serait alors la conscience subjective que l'on commettait un acte prohibé (la supercherie, le mensonge ou un autre acte malhonnête) qui pouvait causer une privation au sens de priver autrui d'un bien ou de mettre ce bien en péril. Une fois cela démontré, le crime est complet. Le fait que l'accusé ait pu espérer qu'il n'y aurait aucune privation ou qu'il ait pu croire qu'il ne faisait rien de mal ne constitue pas un moyen de défense. En d'autres termes, suivant le principe traditionnel de droit criminel qui veut que l'état d'esprit nécessaire à l'infraction soit déterminé en fonction des actes externes qui constituent l'*actus* de l'infraction (voir Williams, *op. cit.*, ch. 3), il convient de se demander, lorsqu'on détermine la *mens rea* de la fraude, si l'accusé a intentionnellement accompli les actes prohibés (supercherie, mensonge ou un autre acte malhonnête) tout en connaissant ou en souhaitant les conséquences visées par l'infraction (soit la privation, y compris le risque de privation). Le sentiment personnel de l'accusé à l'égard du caractère moral ou honnête de l'acte ou de ses conséquences n'est pas plus pertinent quant à l'analyse que ne l'est la conscience de l'accusé que les actes commis constituent une infraction criminelle.

Cela s'applique autant à la troisième catégorie de fraude, soit un «autre moyen dolosif», qu'aux mensonges et à la supercherie. Bien que l'expression «autre moyen dolosif» ait été généralement définie comme un moyen «malhonnête», il n'est pas nécessaire qu'un accusé considère personnellement que ce moyen est malhonnête pour être déclaré coupable de fraude pour y avoir eu recours. Le caractère «malhonnête» du moyen est pertinent pour déterminer si la conduite est du genre de celle visée par l'infraction de fraude; ce qu'une personne raisonnable considère malhonnête aide à déterminer si l'*actus reus* de l'infraction peut être établi en fonction de certains faits. Une fois cela

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accused knowingly undertook the acts in question, aware that deprivation, or risk of deprivation, could follow as a likely consequence.

I have spoken of knowledge of the consequences of the fraudulent act. There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited consequences. It is established when it is shown that the accused, with such knowledge, commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue.

These doctrinal observations suggest that the *actus reus* of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and

2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

Correspondingly, the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and

2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

Where the conduct and knowledge required by these definitions are established, the accused is guilty whether he actually intended the prohibited consequence or was reckless as to whether it would occur.

The inclusion of risk of deprivation in the concept of deprivation in *Olan* requires specific comment. The accused must have subjective aware-

établi, il suffit de déterminer qu'un accusé a sciemment commis les actes en question et qu'il était conscient que la privation ou le risque de privation représentait une conséquence probable.

J'ai parlé de la connaissance des conséquences de l'acte frauduleux. Toutefois, rien ne paraît s'opposer à ce que l'insouciance quant aux conséquences entraîne également la responsabilité criminelle. L'insouciance présuppose la connaissance de la vraisemblance des conséquences prohibées. Elle est établie s'il est démontré que l'accusé, fort d'une telle connaissance, accomplit des actes qui risquent d'entraîner ces conséquences prohibées, tout en ne se souciant pas qu'elles s'ensuivent ou non.

Ces observations doctrinales donnent à entendre que l'*actus reus* de l'infraction de fraude sera établi par la preuve:

1. d'un acte prohibé, qu'il s'agisse d'une supercherie, d'un mensonge ou d'un autre moyen dolosif, et

2. de la privation causée par l'acte prohibé, qui peut consister en une perte véritable ou dans le fait de mettre en péril les intérêts pécuniaires de la victime.

De même, la *mens rea* de la fraude est établie par la preuve:

1. de la connaissance subjective de l'acte prohibé, et

2. de la connaissance subjective que l'acte prohibé pourrait causer une privation à autrui (laquelle privation peut consister en la connaissance que les intérêts pécuniaires de la victime sont mis en péril).

Si la conduite et la connaissance requises par ces définitions sont établies, l'accusé est coupable peu importe qu'il ait effectivement souhaité la conséquence prohibée ou qu'il lui était indifférent qu'elle se réalise ou non.

L'inclusion du risque de privation dans le concept de la privation, que l'on constate dans l'arrêt *Olan*, demande certaines précisions. L'accusé doit,

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ness, at the very least, that his or her conduct will put the property or economic expectations of others at risk. As noted above, this does not mean that the Crown must provide the trier of fact with a mental snapshot proving exactly what was in the accused's mind at the moment the dishonest act was committed. In certain cases, the inference of subjective knowledge of the risk may be drawn from the facts as the accused believed them to be. The accused may introduce evidence negating that inference, such as evidence that his deceit was part of an innocent prank, or evidence of circumstances which led him to believe that no one would act on his lie or deceitful or dishonest act. But in cases like the present one, where the accused tells a lie knowing others will act on it and thereby puts their property at risk, the inference of subjective knowledge that the property of another would be put at risk is clear.

(ii) Jurisprudential Considerations

The view of *mens rea* suggested above accords with earlier rulings of this Court which rejected the notion that the accused's subjective appreciation of his or her dishonesty is relevant to the *mens rea* of fraud. In *Lafrance v. The Queen*, [1975] 2 S.C.R. 201, the accused had taken a car with the intention of returning it later. This Court was faced with the issue of whether this amounted to theft. Martland J. (for the majority) held that it did and that the taking was fraudulent, at p. 214: "The taking was intentional, under no mistake and with knowledge that the motor vehicle was the property of another. In my opinion this made the taking fraudulent."

In *R. v. Lemire*, [1965] S.C.R. 174, this Court held that the accused's belief that his actions would subsequently be ratified afforded no defence. The accused, the Chief of the Quebec Liquor Police, had been told by the Premier of Quebec to submit fictitious expense accounts in order to receive a salary increase which had been agreed to but which could not be officially paid

à tout le moins, être subjectivement conscient que sa conduite mettra en péril le bien d'autrui ou compromettra ses attentes économiques. Comme je l'ai déjà souligné, cela ne signifie pas que le ministère public doit fournir au juge des faits une image exacte de l'état d'esprit de l'accusé au moment où il a commis l'acte malhonnête. Dans certains cas, il est possible de déduire la connaissance subjective du risque des faits tels que l'accusé croyait qu'ils étaient. Ce dernier peut annihiler cette déduction en démontrant, par exemple, que sa supercherie n'était qu'une plaisanterie innocente, ou en établissant les circonstances qui l'ont amené à croire que personne ne se fonderait sur son mensonge, sa supercherie ou son acte malhonnête pour agir. Mais dans les cas comme l'espèce, où l'accusé ment tout en sachant que d'autres personnes se fonderont sur ce mensonge pour agir et met ainsi leur bien en péril, il est facile de déduire qu'il savait subjectivement que le bien d'autrui serait mis en péril.

(ii) Considérations jurisprudentielles

La perception de la *mens rea* proposée plus haut est conforme aux arrêts antérieurs de notre Cour où on a rejeté l'idée selon laquelle la conscience subjective de l'accusé de sa malhonnêteté est pertinente en ce qui concerne la *mens rea* de la fraude. Dans l'arrêt *Lafrance c. La Reine*, [1975] 2 R.C.S. 201, l'accusé s'était emparé d'une automobile dans l'intention de la ramener plus tard. Notre Cour devait décider si cela constituait un vol. À la page 214, le juge Martland (s'exprimant au nom de la majorité) a conclu que oui et qu'on avait agi frauduleusement en prenant la voiture: «L'intention était présente, il n'y a pas eu de méprise et l'on savait que le véhicule à moteur appartenait à un tiers. À mon avis, en prenant la voiture dans ces circonstances, on a agi frauduleusement.»

Dans l'arrêt *R. c. Lemire*, [1965] R.C.S. 174, notre Cour a jugé que le fait que l'accusé croyait que ses actes seraient par la suite entérinés ne constituait pas un moyen de défense. Le Premier ministre du Québec avait dit à l'accusé, le directeur de la Police des liqueurs du Québec, de soumettre des comptes de dépenses fictifs afin de recevoir une augmentation de salaire qui avait déjà

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until a government-wide salary review, then under way, had been completed. In submitting the expense accounts Lemire no doubt felt that his actions, if unorthodox, were not dishonest. Nevertheless, Lemire was convicted. Reversing the decision in the Court of Appeal, Martland J. (for the majority) held, at p. 193:

In other words, [the court below held that] there is no intent to defraud within the requirement of s. 323(1) [now s. 380(1)] if the accused person, while deliberately committing an act which is clearly fraudulent, expects that that which he is doing may, at a later date, be validated. To me the very statement of this proposition establishes its error in law.

I do not, of course, overlook the fact that a variety of rulings can be found in lower courts, some of which adopt the position that unless the Crown establishes that the accused subjectively intended to act dishonestly, the *mens rea* of fraud is not proven and the accused is entitled to be acquitted: see, *R. v. Bobbie* (1988), 43 C.C.C. (3d) 187 (Ont. C.A.); *Lacroix v. La Reine*, [1989] R.J.Q. 812 (C.A.); *R. v. Daigle* (1987), 9 Q.A.C. 140; *R. v. Sebe* (1987), 35 C.C.C. (3d) 97 (Sask. C.A.), and *R. v. Mugford* (1990), 58 C.C.C. (3d) 172 (Nfld. C.A.). This was the position adopted by Proulx J.A. in the appeal now before this Court.

These decisions are largely predicated on the English approach in *R. v. Landy*, [1981] 1 All E.R. 1172 (C.A.), which held that the accused must subjectively believe his or her actions to be dishonest to support conviction, or upon the modification of that approach in *R. v. Ghosh*, [1982] 2 All E.R. 689 (C.A.), where it was held that the accused must subjectively realize that his or her conduct falls below the ordinary standard of reasonable and honest people. There are two problems with applying the English authorities to the Canadian offence of fraud. First, the relevant English offence rests on language different from that of the Canadian offence. Specifically, the English offence (ss. 1 and

été acceptée, mais qui ne pourrait toutefois être officiellement versée que lorsqu'une révision des salaires alors entreprise à l'échelle du gouvernement serait complétée. En soumettant les comptes de dépenses, Lemire croyait indubitablement que ses actes, quoique peu orthodoxes, n'étaient pas malhonnêtes. Lemire a néanmoins été déclaré coupable. Infirmant l'arrêt de la Cour d'appel, le juge Martland conclut, au nom de la majorité, à la p. 193:

[TRADUCTION] En d'autres termes, [la cour d'appel a conclu que] l'accusé n'a aucune intention de frauder au sens de l'exigence prévue au par. 323(1) [maintenant le par. 380(1)] si, en commettant délibérément un acte nettement frauduleux, il s'attend à ce que son geste soit par la suite validé. À mon avis, la formulation même de cette proposition démontre son erreur de droit.

Évidemment, je n'oublie pas qu'on peut trouver toute une gamme de décisions de tribunaux d'instance inférieure, où, dans certains cas, on a adopté le point du vue selon lequel, à moins que le ministère public ne démontre que l'accusé avait subjectivement l'intention d'agir malhonnêtement, la *mens rea* de la fraude n'est pas établie et l'accusé a droit à l'acquittement: voir *R. c. Bobbie* (1988), 43 C.C.C. (3d) 187 (C.A. Ont.); *Lacroix c. La Reine*, [1989] R.J.Q. 812 (C.A.); *R. c. Daigle* (1987), 9 Q.A.C. 140; *R. c. Sebe* (1987), 35 C.C.C. (3d) 97 (C.A. Sask.), et *R. c. Mugford* (1990), 58 C.C.C. (3d) 172 (C.A.T.-N.). C'est le point de vue que le juge Proulx a adopté dans l'appel dont notre Cour est maintenant saisie.

Ces décisions reposent en grande partie sur le point de vue anglais adopté dans *R. c. Landy*, [1981] 1 All E.R. 1172 (C.A.), où on a conclu que, pour justifier une déclaration de culpabilité, il faut que l'accusé croie subjectivement que ses actes sont malhonnêtes, ou sur la modification de ce point de vue dans l'arrêt *R. c. Ghosh*, [1982] 2 All E.R. 689 (C.A.), où on a jugé que l'accusé doit subjectivement se rendre compte que sa conduite ne respecte pas la norme ordinaire de la personne raisonnable et honnête. L'application de la jurisprudence anglaise à l'infraction canadienne de fraude présente deux difficultés. D'abord, l'infraction anglaise pertinente est formulée différemment

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15(1) of the *Theft Act, 1968* (U.K.), 1968, c. 60) expressly refers to "dishonest appropriation" and "dishonestly" obtaining by deception, respectively. This wording, absent in Canada, has been interpreted in England to show Parliament's intention to require subjective awareness of dishonesty. The second problem is, as I see it, that the English authorities cannot be reconciled with the basic principles of criminal law relating to *mens rea*.

The British Columbia Court of Appeal for these reasons rejected the English approach in *R. v. Long* (1990), 61 C.C.C. (3d) 156. Taggart J.A. held at p. 169 that *Landy* was not the law in Canada. With respect to *Ghosh*, he stated, at p. 170: "I agree with Ewart's [*supra*] opinion that the *Ghosh* approach is predicated upon assumptions which have no relevance to the Canadian law of fraud." Taggart J.A. summarized the mental element of fraud as follows, at p. 174:

> ... the mental element of the offence of fraud must not be based on what the accused thought about the honesty or otherwise of his conduct and its consequences. Rather, it must be based on what the accused knew were the facts of the transaction, the circumstances in which it was undertaken and what the consequences might be of carrying it to a conclusion.

In my opinion, Taggart J.A. was correct in rejecting the English approach. While the authorities are far from consistent, the better view is that the accused's belief that the conduct is not wrong or that no one will in the end be hurt affords no defence to a charge of fraud.

(iii) Pragmatic Considerations

Pragmatic considerations support the view of *mens rea* proposed above. A person who deprives another person of what the latter has should not

de l'infraction canadienne. Plus précisément, l'infraction anglaise (décrite à l'art. 1 et au par. 15(1) de la *Theft Act, 1968* (R.-U.), 1968, ch. 60) mentionne expressément l'[TRADUCTION] «appropriation malhonnête» et l'obtention [TRADUCTION] «malhonnête» par supercherie, respectivement. En Angleterre, on a considéré que ces mots, qu'on ne retrouve pas au Canada, démontrent l'intention du Parlement d'exiger la conscience subjective de la malhonnêteté. La deuxième difficulté réside, selon moi, dans le fait que la jurisprudence anglaise n'est pas conciliable avec les principes fondamentaux du droit criminel en matière de *mens rea*.

La Cour d'appel de la Colombie-Britannique a, pour ces motifs, rejeté le point de vue anglais dans l'arrêt *R. c. Long* (1990), 61 C.C.C. (3d) 156. À la page 169, le juge Taggart a conclu que l'arrêt *Landy* ne s'appliquait pas au Canada. En ce qui concerne l'arrêt *Ghosh*, il dit à la p. 170: [TRADUCTION] «Je souscris à l'opinion d'Ewart [*op. cit.*] pour qui le point de vue adopté dans l'arrêt *Ghosh* repose sur des hypothèses qui ne sont aucunement pertinentes en ce qui concerne le droit canadien de la fraude». À la page 174, le juge Taggart résume ainsi l'élément moral de la fraude:

> [TRADUCTION] ... l'élément moral de l'infraction de fraude ne doit pas reposer sur la croyance de l'accusé quant au caractère honnête ou malhonnête de sa conduite et de ses conséquences. Il doit plutôt reposer sur ce que l'accusé savait être les faits de l'opération, les circonstances dans lesquelles elle a eu lieu et ce que les conséquences pourraient être une fois l'opération terminée.

J'estime que le juge Taggart a eu raison de rejeter le point de vue anglais. Bien que la jurisprudence soit loin d'être uniforme, il vaut mieux considérer que la conviction de l'accusé que sa conduite n'est pas mauvaise ou que personne ne sera lésé en fin de compte ne constitue pas un moyen de défense opposable à une accusation de fraude.

(iii) Considérations pragmatiques

Des considérations pragmatiques appuient la perception de la *mens rea* proposée plus haut. La personne qui prive une autre personne de ce

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escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this. As stated in *R. v. Allsop, supra*, approved by this Court in *Olan*, at p. 1182:

> Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated.

The law of fraud must be sufficiently broad to catch this secondary incident of the defrauder's purpose or it will be of little avail.

This approach conforms to the conception of the offence of fraud which imbues this Court's decision in *Olan*. *Olan* points the way to a conception of fraud broad enough in scope to encompass the entire panoply of dishonest commercial dealings. It defines the *actus reus* accordingly; the offence is committed whenever a person deceives, lies or otherwise acts dishonestly, and that act causes deprivation (including risk of deprivation) to another. To adopt a definition of *mens rea* which requires subjective awareness of dishonesty and a belief that actual deprivation (as opposed to risk of deprivation) will result, is inconsistent with *Olan*'s definition of the *actus reus*. The effect of such a test would be to negate the broad thrust of *Olan* and confine the offence of fraud to a narrow ambit, capable of catching only a small portion of the dishonest commercial dealing which *Olan* took as the target of the offence of fraud.

The question arises whether the definition of *mens rea* for fraud which I have proposed may catch conduct which does not warrant criminaliza-

qu'elle possède ne devrait pas échapper à la responsabilité criminelle simplement parce que, selon son code moral ou personnel, elle ne faisait rien de mal ou parce qu'en raison de son optimisme elle croyait que tout se terminerait bien. De nombreuses fraudes sont commises par des personnes qui croient qu'elles ne font rien de mal ou qui croient sincèrement que le fait de mettre en péril le bien d'autrui ne causera finalement aucune perte véritable. Si l'infraction de fraude vise à mettre la main au collet des véritables fraudeurs, sa *mens rea* ne peut être formulée aussi étroitement. Comme on l'a dit dans l'arrêt *R. c. Allsop*, précité, approuvé par notre Cour dans *Olan*, à la p. 1182:

> [TRADUCTION] En général, un fraudeur veut avant tout se procurer un avantage. Le tort causé à sa victime est secondaire et incident. Il n'est «intentionnel» que parce qu'il fait partie du résultat prévu de la fraude.

Le droit de la fraude doit être suffisamment large pour viser ce résultat secondaire de l'intention du fraudeur, sinon il ne sera guère utile.

Ce point de vue est conforme à la conception de l'infraction de fraude qui a inspiré notre Cour dans l'arrêt *Olan*. Ce dernier arrêt ouvre la voie à une conception de la fraude assez large pour comprendre toute la gamme d'activités commerciales malhonnêtes. Il définit l'*actus reus* en conséquence; l'infraction est commise lorsque, par la supercherie, le mensonge ou un autre acte malhonnête, une personne cause une privation (dont un risque de privation) à autrui. L'adoption d'une définition de la *mens rea* qui exige une conscience subjective de la malhonnêteté et une conviction qu'une privation véritable (par opposition à un risque de privation) résultera est incompatible avec la définition de l'*actus reus* formulée dans *Olan*. Un tel critère aurait pour effet d'annuler la portée générale de l'arrêt *Olan* et de limiter la portée de l'infraction de fraude qui ne serait plus susceptible que d'englober une infime partie des activités commerciales malhonnêtes que l'arrêt *Olan* considérait comme visées par l'infraction de fraude.

La question est donc de savoir si la définition de la *mens rea* que j'ai proposée à l'égard de la fraude peut viser une conduite ne justifiant pas la crimina-

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tion. I refer to the fear, reflected in the appellate decisions adopting a narrower definition of the required *mens rea*, that the reach of the offence of fraud may be extended beyond criminal dishonesty to catch sharp or improvident business practices which, although not to be encouraged, do not merit the stigma and loss of liberty that attends the criminal sanction. The concern is that any misrepresentation or practice which induces an incorrect understanding or belief in the minds of customers, or which causes deprivation, will become criminal. As Marshall J.A. put it in *Mugford*, *supra*, at pp. 175-76:

> . . . it is not sufficient to base fraud merely upon a finding that the appellant induced a state of mind in his customers which was not correct. Any misrepresentation may have that effect. Criminal dishonesty extends further. . . .
>
> It would be a startling extension of criminal liability if every statement urging the public to purchase one's wares because only a limited supply remain were by itself to be visited with criminal sanction.

This poses starkly the critical question: does a view of the offence of fraud which catches a broad range of dishonest commercial dealing also catch conduct which should not be regarded as criminal, but rather left to the civil sanction?

In my view, the approach to the offence of fraud adopted in *Olan* and perused in these reasons does not take us out of the proper domain of the criminal sanction. To establish the *actus reus* of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act. Under the third head of the offence it will be necessary to show that the impugned act is one which a reasonable person would see as dishonest. Deprivation or the risk of deprivation must then be shown to have occurred as a matter of fact. To establish the *mens rea* of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and

lisation. Je mentionne la crainte, reflétée dans les arrêts de tribunaux d'appel qui ont adopté une définition plus étroite de la *mens rea* nécessaire, que la portée de l'infraction de fraude puisse être étendue au-delà de la malhonnêteté criminelle de manière à englober des pratiques commerciales déloyales ou imprudentes qui, même si elles ne doivent pas être encouragées, ne méritent ni l'opprobre ni la perte de liberté que comporte la sanction criminelle. On craint que toute fausse déclaration ou toute pratique qui suscite chez le client une mauvaise compréhension ou une conviction inexacte, ou qui cause une privation, ne devienne criminelle. Comme l'affirme le juge Marshall dans l'arrêt *Mugford*, précité, aux pp. 175 et 176:

> [TRADUCTION] . . . il ne suffit pas de fonder la fraude sur la seule conclusion que l'appelant a fait naître chez ses clients un état d'esprit inexact. Toute fausse déclaration peut avoir cet effet. La malhonnêteté criminelle va plus loin . . .
>
> La responsabilité criminelle serait étendue de façon effarante si toute déclaration pressant le public d'acquérir les marchandises de quelqu'un en raison d'un approvisionnement limité devait elle-même faire l'objet d'une sanction criminelle.

La question cruciale est donc celle-ci: une perception de l'infraction de fraude comme visant une large gamme d'activités commerciales malhonnêtes a-t-elle également pour effet d'inclure une conduite qui ne devrait pas être considérée comme criminelle, mais devrait plutôt faire l'objet d'une sanction civile?

À mon avis, l'interprétation de l'infraction de fraude adoptée dans l'arrêt *Olan* et examinée attentivement dans les présents motifs ne nous fait pas sortir du domaine approprié de la sanction criminelle. Pour établir l'*actus reus* de la fraude, le ministère public doit prouver hors de tout doute raisonnable que l'accusé a eu recours à la supercherie ou au mensonge, ou qu'il a accompli quelque autre acte frauduleux. En ce qui concerne le troisième volet de l'infraction, il faudra démontrer que l'acte reproché en est un qu'une personne raisonnable considérerait comme malhonnête. Il faut ensuite démontrer qu'il y a effectivement eu privation ou risque de privation. Pour établir la *mens rea* de la fraude, le ministère public doit

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that the accused was aware that deprivation could result from such conduct.

The requirement of intentional fraudulent action excludes mere negligent misrepresentation. It also excludes improvident business conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. Again, an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused would have no knowledge that the prank would put the property of those who heard it at risk. We are left then with deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk. Such conduct may be appropriately criminalized, in my view.

4. *Application of the Law on this Appeal*

The trial judge found that the appellant deliberately lied to his customers, by means of verbal misrepresentations, a certificate of participation in the insurance scheme, and brochures advising that the scheme protected all deposits. The lies were told in order to induce potential customers to enter into contracts for the homes the appellant was selling and to induce them to give him their money as deposits on the purchase of these homes. The trial judge also found that the appellant knew at the

démontrer que l'accusé a sciemment employé le mensonge, la supercherie ou un autre moyen dolosif alors qu'il savait qu'une privation pouvait en résulter.

L'exigence d'un acte frauduleux intentionnel exclut la simple déclaration inexacte faite par négligence. Elle exclut également le comportement commercial imprudent ou le comportement qui est déloyal au sens de profiter d'une occasion d'affaires au détriment d'une personne moins astucieuse. L'accusé doit intentionnellement tromper, mentir ou accomplir quelque autre acte frauduleux pour que l'infraction soit établie. Une déclaration inexacte faite par négligence ou une pratique commerciale déloyale sont insuffisantes puisque, dans ni l'un ni l'autre cas, on ne trouve l'intention requise de priver par un moyen dolosif. Une déclaration faite par négligence, même si elle est inexacte, ne constitue pas un mensonge intentionnel du point de vue subjectif. De même, le fait de sauter sur une occasion d'affaires sans être motivé par l'intention subjective de causer une privation en trompant ou en induisant autrui en erreur ne constituera pas une fraude. Encore une fois, la supercherie employée négligemment sans s'attendre à des conséquences, comme par exemple, la plaisanterie innocente ou la déclaration faite au cours d'un débat, à laquelle on ne veut pas donner suite, ne constituerait pas une fraude, parce que l'accusé ignorerait que sa plaisanterie mettrait en péril le bien de ceux qui l'ont entendue. Il reste donc les actes frauduleux accomplis délibérément qui, à la connaissance de l'accusé, mettent vraiment en péril le bien d'autrui. À mon avis, une telle conduite peut être à bon droit criminalisée.

4. *Application du droit en l'espèce*

Le juge du procès a conclu que l'appelant avait délibérément menti à ses clients au moyen de fausses déclarations verbales, d'une attestation de participation au plan de garantie et de brochures informant que le plan garantissait tous les dépôts. L'appelant a menti en vue d'amener les acheteurs éventuels à conclure des contrats pour les résidences qu'il vendait et à lui verser des dépôts pour l'achat de ces dernières. Le juge du procès a également conclu que l'appelant savait, au moment où il

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time he made these falsehoods that the insurance for the deposits was not in place. Finally, he found that the appellant genuinely believed that the homes would be built and hence that there was no risk to the depositors. "No risk" used in this sense is the equivalent of saying the appellant believed the risk would not materialize.

Applying the principles discussed above, these findings establish that the appellant was guilty of fraud. The *actus reus* of the offence is clearly established. The appellant committed deliberate falsehoods. Those falsehoods caused or gave rise to deprivation. First, the depositors did not get the insurance protection they were told they would get. That, in itself, is a deprivation sufficient to establish the *actus reus* fraud. Second, the money they gave to the appellant's company was put at risk, a risk which in most cases materialized. Again, this suffices to establish deprivation.

The *mens rea* too is established. The appellant told the depositors they had insurance protection when he knew that they did not have that protection. He knew this to be false. He knew that by this act he was depriving the depositors of something they thought they had, insurance protection. It may also be inferred from his possession of this knowledge that the appellant knew that he was placing the depositors' money at risk. That established, his *mens rea* is proved. The fact that he sincerely believed that in the end the houses would be built and that the risk would not materialize cannot save him.

VI — Disposition

I would dismiss the appeal.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J.—Although I am in general agreement with the reasons of McLachlin J., I share some of the reservations expressed by my colleague Sopinka J. in his reasons, in particular regarding the two following issues, which he expressed as follows (at pp. 9-10):

Secondly, I cannot agree with the statement that "[t]ypically, *mens rea* is concerned with the consequences of

a fait ces mensonges, que les dépôts n'étaient pas garantis. Enfin, il a conclu que l'appelant croyait sincèrement que les résidences seraient construites et que, par conséquent, les déposants ne risquaient rien. Utilisée dans ce sens, l'expression «ne risquaient rien» revient à dire que l'appelant croyait que le risque ne se concrétiserait pas.

Si on applique les principes analysés plus haut, ces conclusions établissent que l'appelant était coupable de fraude. L'*actus reus* de l'infraction est nettement établi. L'appelant a menti délibérément et ses mensonges ont causé une privation. Premièrement, les déposants n'ont pas obtenu la garantie qui leur était promise. Cela constitue en soi une privation suffisante pour établir l'*actus reus* de la fraude. Deuxièmement, l'argent qu'ils ont versé à la compagnie de l'appelant a été exposé à un risque qui, dans la plupart des cas, s'est concrétisé. Cela suffit également à établir la privation.

La *mens rea* est également établie. L'appelant a dit aux déposants qu'ils bénéficiaient d'une garantie alors qu'il savait que ce n'était pas le cas. Il savait que c'était faux. Il savait que, par ce geste, il privait les déposants d'une chose dont ils croyaient bénéficier, soit une garantie. On peut également déduire de cette connaissance qu'il avait que l'appelant savait qu'il mettait en péril l'argent des déposants. La *mens rea* est par le fait même établie. Le fait que l'appelant croyait sincèrement que les résidences seraient finalement construites et que le risque ne se concrétiserait pas ne lui est d'aucun secours.

VI — Dispositif

Je suis d'avis de rejeter le pourvoi.

Les motifs suivants ont été rendus par

LE JUGE L'HEUREUX-DUBÉ—Bien que je souscrive d'une manière générale aux motifs du juge McLachlin, je partage certaines des réserves exprimées par le juge Sopinka, dans ses motifs, au sujet des deux questions suivantes notamment (aux pp. 9 et 10):

Deuxièmement, je ne puis souscrire à l'affirmation voulant que «[h]abituellement, la *mens rea* porte sur les

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the prohibited *actus reus*." The *actus reus* often includes the consequences, and, frequently, more serious offences are distinguished from less serious offences by the consequences without any additional mental element. See *R. v. DeSousa*, [1992] 2 S.C.R. 944. Thirdly, I have reservations about the statement that "[r]ecklessness presupposes knowledge of the likelihood of the prohibited consequences" as a general proposition. This is the subjective definition of recklessness which I agree is applicable in the case of fraud but not necessarily in all cases. For instance, recklessness in the definition of criminal negligence may arguably be made out if there is objective foresight of risk. This is an issue which we have yet to resolve.

I agree with the result reached by both of my colleagues and would dispose of the case as they do.

Appeal dismissed.

Solicitors for the appellant: Hébert & Bourque, Montréal.

Solicitor for the respondent: Marcel Patenaude, Longueuil.

conséquences de l'*actus reus* prohibé.» Il arrive fréquemment que l'*actus reus* inclue les conséquences et que des infractions plus graves se distinguent d'infractions moins graves par leurs conséquences indépendamment de tout élément moral additionnel. Voir *R. c. DeSousa*, [1992] 2 R.C.S. 944. Troisièmement, j'éprouve des doutes à l'égard de l'affirmation, posée comme principe général, selon laquelle «[l]'insouciance présuppose la connaissance de la vraisemblance des conséquences prohibées.» Il s'agit là de la définition subjective de l'insouciance qui, je le reconnais, s'applique au cas de fraude, mais non nécessairement à tous les cas. Ainsi, on pourrait soutenir que, selon la définition de négligence criminelle, il y a insouciance s'il y a prévision objective du risque. C'est là une question que nous n'avons pas encore résolue.

Je suis d'accord avec le résultat auquel en arrivent mes deux collègues et je trancherais le pourvoi comme ils le suggèrent.

Pourvoi rejeté.

Procureurs de l'appelant: Hébert & Bourque, Montréal.

Procureur de l'intimée: Marcel Patenaude, Longueuil.

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TAB 61

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Re FROMENT. ALBERTA LBR. Co. Ltd. v. ALBERTA DEPT. OF AGRICULTURE.

Alberta Supreme Court in Bankruptcy, Tweedie, J. May 28, 1925.

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G. H. Van Allen, K.C., for plaintiff; *W. S. Gray*, K.C., for defendant; The trustee was not represented.

TWEEDIE, J.:—This is an action brought by the plaintiff, a chattel mortgagee, to determine, in substance, the validity of a statutory lien claimed by the defendant as guarantor by virtue of the provisions of the Live Stock Encouragement Act and amendments thereto (1917 (Alta.), c. 9, now R.S.A. 1922, c. 65), and its right, in priority to the plaintiff, to the proceeds realized from the sale of property which was subject to both the mortgages of the plaintiff and the lien of the defendant. The plaintiff asks for (1) a declaration that it is entitled in priority to the defendant to the proceeds realized from the sale, and (2) for a direction that the trustee pay to it the sum of $482 so realized.

Summary proceedings were instituted to determine the respective rights of the parties, but owing to the numerous objections involving questions of fact, both as to the validity of the lien and the defendant's right of enforcement, raised on behalf of the plaintiff, pleadings were directed for the purpose of determining the issues. Many of the objections as to validity of the lien raised on the application, and set forth as allegations in the statement of claim, were abandoned at the close of the trial, as the result of information gained upon examination for discovery of an officer of the defendant department and facts disclosed during the hearing of the case.

The facts material to the questions in issue are as follows:—

In September, 1918, one H. R. Froment and 5 others formed themselves into an association under the Live Stock Encouragement Act as amended by 1918 (Alta.), c. 43, for the purpose of procuring a loan to be used in the purchase of live-stock, the repayment of which was to be guaranteed, pursuant to the provisions of the Act, by the Province of Alberta.

On September 14, the association filed with the commissioner, the officer designated in the Act for that purpose, an application in writing, signed by each of its members, for a loan of $3,000 of which $500 was to be received by each of the 6 members. The application stated that Froment required his portion of the loan for the purchase of "milk cows and heifers, Shorthorns preferred," but did not state "the kind of live stock which each purchaser," other than Froment, intended to purchase.

The application was approved by the commissioner and, arrangements having been previously made with the Merchants Bank of Canada to advance money to the various associations

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to be formed from time to time, a promissory note signed by all the members of the association was obtained by the commissioner as required by s. 5 of the Act as enacted by 1918 (Alta.), c. 43, s. 2. The note dated December 9, 1918, reads as follows:—

"Five years after date I promise to pay to the Order of The Merchants Bank of Canada at Edmonton . . . Alberta, the sum of three thousand dollars with interest at the rate of six per cent. per annum payable annually. Value received." Then follow the signatures.

The Provincial Treasurer, endorsed on the note in the form prescribed (s. 6, as enacted by 1918 (Alta.), c. 43, s. 3), the following guarantee:—

"Pursuant to the statute on that behalf I do hereby on behalf of the Province of Alberta guarantee in case of default by the makers payment of the principal and interest of the within promissory note."

The note so guaranteed was forwarded to the bank, and each member of the association received $500, which was used in the purchase of the "kind of live stock" specified in the Act (s. 3).

On October 26, 1921, Froment and his wife being indebted to the plaintiff gave a chattel mortgage to secure the amount of their indebtedness. It is admitted that the wife had no interest in the mortgaged property, her signature having been obtained for the purpose of having her bound by the covenants. The mortgage, which was in good standing at the date of the authorized assignment hereinafter referred to, charged property alleged to be subject to the defendant's statutory lien.

On November 28, 1923, Froment made an authorized assignment under the Bankruptcy Act, 1919 (Can.), c. 36.

On December 11, 1923, a meeting of his creditors was held at which the Traders Trust Co. was elected trustee and at which it was resolved that:—

"The Trustee arrange to hold a cash auction sale of the chattels of the estate forthwith and that the proceeds of each chattel be specifically identified by the clerk of the sale and that the proceeds be held in trust by the trustee pending settlement of the various claims."—the "settlement of the various claims" having reference no doubt to the dispute between the various secured creditors as to their rights against the chattels and personal property affected by their respective securities.

On December 21, 1923, the trustee sold the chattels by public auction and realized $1,322.35, which amount was almost wholly realized from chattels charged in favour of secured creditors.

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The proceeds of the sale were identified by the clerk as resulting from chattels affected by the security of

(a) The Crown (defendant), $212, (b) The Alberta Lumber Co. Ltd. (plaintiff), $482, (c) The Royal Bank of Canada, $414.50, (d) T. Daniels & Son, $31, (e) A. Thompson, $10; $1,149.50, leaving a balance of $172.85 to be disposed of according to the trustee's statement on file, as follows:—Trustee's fees, $12.58, Costs of sale, $71.50, For distribution, $88.77; $172.85.

The amount of $212 above mentioned as having been realized from the sale of the Crown's security is the amount realized from the sale of cows purchased by the assignor with money procured by him out of the loan to the association, and their offspring or other live-stock substituted in place thereof pursuant to the provisions of the Live Stock Encouragement Act.

At the time of the assignment there was owing under the plaintiff's chattel mortgage $771.10, and on the note $2,069.65, 2 of the makers having paid their share in full, one in part, while the remaining 3 had not paid any portion thereof and were in arrears for approximately 2 years' interest in addition. Froment was directly liable as maker to the bank for the full amount but as between himself and the other members of the association for $589.10.

The Bank of Montreal is now the holder of the note, having acquired it upon taking over the business of the Merchants Bank of Canada, the lender. No proof of claim has been filed with the trustee on its behalf, it realizing no doubt that practically nothing would be available for distribution amongst the unsecured creditors, and preferring to rely for payment upon the other makers of the note and the defendant, the guarantor.

On December 11, 1923, the defendant proved for the full amount owing on the note, and in its proofs stated that it held security described as "a statutory charge upon the real and personal property within the Province of the members of the association." That claim was not disallowed by the trustee. At the trial it was stated by counsel for the defendant that it was abandoning its claim except as to the amount for which the authorized assignor was directly liable as between the members of the association, *i.e.*, $589.10, and desired to enforce its security only to that extent.

No claim has been filed by any of the authorized assignor's co-makers of the note.

The note became due and payable on December 12, 1923, and nothing has been paid on account of it since the authorized assignment.

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The security claimed by the defendant comes under 2 heads, namely, that acquired under the provisions of ss. 7, 8 and 13 of the Act, which sections create a charge upon all live-stock purchased by the members of the association with the proceeds of the loan, their offspring and any live-stock substituted in place thereof in accordance with the provisions of the Act, and the additional security acquired under s. 6 (*b*) as enacted by 1921 (Alta.), c. 47, s. 3, which creates a charge upon all the property real and personal within the Province of the members of the association.

Numerous grounds were relied upon on behalf of the plaintiff to establish that "the claim of the defendant is invalid, illegal and void," many of which, as already indicated, were abandoned at the trial. There remains to be considered the following:—(1) The application did not state "the kind of live stock each purchaser intended to purchase" with his share of the proceeds of the loan. (2) "The commissioner did not obtain a joint and several promissory note of the members of the association for the amount of money to be advanced." (3) "The note was for a period exceeding 5 years" and (4) The department is not the holder of the note, has not fulfilled its guarantee nor has it advanced any monies for such purpose.

As to the first of these contentions: Section 3 of the Act provides in part that "The said application shall be in writing and shall state . . . the kind of live stock which each purchaser intends to purchase." The application, as already pointed out, did not so state as to 5 of the purchasing applicants. It was argued on behalf of the plaintiff that strict compliance with the above provision was a condition precedent to the exercise by the Provincial Treasurer of his right to guarantee payment of the note without which the Province could not be made liable and consequently the statutory charge could not become effective. That, in my opinion is not a condition precedent as contended for, but is a direction for the purpose of giving information as to grade or quality of the live-stock, for the purpose of assisting the commissioner in determining whether or not the loan should be recommended. The Act itself specifically sets forth the kind of live-stock which may be purchased by each, namely "cows and heifers," and under certain conditions, 10% of the loan may be used "for the joint purchase of a pure-bred bull" (s. 3). The application being silent on this point will be deemed to be an application for a loan to be used in the purchase of live-stock specified in the Act. Even if this objection were tenable under the Act as originally passed, it ceased to be available under s. 6 (*a*) as en-

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acted by 1918 (Alta.), c. 43, s. 5, in force when the loan was made, which provides that "The guarantee of any note by the Treasurer in form of schedule A to this Act or to a like effect shall render the Province of Alberta liable as endorser thereof and shall be conclusive evidence of the liability of the province for the payment of the principal and interest secured thereby." The omission from the application as alleged does not affect the liability of the Province nor its right to the security claimed in connection therewith.

As to the second objection, that the commissioner did not obtain a joint and several promissory note: s. 5 of the Act as re-enacted, provides that the commissioner "shall obtain the joint and several promissory note of the members of the association for the amount of the money to be advanced." It is argued that this note must be payable to the commissioner himself. There is nothing in the section to so indicate. It is clear from a perusal of the whole Act, particularly s. 11 and ss. 5 and 6 as re-enacted, that the payee of the note is to be the lender, in this case the Merchants Bank of Canada. It is further objected that the note is not "joint and several." The words of promise used in the note are "I promise to pay" which, when a note is signed by 2 or more persons, as is the case in the note in question, are sufficient to constitute it a joint and several note (s. 179 (2) Bills of Exchange Act, R.S.C. 1906, c. 119; Falconbridge on Banking and Bills of Exchange, 3rd ed., p. 889).

As to the third objection, that the note was for a period exceeding 5 years: It is contended that inasmuch as the note became payable by reason of the days of grace 3 days after the expiration of the 5-year period that the Provincial Treasurer had no authority to guarantee the loan. Section 12 of the Act provides that "No loan shall be recommended or guaranteed under this Act covering a greater period than five years . . ." This section must, however, be read in conjunction with ss. 5 and 6 as re-enacted, which respectively provide that the commissioner shall obtain a joint and several promissory note "such note to be for a period not exceeding five years," and upon receipt of the necessary recommendations from the commissioner "the Treasurer may endorse on such note a guarantee in the form" prescribed. The limitation to a period of 5 years within which the loan must be repaid has reference only to the agreement between the lender and the members of the association and when the Act directs that the obligation shall be taken in a particular form, as here in the form of a promissory note, the time for payment in which as agreed between the parties

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and as set forth in the document is extended by law or custom, there is an implied authority to execute a guarantee for a period which will include such additional time. The guarantee was for the period authorized by the Act.

As to the fourth objection that the defendant is not the holder of the note nor has the Province discharged its obligation under the guarantee: These facts which were admitted can in no way affect the validity of the charge or lien of the defendant which was created and existed for the purpose of enabling the Province to indemnify itself for any payments which it might be called upon to make under its guarantee, for which purpose it is clearly entitled to take and hold security. The greater part of argument of plaintiff's counsel in connection with this point was directed, however, against the defendant's right to prove its claim under the Bankruptcy Act and its consequent right to realize upon its security in accordance with the provisions thereof and reimburse itself in anticipation of the discharge of its obligation. The question as to right of proof and the validity of the security are separate and distinct. Strictly speaking, the proof of claim, having been allowed by the trustee, should not now be open to collateral attack in the proceedings as the trustee is not a party to the action, nor is the procedure that ordinarily adopted for the determination of such questions. Section 53 (2) of the Bankruptcy Act gives to the Court power to expunge or reduce a proof "if the trustee declines to interfere in the matter," which evidently is not the case here, as there is no evidence of any application having been made to him for that purpose.

In view of the fact that the only question involved in this connection affecting the trustee is one of law, *i.e.*, as to the right of proof as to a contingent liability and the trustee has since the trial of the action consented to be added as a party in order to avoid the additional cost which necessarily would be involved in taking proceedings *ab initio* to determine the question, it will now be dealt with.

The liability in connection with which the defendant has filed its proof of claim is contingent. The authorized assignor Froment was subject to 4 distinct liabilities in regard to the same debt. As one of the makers of the note he is liable (a) as between himself and the holder primarily for the unpaid balance, the note being joint and several, the relation between the parties being that of debtor and creditor; (b) as between himself and the defendant for the unpaid balance in the event of the latter being called upon for payment, the relation being that of principal and surety; (c) as between him-

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self and the other makers, primarily for the share of the loan received by him, the relation of the parties being that of principal and surety and (d) as between himself and one or more of the other makers for contribution of his fair proportion of any sum, payment of which may be necessary to discharge the obligation under the note and on account of which reimbursement cannot be obtained from those, who, as between the makers, are primarily liable. The relation between them is that of co-sureties. He is liable for the debt, for indemnity to the defendant, for indemnity to his co-makers and for contribution.

Has the defendant a provable claim in view of the fact that it is not the holder of the note and has not discharged its obligation to the creditor? In support of his contention that it has not counsel for the plaintiff relies upon a number of authorities having to do with the rights of endorsers under the Bills of Exchange Act and of guarantors and sureties at common law and in equity apart from insolvency proceedings.

But the claim which the defendant seeks to enforce here is not one against the authorized assignor but one, by reason of the assignor's obligation, against the trustee in bankruptcy for the payment of a dividend and the enforcement of its rights under the lien against the estate of the debtor, given by the Bankruptcy Act. That Act extends the rights of persons who are subject to a contingent liability.

Under s. 44 (2) of that Act "all debts and liabilities, present and future, to which the debtor is subject at the date of the receiving order or the making of an authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order or the making of the authorized assignment, shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment."—if the claim is based upon a contract or promise as provided for in s-s. 1 of the same section. The provisions of these subsections are similar to those contained in the Bankruptcy Acts 1883 (Imp.), c. 52, s. 37, and 1914 (Imp.), c. 59, s. 30, under which sections the right of proof on the part of a surety has arisen in numerous cases as a result of which "It is now established, notwithstanding the doubts expressed in *Re Parrott, [Ex p. Whittaker* (1891)] 8 Mor. 49, that the contingent liability of a surety who has not been called upon to pay, or has not in fact paid, forms a debt provable in bankruptcy of the principal debtor (*Re Paine,* (1897) 1 Q.B. 122; *Re Herepath & Delmar, [Ex p. Delmar* (1890)] 7 Mor. 129; *Re Blackpool Motor Car Co. Limited* (1901) 1 Ch. 77) and that one surety can prove in the bank-

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ruptcy of a co-surety for contribution, although the proving surety has not paid the creditor anything. (*Wolmershausen* v. *Guillick* (1893) 2 Ch. 514.)'' Williams on Bankruptcy, 12th ed., p. 153. In *Re Herepath & Delmar, Ex p. Delmar, supra,* the proof of claim was filed by one who was a party to a bill of exchange but not the holder and it was held that he was entitled to prove and receive the dividends on account thereof before having paid the holder. The defendant has a provable claim against the estate of Froment. But the holder of the note also has a provable claim for the debt; and Froment's co-makers each have for indemnity and contribution, the amounts of which might subsequently be determined. All, however, would not be entitled to prove. Each of their claims relate to the same debt and to allow proof in respect of each might result in double or treble or more proof and the payment of an amount by way of dividends beyond that which would be properly payable in respect of the debt. No proof having been filed in regard to the note in question other than that of the defendant the trustee acted properly in allowing it and the defendant is entitled to receive dividends in connection therewith and to deal with his security in the manner authorized by the Bankruptcy Act.

It is further contended that, even if the charge created under s. 6 (*b*) is valid, the defendant has, or at least it is estopped from denying that it has ''surrendered or abandoned it'' by reason of having permitted Froment prior to his assignment to deal with the security in a manner inconsistent with the provisions of the Act under which the charge attached and to the prejudice of the plaintiff. As to this contention I find all the facts against the plaintiff and hold that there was no abandonment or surrender of its security by the defendant.

The plaintiff's last contention is that ''The charge, if any, of the Department is a charge subject to the vested interests of third parties and, therefore, inferior to the plaintiff's mortgage.'' The charge here referred to has no reference to the charge upon live-stock purchased with the proceeds of the loan but that created by s. 6 (*b*), now s. 10, R.S.A. 1922, c. 65, which reads as follows:—

''10. The Department shall have a charge upon all the real and personal property within the Province of every purchaser, as security for the payment of all sums of money due or to become due under any promissory note whensoever given by the association of which he is a member.''

The note in question was signed on December 8, 1918; the above-quoted section came into force on April 19, 1921; the

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chattel mortgage in favour of the plaintiff was executed on October 26, 1921.

The section creating the charge in so far as the makers of the note are concerned, is retroactive and the charge is effective to bind the property of all the members of the association for the payment of any note given pursuant to the Act. That it was so intended appears from the use of the words "whensoever given" in referring to the note. "Whensoever" means "at whatever time," which includes a point of time prior to the coming into force of the section. This view is further emphasized by the reference to the notes as "due or to become due." No note could be "due" unless it had been previously given, while "become due" may refer to notes previously given but which have not matured or notes to be given in the future. The defendant has a charge as provided for in the section for the payment of the note in question.

As to the vested interests of third parties, it is quite conceivable that there may be third parties, such as *bona fide* purchasers, mortgagees, lienholders, pledgees and such like, who may have acquired their respective interests before the enactment of the section in question, to which interest or interests the defendant's charge would be subject. In relation to the property of the debtor, as well as that of other members of the association, the right of the department to a charge in its favour was determined by an event, the signing of the note, the happening of which was antecedent to the enactment of the statute creating it, while its extent was determined by the conditions as they existed at the time of its creation. When the defendant obtained its statutory charge it was effective against all the property of each of the members of the association. The plaintiff had no interest, vested or otherwise, in the property of the authorized assignor at the time when the defendant's charge became effective and that charge being a valid one is not subject to the plaintiff's mortgage.

The plaintiff is not entitled to the declaration asked for nor to the payment to it in priority to the defendant of the sum of $482 and the action must be dismissed.

The defendant, having consented to the reduction of its claim to the sum for which the authorized assignor was primarily liable on the note, the claim will be reduced to that amount by the trustee and the defendant allowed to realize on its security to that extent. It appearing that the defendant has a charge on all the property "real and personal" of the authorized assignor and that there are several mortgages other than the plaintiff's, the trustee is directed to require from the de-

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fendant a detailed statement setting forth full particulars of the property affected by its charge and if it be found that there are assets subject to its charge which may be realized upon and which are not subject to the claims of the other secured creditors these assets should be realized by the defendant and the proceeds applied in satisfaction of its claim. The plaintiff has leave to apply to the Court at any time in this connection.

As to the money in the hands of the trustee from the sale of property as directed by the creditors, the trustee should if the secured creditors cannot agree as to their respective rights as to the proceeds, apply to the Court for directions.

The Traders Trust Co., the trustee, will be added as a party defendant to the action.

As the plaintiff and defendant have agreed as between themselves as to costs no order will be made in regard to same. The trustee will not be subject to any costs.

Judgment for defendant.

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TAB 62

Court of Queen's Bench of Alberta

Citation: Re: SemCanada Crude Company (Orleans Energy Ltd.), 2012 ABQB 495

Date: 20120731
Docket: 0801 08510
Registry: Calgary

2012 ABQB 495 (CanLII)

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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc. And 1380331 Alberta ULC

(Re: Orleans Energy Ltd.)

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] SemCAMS ULC seeks an order declaring that:

a) any claims that RMP Energy Inc. (formerly Orleans Energy Ltd.) ("Orleans") may have against SemCAMS with respect to contractual equalization adjustments to volumes of natural gas delivered by Orleans to SemCAMS (the "Price Adjustment Claim") pursuant to an inlet gas purchase agreement dated July 1, 2007 (the "IGPA") were compromised and released by the SemCAMS Plan of Arrangement dated July 24, 2009 (the "Plan") and the Plan Sanction Order granted on October 27, 2009;

b) in accordance with the Claims Process Order of October 22, 2008, Orleans is barred from asserting or enforcing the Price Adjustment Claim, and that such claim is extinguished; and

c) the Statement of Claim filed by Orleans on November 29, 2011 is in breach of the Plan and the Plan Sanction Order and should be struck.

[2] Orleans cross-applies for a declaration that the Price Adjustment Claim was not compromised or released by the Plan and that SemCAMS owes it $1,616,412.28.

[3] The Price Adjustment Claim relates to an accounting process (the "Rework") issued by SemCAMS in June 2011 that adjusted the amount payable by SemCAMS for natural gas purchased by it from Orleans pursuant to the IGPA in the year 2007.

[4] The Rework relates to natural gas purchases that occurred prior to SemCAMS filing proceedings under the CCAA. SemCAMS submits that a claim that arises from such Rework is thus caught and released by the Claims Process Order (which provided for a Claims Bar Date of December 1, 2008). the Plan and the Plan Sanction Order. SemCAMS also submits that Orleans was aware in early 2008, even before the CCAA proceedings had commenced, that Orleans' own reporting error had caused SemCAMS to under-allocate a substantial portion of natural gas product to Orleans in its accounting, and that credit for this under-allocation would be included in the 2007 Rework.

[5] Orleans submits that when the Plan Sanction Order was granted, it was uncertain whether Orleans would be in a net credit or net debit position as a result of the Rework, or in what amount. Thus, Orleans submits, Orleans could not predict the outcome of the Rework, and any estimate it may make would be entirely speculative. Orleans submits that it had no cause of action against SemCAMS at the time of the Plan Sanction Order, and that thus, the Price Adjustment Claim did not fall within the definition of "claim" in the CCAA and could not be compromised.

[6] Orleans submits that, to the extent that the Plan, the Plan Sanction Order and the Claims Process Order provide otherwise, these documents and orders should be interpreted to allow the Price Adjustment Claim to be unaffected, or the offending portions of the Plan and Plan Sanction Order should be severed, amended or disregarded.

Relevant Facts

[7] On July 22, 2008, SemCAMS was granted an Initial Order pursuant to s. 11(1) of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). In a separate application on the same date, SemCanada Crude Company was also granted an Initial Order under the CCAA. On July 24, 2008, CEG Energy Options Inc. commenced proposal proceedings in bankruptcy. On July 30, 2008, the CCAA proceedings of SemCAMS and SemCanada and the bankruptcy proceedings of CEG were procedurally consolidated with other proceedings commenced under the CCAA and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 by affiliated or related companies for the purpose of administrative convenience.

[8] The CCAA proceedings, including the stay that was imposed by the Initial Order, continued until plans of arrangement and reorganization of SemCAMS and other related entities, both in Canada and in the United States, were implemented on November 30, 2009.

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[9] On October 22, 2008, the Court granted a Claims Process Order that set out the process for determining claims of creditors in the CCAA proceedings. Pursuant to this order, any creditor who failed to file a claim by December 1, 2008 (the "Claims Bar Date") was barred from asserting or enforcing any pre-filing claim.

[10] This application relates only to SemCAMS. SemCAMS is the Operator of four natural gas processing plants and natural gas gathering systems and pipelines in Alberta including the facilities at the KA Plant. Orleans is a gas producer and uses the processing facilities at the KA Plant.

[11] The KA Plant operates pursuant to a construction, ownership and operation agreement entered into among the joint owners of the plant and SemCAMS as the Operator (the "CO&O Agreement"). SemCAMS is both a joint owner and the Operator of the plant. Orleans is not a joint owner. The KA Plant is used to gather and process raw natural gas for joint owners and for third party producers.

[12] Typically, a party may have its natural gas processed at the KA Plant in two ways:

a) as a joint owner under the CO&O Agreement; or

b) as a third party user under a gas handling and processing agreement (a "Gas Processing Agreement").

[13] However, under the CO&O Agreement, joint owners are entitled to use throughput capacity in the plant in proportion to their ownership interest. Joint owners deliver raw natural gas to the plant for processing by the Operator, and when processing is complete, either take or sell the processed gas ("Sales Gas") and related products to purchasers. Joint owners retain title to their raw gas, Sales Gas and products at all times during processing.

[14] If a joint owner does not use its throughput capacity, the excess capacity can be used by other joint owners or reallocated to third party producers under Gas Processing Agreements, but joint owners have the highest priority for processing. Third party users can be shut out of the plant if joint owners use all their capacity in a given month.

[15] Under a Gas Processing Agreement between a third party user and the Operator, the third party user delivers raw natural gas to the plant for processing, and when processing is complete, either takes or sells Sales Gas and products. Third party users retain title to their raw gas, Sales Gas and products at all times.

[16] Monthly payments made by joint owners and third party users are based on projected use of the plant. Projected throughput typically varies from actual throughput, and at the end of a calendar year, there is a "thirteenth month adjustment" that reconciles projected throughput to

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actual throughput (the "Thirteenth Month Adjustment"). The Thirteenth Month Adjustment is often further reconciled for each year with revised information provided by owners and third party users, thus the Rework. The main distinction between the Thirteenth Month Adjustment and the Rework is that the focus of the Thirteenth Month Adjustment is on information available to SemCAMS in its capacity as the Operator of the KA Plant, while the Rework process requires more involvement from parties that deliver gas and related products to the plant.

[17] On July 1, 2007, SemCAMS and Orleans entered into the IGPA. Under the IGPA:

a) Orleans sold raw natural gas to SemCAMS in its individual capacity at the KA Plant inlets;

b) SemCAMS agreed to pay Orleans a premium for its raw natural gas, less certain amounts (as described below);

c) SemCAMS took title to the gas at the KA Plant inlets; and

d) the raw natural gas sold by Orleans to SemCAMS would be processed at the KA Plant using the capacity and priority rights held by SemCAMS by virtue of its joint ownership interest in the KA Plant.

[18] Since SemCAMS took title to the raw natural gas at the plant inlets, it could use its throughput capacity as a joint owner and Orleans would not be at risk of losing throughput capacity.

[19] The pricing for the raw natural gas under the IGPA establishes through a "netback" pricing mechanism, which provides that SemCAMS would purchase the raw natural gas from Orleans at a specified price, less the costs associated with the subsequent processing of the gas (the "Processing Costs"). SemCAMS as one of the joint owners of the KA Plant paid lower capital fees to process gas. Since the netback pricing mechanism under the IGPA is based in part on the Processing Costs, and the Processing Costs are based in part on the operating expenses paid by SemCAMS to process SemCAMS" raw natural gas at the KA Plant, the purchase price paid by SemCAMS to Orleans was subject to contractual price adjustments. The IGPA also provided Orleans with a contractual right to request an audit to verify actual throughput and adjust the purchase price accordingly. The IGPA provides that adjustments as a result of audits or otherwise shall be applied to gas purchased by SemCAMS under the IGPA as follows:

a. The Processing Agreement includes a thirteenth month adjustment clause which is hereby incorporated into this agreement so that any adjustments made pursuant to that clause, or otherwise, <u>including, without limitation, any adjustments arising from any audits as provided for in the Processing Agreement or in the . . . CO&O Agreement . . .</u> shall be applied to all gas purchased by SemCAMS under this Agreement. [emphasis added]

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[20] SemCAMS entered into inlet gas purchase agreements similar to the IGPA with other producers. The Orleans IGPA was terminated on July 22, 2008.

[21] The Rework, like the Thirteenth Month Adjustment, is a redistribution by SemCAMS as Operator of the KA Plant of funds paid by joint owners and third party users throughout the year at the KA Plant. The joint owners and third party users that have underpaid (i.e. who have been allocated excess production or invoiced insufficient share of the costs) are invoiced by the Operator, for the amount they underpaid. The invoiced amount is paid to the Operator, for the sole purpose of redistribution by it, on a pro-rata basis, to the joint owners and third party users that have overpaid.

[22] SemCAMS asserts that the Rework is not solely within the control of the Operator, noting that it is performed in conjunction with third parties and joint owners to verify their respective costs and throughput. As described by SemCAMS, conducting a Rework is a slow process. The revised information that results in a Rework typically comes from joint owners and third parties conducting audits or from making adjustments for actual volumes delivered. SemCAMS has submitted that audits can occur up to 26 months after the end of the production year. As part of an audit, the auditor forwards its queries to the Operator who responds to such queries. The auditor can then accept or reject the Operator's response. Once the Operator has the actual throughput from joint owners and third parties (including any changes from audits), the Operator has the information to calculate the Rework.

[23] SemCAMS as Operator expects that it will likely complete a Rework for the KA Plant for all production years. It has completed a Rework for the KA Plant for 2005, 2006 and 2007 and is in the process of completing a Rework for 2008. SemCAMS as Operator will be completing a Rework for 2009, based on the revised information that the Operator has already received.

[24] SemCAMS asserts that Orleans did not properly report the production volumes that it delivered to the KA Plant during 2007 and early 2008 because it did not include analysis and volumes for the hydrocarbon liquids. In a January 31, 2008 email, SemCAMS advised Orleans that it had been apparently under-allocated the hydrocarbon liquid known as condensate. Specifically, SemCAMS advised Orleans that it appeared that Orleans has been under allocated 400.6 m3 of condensate for the production month of December 2007 alone. In an e-mail dated February 6, 2008, SemCAMS advised that it had investigated this issue and determined that the under-allocation had occurred because Orleans had not provided the required information that would allow SemCAMS to properly determine the volumes of hydrocarbon liquids delivered under the IGPA.

[25] On February 13, 2008, accounting staff from SemCAMS and Orleans met to discuss the reporting issues. SemCAMS informed Orleans that it needed to provide revised production volumes to rectify the reporting issues going forward. Orleans submits that it provided the necessary revised reports the next day, although SemCAMS submits that only some of the information was delivered at that time.

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[26] The email evidence establishes that Orleans knew in April of 2008 that SemCAMS would be conducting a Rework for 2008 that would include the issue of hydrocarbon under-allocation, but that the Rework would take some time, probably over a year.

[27] Orleans concedes that it would have prepared an estimate of what it would be owed by SemCAMS to Orleans for the six months of under-allocation of hydrocarbons in 2007 under the IGPA, although its Chief Financial Officer indicated he would not recall this with certainty. Orleans submits that, until SemCAMS finalized the Rework, it had no way to quantify what the actual results would be, whether the adjustment would be positive or negative, but concedes that it would have been able to estimate the credit that Orleans would get under the Rework associated with the shortfall for condensate, subject to having to rely on the information provided by the third-party owner of the gathering system that Orleans was using to get its gas into the KA Plant. SemCAMS submits, and Orleans does not dispute, that the financial impact of the condensate under-allocation for December, 2008 was approximately $233,000. If that was typical for the six months of 2007 during which condensate was under-reported, Orleans would be entitled to credit of approximately $1.4 million.

[28] In the fall of 2008, Orleans received the Claims Process Order and became aware of the Claims Bar Date of December 1, 2008. It prepared a Proof of Claim relating to gas purchased from SemCAMS in June and July of 2008 and for Thirteenth Month Adjustments for previous time periods, but with no contingent claim for the condensate under-allocation.

[29] On August 11, 2009, the Monitor sent Orleans a Notice of Revision increasing its claim to include an unsecured claim for a price adjustment resulting from the 2008 Thirteenth Month Adjustment. Orleans challenged this treatment, alleging that the Thirteenth Month Adjustment price adjustment should be treated as an "Unaffected Claim" under the Plan. After the decision in *Re: SemCanada Crude Company (Celtic Exploration Ltd.)*, 2010 ABQB 531, leave to appeal dismissed in *Celtic Exploration Ltd. v. SemCAMS ULC*, 2010 ABCA 403 (the "Celtic Decision"), Orleans withdrew its Notice of Dispute. In the Celtic Decision, I found that the Thirteenth Month Adjustment was part of Celtic's unsecured claim for the unpaid portion of what SemCAMS as purchaser under the Celtic IGPA owed for the raw gas it purchased from Celtic prior to the CCAA filing: para. 78.

[30] In September of 2010, there was communication between SemCAMS and a consultant retained by Orleans with respect to the Rework. Orleans' consultant told SemCAMS that Orleans would provide further information to SemCAMS. SemCAMS provided revised figures to Orleans and asked Orleans to confirm them.

[31] On June 30, 2011, SemCAMS sent Orleans the details of the Rework for 2007. The Rework indicated that Orleans was owed $1,616,4012.68 by SemCAMS pursuant to the IGPA as a price adjustment for gas sold by Orleans to SemCAMS from the commencement of the IGPA

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through December 31, 2007. SemCAMS takes the position that this is a debt compromised by the Plan and extinguished by the Plan Sanction Order.

[32] With respect to the Orleans gas that was processed at the KA Plant in 2007 prior to the commencement of the IGPA, the Rework details indicate that Orleans is owed $383,408.03. Orleans' claim for such amount was not compromised by the Plan and the Plan Sanction Order because SemCAMS as Operator of the KA Plant processed such gas pursuant to a Gas Processing Agreement with Orleans. Orleans has been paid this amount.

[33] SemCAMS has prepared a chart that details the Rework for 2007 relating to SemCAMS and the other companies that sold gas to SemCAMS prior to the CCAA proceedings under inlet gas purchase agreements. This chart indicates that SemCAMS overpaid the Operator of the KA Plant a net amount of $645,282.95 for aggregate gas purchases from inlet gas purchase agreement customers during 2007. Absent the CCAA proceedings, this amount of overpayment would be paid back to SemCAMS and redistributed to those customers, leaving SemCAMS in a net-zero position. However, SemCAMS takes the position that the price adjustments (whether overpayments or underpayments) are stayed payables and that any claims the inlet gas purchase agreement customers may have for underpayments were compromised and released by the Plan. Similarly, it takes the position that it cannot collect back any overpayments made to such customers as identified by the Rework. Consequently, SemCAMS is in a better position by the amount of $645,282.95 than it would have been had the CCAA proceedings not intervened.

[34] The 2008 Rework has not been completed.

Issues

1. Is the Price Adjustment Claim a "claim" that can be compromised under the CCAA?

2. Was the Price Adjustment Claim released and discharged by the Plan and barred by the Plan Sanction Order?

3. Should the Orleans Statement of Claim be struck out?

Analysis

Statutory Provisions and Case Law

[35] Section 2 of the CCAA defines a "claim" as being "any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*."

[36] Section 2 of the *BIA* defines a "claim provable in bankruptcy", "provable claim" or "claim provable" as including any claim or liability provable in proceedings under the *Act*.

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[37] Section 121 of the *BIA* defines a "claim provable" as follows:

> **Claims provable**
>
> 121.(1) all 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 shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135. [emphasis added]

[38] Thus, claims provable in bankruptcy include contingent and unliquidated liabilities if the bankrupt is subject to such a liability on the day on which the bankrupt becomes bankrupt or becomes subject to such liability before the bankrupt's discharge by reason of an obligation incurred before bankruptcy, if such claims are determined to be probable claims by a trustee and valued as such pursuant to Section 135 of the *BIA*. An appeal from such determination may be made to a Court.

[39] The language of Section 121 of the *BIA* is echoed in part in the language of Section 19 of the CCAA as follows:

> **Claims**
> 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 related to debts or liabilities, present or future, to which the company ***is subject*** on the earlier of
>
> (i) the day on which proceedings commended under this 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). [emphasis added]

Section 19(1)(a)(ii) does not apply in this case.

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[40] Case law discussing whether particular claims are "provable claims" under the *BIA* is therefore relevant to the same issue under the CCAA.

[41] Orleans relies on *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 (Sask.Q.B.) for the proposition that, if all of the elements establishing liability for a debt are not known or proven or if a claim is too speculative or difficult to prove it will not be a "provable claim". *Claude Resources* involved a statement of claim alleging breach of fiduciary duty and negligence and a claim by some of the defendants against the bankrupt company for indemnity. The Court found that there must be some element of probability about the contingent liability arising from the litigation before the Court should recognize s claim as a "provable claim", and without such element of probability, the claim was too remote or speculative: para. 30.

[42] The reasoning in *Claude Resources* was rejected by the Ontario Court of Appeal in *Confederation Treasury Services Ltd., Re* (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75 (C.A.).

[43] That case similarly involved a claim arising from the potential liability of the bankrupt's auditors and former directors and officers arising from litigation against them and their claim for contribution and indemnity against the bankrupt company. The Court noted that the need for probability of liability arising from court proceedings articulated in *Claude Resources* was too high a threshold for the establishment of such a claim. It commented at para. 4 that, "(w)hile there may be claims so remote and speculative in nature that they could not properly be considered contingent claims", the claim of the auditors did not fall within the category. The claim was remitted back to the trial court for valuation pursuant to Section 121(2) of the *BIA* "upon such evidence as may be adduced by the parties in respect of such valuation".

[44] The reasoning in *Confederation Treasury Services*, including the rejection of the test set out in *Claude Resources*, was adopted in *National Bank of Canada v. Merit Energy Ltd.*, 2001 ABQB 583, 294 A.R. 15 aff'd 2002 ABCA 5, 96 Alta. L.R. (3d) 1 at para. 77 by LoVecchio J., who noted that Section 121 of the *BIA* does not specify the degree of certainty required to make a claim provable. The *Confederation Treasury Services* reasoning was also adopted in *Experienced Equipment Sales & Rentals Inc., Re*, 2001 ABQB 461, 208 A.C.W.S. (3d) 453, in a situation where a claim was made pursuant to a statement of claim alleging damages for slander of title. Belzil, J. noted that the statement of claim in question disclosed a recognized cause of action that had the legal potential to be reduced to a judgment, and commented that "(i)t would be incongruous in the extreme if a Trustee rejected a claim as being too remote and speculative only to have a Court later conclude that the claim was valid and quantifiable": para. 25.

[45] In *Auctioneers' Assn. (Alberta) v. Hunter*, 2002 ABQB 28, 309 A.R. 290, Master Funduk undertook a thorough review of existing case law on this issue in an application for summary judgment where the plaintiff's lawsuit was started after the date that the defendant was discharged from bankruptcy and the issue was whether the defendant's liability on the guarantee

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that was the basis for the lawsuit was released by the order of discharge. Master Funduk thus had to consider whether the plaintiff's claim was a claim "provable in bankruptcy".

[46] The Master found that it was, relying on *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.*, [1992] 4 W.W.R. 309 (Alta.C.A.) and *Confederation Treasury Services*. He noted at para. 46 that *Abacus Cities* held that facts occurring after the date of bankruptcy based on a pre-bankruptcy contract can give rise to a claim provable in bankruptcy. The claim in *Abacus Cities* was for costs incurred by a mortgagee after the date of the bankruptcy based on indemnities set out in pre-bankruptcy mortgages.

[47] In *Abacus Cities*, the Court dealt with the argument that Section 121(2) limits future liabilities to those that can be valued before they arise. The Court conceded that future claims can be limited if they are not provable "when the trustee calls for proof", but commented that "(o)ne must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process:" page 317. The Court thus found that Section 121(2) did not necessary defeat the mortgagees, commenting at page 319 that:

> In conclusion, no rule of law forbids simpliciter the enforcement of a pre-bankruptcy cost indemnity given by the bankrupt to a creditor for expenses incurred after bankruptcy. But a bankruptcy court may refuse to enforce that indemnity. It might refuse when enforcement would countenance abuse of the bankruptcy process; or where a creditor incurred costs other than in a "commercially reasonable fashion."

[48] Master Funduk noted in his review of case authority the comment in *Re Paine*; *Ex parte Read*, [1897] 1 Q.B. 122 that "it is now established . . . that the contingent liability of a surety who has not been called upon to pay, or has not in fact paid, forms a debt provable in the bankruptcy of the principal debtor": para. 50, citing *Re Froment*, [1925] 2 W.W.R. 415.

[49] The Master preferred the reasoning in *Confederation Treasury Services* to that of *Claude Resources*. He also considered the case of *Ontario New Home Warranty Program v. Jiordan Homes Ltd.* (1999), 43 O.R. (3d) 756 (Ont.Gen.Div.), where a claimant had made a claim against a new home warranty program relating to a discharged bankrupt and the program sued the discharged bankrupt on the basis of an indemnity provision under a guarantee. The Master pointed out that the Court in *Ontario New Home Warranty* had been incorrectly advised by counsel that there were no cases on point, and had made its decision in the absence of existing authority. Master Funduk distinguished *Ontario New Home Warranty* on the facts, but he also questioned the Court's statement that a bankrupt is not "subject to a liability" until and unless the New Home Warranty Program pays a claim. The Master noted that this statement "overlooks the fact that the bankrupt's liability is a contingent liability and section 121 recognizes contingent liabilities": para. 62. He therefore found that the *Ontario New Home Warranty* case had no precedential value, noting that the issue in the case before him was whether the contingent claim could be valued and, if so, what value should be given to it: para. 68. He directed that the case go to trial solely to determine the value of the liability, noting that if the liability could not be valued

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pursuant to Section 135 of the BIA, the defendant would not be released from any liability based on the guarantee.

[50] Orleans points out that the Master did not refer to the Queen's Bench decision of *Peters v. Remington* (2001), 291 AR 189 in his discussion of authorities, and submits that, thus, the Master's decision suffers from the same kind of deficiency that he criticized in *Jiordan Homes*. However, it is notable that while the Court of Appeal upheld the result in *Peters* (2004 ABCA 5), it did so on the basis of *res judicata* arising from a previous determination of the issue by a trustee in bankruptcy, and found the trial judge in error for considering the issue afresh. The issue identified by the Court of Appeal in *Peters* was a narrow one on facts that are distinguishable from this case: if a claim has already been denied in bankruptcy as offending the "rule against double proofs", can it be pursued after the proposal has been accepted: para. 1. This is a different issue from this case, where a claim was not made in the CCAA proceedings.

[51] In *Harvey, Re*, 2004 ABQB 773, 373 A.R. 373, a trustee in bankruptcy sought a declaration that the indebtedness of the bankrupt to Human Resources and Development Canada ("HRDC") was a claim provable in bankruptcy. HRDC took the position that its claim for recovery of an employment insurance overpayment became a debt due only when the Canada Employment Insurance Commission made a decision under Section 52 of the *Employment Insurance Act* that a person had received money to which he was not entitled. At para. 19 of the decision, Master Smart concluded that the claim was provable, noting that Section 121 of the *BIA* clearly provides that a contingent as unliquidated claim may be a provable claim. He commented that, even if Section 52 of the *Employment Insurance Act* created a true condition precedent to the claim, it was still a provable claim as long as it was not too remote or speculative, citing *Confederation Treasury Services*. Master Smart noted that:

> (a)ll of the events which gave rise to the liability to HRDC occurred prior to the bankruptcy. All that need be done by HRDC is to review its file, calculate the amount and give notice. Indeed, in this case it has already been done but in any case it cannot be said that these tasks are so difficult so as to cause one to conclude that the claim is too speculative or remote.

1. Is the Price Adjustment Claim a "claim" that can be compromised under the CCAA?

A. Was SemCAMS "subject to" the Price Adjustment Claim prior to the Plan Sanction Order?

[52] Orleans submits that SemCAMS was not "subject to" the Price Adjustment Claim at the time of the Plan Sanction Order, and that the claim is thus not a "claim" under the CCAA, since both Section 121 of the *BIA* and Section 19 of the CCAA requires the debt or liability to be one, present or future, that the debtor is "subject to" on the day proceedings are commenced or before discharge or plan sanction.

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[53] Orleans relies on the fact that it could not have submitted an invoice for the Price Adjustment Claim prior to the completion of the Rework. This argument ignores the distinction between "debt" and "liability", both of which are included in the definition of provable claims.

[54] A "liability" is a term that can be used to describe "an unliquidated or unspecified legal obligation". A "debt" is a narrower term that refers to "a specific kind of obligation for a liquidated or certain sum": *Royal Trust Co. v. H.A. Roberts Group Ltd.*, [1995] 4 W.W.R. 305 (Sask.Q.B.) at para. 119, cited with approval in *Re West Bay SonShip Yachts Ltd.*, 2009 BCCA 31, 306 D.L.R. (4th) 294 at para. 22. While the Price Adjustment Claim may not have been a liquidated debt at the time of the Plan Sanction Order, it was certainly a liability that arose from the IGPA. The Price Adjustment Claim, like the Thirteenth Month Adjustment, represents a claim for the unpaid portion of what SemCAMS as purchaser under the IGPA owed to Orleans for the gas and associated liquids it purchased from Orleans prior to the CCAA filing: see the *Celtic* Decision at para. 78.

[55] Orleans relies on *Ontario New Home Warranty* for the submission that a claim is a provable claim only if the debtor actually becomes liable before his discharge. I have already referred to the lack of precedential value of that case, but note that, in any event, the Court in *Ontario New Home Warranty* conceded that Section 121(1) included liabilities that may come due at a future time after discharge, as long as they arose prior to discharge : para. 11. The claim in issue in *Ontario New Home Warranty* was an indemnity agreement that the Court found had not become a liability until after the bankrupt was discharged, a different fact scenario from the one in this case. The Court in *Ontario New Home Warranty* did not turn its mind to whether the claim in that case was a contingent claim.

[56] Orleans concedes that all of the obligations under the IGPA, including the Rework, existed upon the execution of the IGPA, but submits that SemCAMS was not "subject to" the Price Adjustment Claim until after the Plan Sanction Order, because no-one knew with any certainty that any liability would arise from SemCAMS to Orleans as a result of the Rework. The issue of certainty will be subject to further analysis in this decision, but this argument fails because SemCAMS was, in fact, subject to a contingent liability, future and unliquidated, arising from the under-allocation of condensation in 2007.

B. Is it necessary that Orleans have a cause of action that could lead to a judgment before a claim is a "provable claim"?

[57] Orleans submits that it had suffered no injury and had no cause of action to recover the Price Adjustment Claim at the time that SemCAMS obtained the Plan Sanction Order. It suggests that the *West Bay* decision stands for the proposition that a "provable claim" must be something for which the creditor could have filed a lawsuit and obtained judgment at the time of the CCAA proceedings.

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[58] I find that Orleans had suffered an "injury" at the time of the CCAA proceedings that related to the Price Adjustment Claim: it was under-allocated condensate for the six months in 2007, giving rise to a liability even though the debt was not liquidated until the Rework. The non-performance of the contract (to the extent that such non-performance existed since the under-allocation arose from Orleans' failure to properly report volumes of condensate to SemCAMS) occurred prior to the CCAA filing. The injury "matured" when the amount of the debt was ascertained with finality through the Rework.

[59] At any rate, *West Bay* does not stand for the bald proposition suggested by Orleans. *West Bay* involved a common law claim for damages for wrongful dismissal. West Bay had filed for protection under the CCAA on December 16, 2005. The employee claimant was given notice on January 17, 2006 that his employment would be terminated effective June 6, 2006. A plan was sanctioned on June 23, 2006. The claimant did not file a Proof of Claim.

[60] The Court found that this wrongful dismissal claim did not accrue from the outset of the claimant's employment, and thus did not represent a contingent liability of *West Bay* of the date of filing under the CCAA. It was thus not a pre-filing claim. In coming to this conclusion, Levine, J.A., commented at para. 21 that:

> The question that arises in this case is whether the existence of a contractual obligation, and the corresponding potential for a claim for damages for its breach, is a contingent liability of the party who may commit the breach. I conclude that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where this is no present cause of action. That is, until there is a breach of contract, there is no legal basis for any claim or any corresponding liability.

[61] She noted at para. 24 that, until termination of the contract of employment without notice, there was no injury, and that the mere possibility of a breach of contract is not sufficient to give rise to a contingent liability.

[62] The Court ultimately determined the matter on the basis that the claim for damages fell within the definition of "claim" for other reasons relating to the language of the Plan, and there was no consideration of whether the claim fell within s. 19(1)(b) of the CCAA.

[63] Interpreting section 19 in the manner suggested by Orleans, that claims must be liabilities that could be sued to judgment before the end of the CCAA proceeding, does not accord with a common sense interpretation of section 19 and the definition of "claims" under the CCAA, as these sections on their face encompass future liabilities, contingent and unliquidated that may not be payable until the future, if at all, depending on the occurrence of the contingent event.

[64] This interpretation also leads to absurd results: the original $8.6 million claim for gas sold before the Initial Order was granted would be compromised, the Thirteenth Month Adjustment would be compromised, but the Rework amount would survive the CCAA

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proceedings, even though it arose from the same set of circumstances. If the Rework had resulted in an amount owing by Orleans, it would have received a compromised amount on the debt owing to it by SemCAMS but would have to pay the entire amount of any overpayment back.

[65] In this case, the Price Adjustment Claim arose from an "injury" that occurred prior to the CCAA filing, a pre-filing liability that existed at the time of the CCAA filing. It gave rise to a contingent, unliquidated liability prior to the Plan Sanction Order.

C. Was the Price Adjustment Claim too uncertain at the time of the Plan Sanction Order for it to fall within the definition of "claim" under the CCAA?

[66] Orleans submits that, prior to the receipt of the Rework details, it did not know and could not have known if SemCAMS had to pay Orleans or vice-versa. That may be so, but Orleans knew that SemCAMS had under-paid it for condensate. It knew it was entitled to a credit in the Rework for the under-allocated condensate and it could, and likely did, calculate the value of that credit. If that calculation could not be made with absolute finality, it could be made with a fair degree of certainty.

[67] SemCAMS concedes that the amount owed by it to Orleans for 2007 was not finally ascertained until the Rework, as the process could result in adjustments with respect to other parties that could counter or reduce the credit, but submits that Section 19 allows a plan to compromise future and contingent claims. It is the very nature of a contingent claim that it is "a claim which may or may not ever ripen into a debt, according as some future event does or does not happen": *Gardner v Newton* (1916), 29 D.L.R. 276 at 281, cited by the Court of Appeal in *Peters* at para. 25.

[68] The Price Adjustment Claim was not too speculative to be a provable claim. It was sufficiently certain that a) SemCAMS had an obligation to pay for a price adjustment credit for 2007 arising out of the under-allocation of the condensate; b) that this would be addressed in a Rework; and c) the amount of the credit could have been calculated with some degree of certainty. Even claims made under indemnities that give rise to double contingencies have been found to be provable claims, subject to valuation, and the Price Adjustment Claim had a greater degree of certainty than this type of claim. The fact situation in this case is similar to that in *Re Harvey*; as in that case, the relevant underlying transaction occurred before the insolvency event, even though the debt did not come due until the occurrence of a required event.

[69] I cannot agree with Orleans' submission that requiring Orleans and other inlet gas purchase agreement customers to file contingent claims with respect to the Rework would be impractical and unworkable. As was the case in *Confederation Treasury*, *Auctioneers' Association* and *Experienced Equipment Sales and Rentals*, the claim may have required valuation by the Monitor or the Court, but again, that is the nature of a contingent unliquidated claim.

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[70] In summary, I find that the Price Adjustment Claim is a claim that can be compromised under the CCAA.

2. Was the Price Adjustment Claim released and discharged by the Plan and barred by the Plan Sanction Order?

[71] The Claims Process Order of October 22, 2008, which was served on Orleans, makes it clear that "claim" includes contingent claims, defining "claim" as including:

> . . . any . . . claim . . . made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including without limitation . . . by reasons of any breach of contract or other agreement (oral or written) . . . and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown . . . and whether or not any right or claim is executory or anticipatory in nature including . . . with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future . . . [emphasis added]

Orleans did not file a Proof of Claim for the Price Adjustment Claim, or any credit owing to it arising from the under-allocation of condensate, before the Claims Bar Date of December 1, 2008, and does not apply to file a late claim.

[72] The relevant portions of Section 8.1 of the Plan are as follows:

> On the Plan Implementation Date . . . the Company . . .shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages . . . on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert . . . whether known or unknown, matured or unmatured, foreseen or unforeseen, existing ro hereafter arising, based in whole or in part on any act or omission, occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, the business and affairs of the Company whenever or however conducted . . . the Plan, the CCAA Proceedings, any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law; . . . [emphasis added]

[73] As I have found that the Price Adjustment Claim is a claim that may be subject to compromise under Section 19(1) of the CCAA, it is clear that it is caught by Section 8.1 of the Plan. Paragraphs 28 and 45 of the Plan Sanction Order give effect to Section 8.1 as follows:

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> 28. Pursuant to and in accordance with the Plan, any and all Affected Claims of any nature against the Company, . . . shall be forever compromised, discharged and released, and the ability of any Person to proceed against the Company in respect of or relating to any Affected Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims are hereby permanently stayed, subject only to the right of Affected Creditors to receive the distributions pursuant to the Plan and this Plan Sanction Order in respect of their Affected Claims.
>
> . . .
>
> 45. Pursuant to and in accordance with Section 8.1 of the Plan, on the Plan Implementation Date the Released Parties shall be released and discharged from any and all demands, claims, actions, causes of action . . .on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert. . .whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, the business and affairs of the Company whenever or however conducted . . .any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law.

The Price Adjustment Claim was thus released and discharged by the Plan and has become barred and extinguished by the Plan Sanction Order.

[74] Given that I find that the Price Adjustment Claim falls within the definition of a "claim" under the CCAA, it is not necessary that I address whether the Plan Sanction Order exceeds the jurisdiction of the Court, nor is it necessary that I address whether allowing the Price Adjustment Claim to succeed would result in unequal treatment among creditors and work a prejudice on SemCAMS and the CCAA process.

3. Should the Orleans Statement of Claim be struck out?

[75] In its Statement of Claim, Orleans claims damages for breach of the IGPA, specifically amounts stated to be owing by the Rework. It was filed in breach of paragraph 25 of the Plan Sanction Order, which stays all proceedings with respect to such a claim.

[76] The Statement of Claim is accordingly struck out.

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Conclusion

[77] In summary, I find that Orleans' Price Adjustment Claim is a "claim" that can be compromised under the CCAA, that it was released and discharged by the Plan and barred and extinguished by the Plan Sanction Order.

[78] I find the Statement of Claim relating to the Price Adjustment Claim to be a breach of the Plan Sanction Order and, accordingly, I strike it.

[79] If the parties are unable to agree on costs, that issue may be addressed through written submissions, filed within 45 days.

Dated at the City of Calgary, Alberta this 31st day of July, 2012.

B.E. Romaine
J.C.Q.B.A.

Appearances:

A. Robert Anderson, Q.C.
Doug Schweitzer and Daniel Yaverbaum
Osler, Hoskin & Harcourt LLP
for SemCAMS ULC

Trevor A. Batty and Doug S. Nishimura
Burnet, Duckworth & Palmer LLP
for RMP Energy Inc. formerly Orleans Energy Ltd.

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TAB 63

SUPERIOR COURT

2013 QCCS 2214 (CanLII)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-17-017403-034

DATE: May 15, 2013

PRESENT: **THE HONOURABLE JEAN GUIBAULT J.S.C.**

ROYAL BANK OF CANADA
Plaintiff
v.
CAPITAL FACTORS, INC.
and
REGIONS BANK
(formerly known as UNION PLANTERS BANK OF FLORIDA)
Defendants

JUDGMENT

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[1] The Plaintiff, Royal Bank of Canada (hereinafter, "RBC" or "the Bank"), which was the victim of a fraud in a certain form of kiting in April 1998, is claiming from the Defendants Regions Bank (hereinafter, "Union Bank") and Capital Factors, Inc. the sum of $12 007 800 (US$9 000 000 converted into Canadian dollars as at April 8, 1998), representing the net loss it incurred as a result of various interbank transactions between the Plaintiff and the Defendants and involving their respective clients, the company Tiagi – Tabah International Apparel Group Inc. (hereinafter, "Tiagi") in the case of RBC and its US subsidiary Global Orbit Industries Inc. (hereinafter, "Global" or "Global Orbit") in the case the Defendants.

[2] RBC claims that these two Florida financial institutions should have put an end to the kiting and to their business dealings with Global in January or February 1998 when they began to have doubts about the way in which the line of credit with Capital Factors and the bank account with Union Bank were being operated, or at least that the two Defendants showed negligence by not notifying the Royal Bank of Canada of the considerable disparity between the volume of transactions charged to Global Orbit's account with Capital Factors and the amounts advanced by the latter in relation to the purchase of accounts receivable.

[3] The Defendants do not admit any liability for the loss incurred by RBC, which, according to them, was very negligent in the operation of Tiagi's bank account. They asserted that RBC has only itself to blame for the loss thus incurred and raised several points of law on the merits of the claim, particularly as regards the law applicable to the present case and the prescription of rights to pursue remedies.

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❖ PARTIES AND MAIN WITNESSES HEARD BY THE COURT OR WHOSE EXAMINATION OUT OF COURT WAS FILED IN WHOLE OR IN PART IN THE RECORD

➢ Plaintiff, Royal Bank of Canada

[4] The Plaintiff RBC is a major global financial institution that has been in operation since 1864 and whose corporate headquarters and principal place of business are located at 1, Place Ville Marie, in Montréal.

[5] The Bank describes itself as follows on its website:

> Royal Bank of Canada . . . and its subsidiaries operate under the master brand name RBC.
>
> - We are one of Canada's largest banks as measured by assets and market capitalization, and are among the largest banks in the world, based on market capitalization.
>
> - We are one of North America's leading diversified financial services companies, and provide personal and commercial banking, wealth management services, insurance, corporate and investment banking and investor services on a global basis.
>
> - We employ approximately 80,000 full- and part-time employees who serve more than 15 million personal, business, public sector and institutional clients through offices in Canada, the U.S. and 49 other countries.[1]

1 RBC website, Corporate Profile section, at http://www.rbc.com/aboutus/index.html (consulted February 19, 2013).

- **MAIN WITNESSES PRESENTED BY RBC**

1. Michel Chapdelaine

[6] Mr. Chapdelaine, who worked for the Bank for over 30 years, was manager of the Business Banking Centre at Place Ville Marie at the time of the events that concern us. He was in charge of approximately 30 employees, and particularly Denise Doucet, who was responsible for the Tiagi account from which all of the fraudulent transactions were made.

2. Denise Doucet

[7] At the time of the events, Ms. Doucet was the Account Manager directly responsible for the Tiagi account, which all of the employees from the Bank involved in this situation characterized as a non-borrowing account that operated, according to Ms. Doucet, in a completely regular manner until late March, early April 1998 when Union Bank returned a series of cheques marked “NSF” or “account closed”.

3. Carl Bruneault

[8] At the time of the events, Mr. Bruneault was a team leader in charge of five tellers at the Business Banking Centre located at 1, Place Ville Marie, from which the Tiagi account was operated.

4. Robert Mills and Ray Maddeault

[9] Robert Mills, who was Audit Manager for RBC at the time of the events, and Ray Maddeault were also involved for the Plaintiff following the discovery of the kiting scheme and the account overdraft in April 1998. At the request of RBC’s most senior executives, these two witnesses were asked to investigate all the events that gave rise to the loss incurred by RBC, in order to understand how the Bank could have incurred such a loss, introduce mechanisms to prevent the recurrence of such events, and recover the loss incurred, insofar as possible, from the institutions and individuals responsible.

[10] The Court will return in particular to the testimony of these witnesses when it analyzes the various points of law raised by, and the liability of, each party.

5. Expert witness – Martin Fafard

[11] RBC also presented, as an expert witness, forensic accountant Martin Fafard, who prepared a very interesting analysis of the flow of money between the different

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bank accounts in Canada and Florida, and who concluded that the banking transactions conducted by Tiagi and Global Orbit could be characterized as transactions out of the ordinary course of business.

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- **Defence, Capital Factors, Inc.**

[12] As described by RBC in its Re-Amended Motion to Institute Proceedings: "Capital Factors, Inc. ("Capital Factors") is a corporation duly organized and existing pursuant to the laws of the State of Florida and is in the business of providing commercial factoring and related services".

[13] At the time with which we are concerned, Capital Factors established a business relationship with Global Orbit, a subsidiary of Tiagi, and in its capacity of lender it granted Global a stock-secured line of credit. It also agreed, through the factoring mechanism, to buy Global's accounts receivable. The total amount of credit granted to Global by Capital Factors stood at $14 000 000 as at April 1, 1998, based on the ratios agreed upon between the parties.

- **WITNESSES FOR CAPITAL FACTORS**

1. Javier Holtz

[14] In 1997-1998, Mr. Holtz was Manager of Union Bank and Chief Operating Officer and Vice-President of Capital Factors. If there is any liability on the part of Union Bank in this case, it is mainly because Mr. Holtz held a key position at both financial institutions and was aware of the way in which the line of credit with Capital Factors operated and, as contended by RBC, of the repercussions these transactions had on the account held by Global Orbit at Union Bank.

[15] According to RBC, Mr. Holtz knew or was in a position to know that irregular transactions were being made from the account and the line of credit with Capital Factors, in that Global Orbit's day-to-day operations and transactions were not completely out of step with the credit granted; this created a situation of "imbalance" that justified either the immediate closure of Global Orbit's account at Union Bank and an end to the financing granted by Capital Factors or, at least, an obligation for the two Defendants to notify RBC of the risk such transactions could pose for it.

2. Michael Levine

[16] The second witness presented by Capital Factors was Michael Levine, an attorney, member of the Florida Bar and General Counsel for Capital Factors. During his testimony, Mr. Levine stressed the fact that Capital Factors and Union Bank operated independently of one another. He himself had no connection with Union Bank at the time and, even though he was involved in Capital Factors' day-to-day operations, was never notified and never even suspected that Global Orbit's account was being

operated improperly and that there was a risk of kiting on the part of Global Orbit or its parent company Tiagi.

[17] Mr. Levine clearly stated to the Court that at no time did either officer of Capital Factors mention improper or illegal transactions by Global Orbit within the framework of the financing granted to it by Capital Factors.

3. Ellen Ferri

[18] The third most important witness heard by the Court and presented by Capital Factors was Ellen Ferri, Account Executive and Portfolio Manager for Capital Factors in 1997-1998. Ms. Ferri's testimony is very important in this case to the extent that she was responsible for day-to-day operations and relations between Capital Factors and Global Orbit throughout the period concerned.

[19] Ms. Ferri testified with aplomb, and the Court was very impressed with her testimony and her high level of expertise in factoring. Even though she was notified about the imbalance in the operation of Global Orbit's account, she said that she never suspected kiting activities by Tiagi with risk of prejudice and loss to RBC.

4. Scott MacMillan

[20] Mr. MacMillan is also a very important witness as far as the two Defendants in this dispute are concerned. He was Ms. Ferri's immediate supervisor and was examined at length out of Court prior to the hearing of this case. His testimony as a whole was filed in the Court record.

[21] Unfortunately, his health prevented him from being present and testifying during the hearing before the undersigned. Even though this witness could not be heard, it was the answers that RBC obtained from Mr. MacMillan concerning his alleged knowledge of the improper operation of Global Orbit's account with Capital Factors and the imbalance therein that formed, according to RBC, the basis of its action.

5. Expert witness – Barkley Clark

[22] Barkley Clark, an attorney and Harvard professor, was also heard as an expert witness for Capital Factors. He was called to testify on the law applicable in Florida to banks and their affiliated financial institutions, and particularly on the obligation of confidentiality imposed on them by Florida law.

- **Defence, Union Bank**

[23] In its Re-Amended Motion to Institute Proceedings, the Plaintiff described Union Bank as follows:

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> At all relevant times, Capital Factors was a wholly owned subsidiary of Capital Factors Holding, Inc. ("**Capital Factors Holding**") a majority owned subsidiary of Union Planters Bank of Florida F/K/A Capital Bank ("**Union Bank**"). Regions Bank is the successor to Capital Bank and Union Bank. In late 1998, Capital Factors Holding became a wholly owned subsidiary of Union Bank's successor-in-interest Union Planters Bank, National Association, as appears from Roy Tanis' undertakings no. 1 and 2 identified as Exhibit R-50;[2]

- **WITNESSES FOR UNION BANK**

1. Patricia Carol

[24] Patricia Carol was the first witness heard for Union Bank for whom she has worked since 1972. Ms. Carol has over 35 years of experience in banking and has held various positions over the years. She explained to the Court the day-to-day operation of the bank, and particularly of the account opened in the name of Global Orbit. She confirmed to the Court that there was no authority within the branch where Global Orbit's account was operated to accept overdrafts, and she made sure on a daily basis that, in accordance with the applicable regulations, there were sufficient funds in the account to cover the cheques issued by the debtor Global Orbit. She did not notice anything unusual or suspicious about the operation of the account prior to its closure in March 1998.

2. Beverly Meyers

[25] Beverly Meyers was the second witness heard on behalf of Union Bank. She was Acting Assistant Manager for Union Bank in 1997-1998. She corroborated everything that Ms. Carol said and confirmed to the Court that there was nothing unusual or suspicious about the operation of Global Orbit's account in 1997-1998.

- **Third parties not party to this dispute**

[26] In addition to the parties described above and the witnesses heard during the hearing for each party, it should be noted that an important role was played by other individuals and corporations who, even though they were directly involved, were neither parties nor third parties. They are:

Fayez Tabah

Georges Tabah

Mark Tabah

Stephen Tabah

George Tabah, Jr.

2 Re-Amended Motion to Institute Proceedings, dated October 25, 2012, para. 4.

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Carla Tabah

Gary Tabah

Monah Tabah and

Marina Tabah

who are referred to collectively in any combination of one or more as "the Tabah Family", which had established a personal business relationship with RBC.

[27] At the heart of this dispute is **Tiagi - Tabah International Apparel Group Inc.**, with all its subsidiaries and related companies, more fully described in paragraph 8 of the Re-Amended Motion to Institute Proceedings, which reads as follows:

> The Tabah Companies were in the business of apparels and were headquartered and administered out of the Executive Offices located at 9420 L'Acadie Boulevard, Montréal (Québec) but had activities in Canada and the United States. However, all strategic decision-making and financial, administrative and accounting operations conducted by and for the Tabah Companies were centered in Montréal;

[28] It was in the name of Tiagi and without any further verification other than the knowledge it had of the personal banking transactions conducted by members of the Tabah family that RBC opened what it calls a non-borrowing account in the name of Tiagi – Tabah International, and this is the bank account from which all the transactions that gave rise to the kiting fraud were made.

[29] The second important corporate entity is **Global Orbit Industries Inc.**, a subsidiary of Tiagi that operates in the United States and deals with, as mentioned earlier, Union Bank, one of the Defendants, for banking purposes and with Capital Factors for the purposes of the credit granted to it for its operations.

[30] **Rami Chehata**, President and Chief Operating Officer for Global Orbit, was also involved on a day-to-day basis in all of the transactions that concern us. Neither Mr. Chehata nor any members of the Tiagi Family were called as witnesses during the hearing, since their version of the facts was limited to the filing of the out-of-court examinations held prior to the hearing in different litigations involving one or other of the parties in this case.

[31] Lastly, there was **Heller Financial Inc.**, a corporation in the business of providing commercial factoring and related services. Following talks with various financial institutions in previous months, Global Orbit entered into a series of agreements in winter 1998 whereby Heller would provide factoring services to Global in replacement of Capital Factors. In early April 1998, Heller thus replaced Capital Factors, for all intents and purposes, as regards all of the financing required by Global for its operations in the United States.

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[32] At the hearing and in the expertise report prepared by Martin Fafard, a forensic accountant with Raymond Chabot Grant Thornton & Cie, it was mentioned that large sums seem to have passed through the **Bank of Montreal**. However, the evidence is silent with respect to the exact role that the bank may have played in the fraud designed by Tiagi to the detriment of RBC.

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❖ THE KITING SCHEME

[33] The fraud involving the Tabah Family, Tiagi and Global Orbit is clearly described in the Re-Amended Motion to Institute Proceedings. For the purposes of this judgment, the Court reproduces paragraphs 12 *et seq.*, which describe the fraud:

> 12. Starting in or about November 1997, and continuing through March or early April, 1998, there were illegal and unauthorized activities in Tiagi's RBC Account that ultimately resulted in a substantial overdraft when items that had been presented for deposit into Tiagi's RBC Account were returned. The returned items were cheques drawn by Global on an account at Union Bank ("**Global's Union Bank Account**") and made payable to Tiagi;
>
> 13. The activity started with two deposits, each of $200,000.00 U.S., one into Tiagi's RBC Account with a cheque from Global's Union Bank Account, and another into Global's Union Bank Account with a cheque drawn on Tiagi's RBC Account;
>
> 14. As time progressed, the amount of the deposits (and the associated withdrawals) became larger and more frequent. From time to time, Tiagi authorized the wire transfer of funds out of Tiagi's RBC Account into Global's Union Bank Account and to a bank account held by Capital Factors at First Union National Bank of Florida ("**First Union Bank**");
>
> 15. The amount of the items processed through Tiagi's RBC Account totaled $1.1 million U.S. in November 1997, $12 million U.S. in December 1997, $24 million U.S. in January 1998, and $101 million U.S. for the period February 25 to March 25, 1998. Substantially all of the deposits into Tiagi's RBC Account were in the form of cheques drawn on Global's Union Bank Account;
>
> 16. In or about late March 1998, Tiagi authorized certain wire transfers of funds from Tiagi's RBC account. More precisely, Tiagi authorized the following wire transfers from Tiagi's RBC Account to Global's Union Bank Account: (a) on March 19, 1998, a transfer in the amount of $3,907,344.00 U.S.; (b) on March 25, 1998, a transfer in the amount of $5,200,000.00 U.S.; and (c) on March 30, 1998, a transfer in the amount of $400,000.00. U.S. Also, Tiagi authorized the following wire transfers from Tiagi's RBC Account to an account held in the name of Capital Factors at First Union Bank: (a) on March 19, 1998, a transfer in the amount of $8,018,000.00 U.S.; (b) on March 20, 1998, a

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transfer in the amount of $5,451,000.00 U.S.; (c) on March 23, 1998, a transfer in the amount of $4,531,500.00 U.S.; (d) on March 30, 1998, a transfer in the amount of $5,000,000.00 U.S.; and (e) on March 31, 1998, a transfer in the amount of $10,027,000.00 U.S. Upon receiving Tiagi's authorizations, Royal Bank transferred the funds, a copy of the transfers authorizations being identified en liasse as **Exhibit R-6**;

17. In or about late March 1998 and early April 1998, Tiagi had deposited into Tiagi's RBC Account a number of cheques from Global that were drawn on Global's Union Bank Account and each of those cheques were returned unpaid because they were written either on an account with insufficient funds or on an account that was closed (collectively, the "**Dishonored Cheques**");

18. Union Bank returned unpaid the following Dishonored Cheques made payable to Tiagi: (a) (...) 30 cheques dated March 26, 1998 or March 27, 1998, in the total amount of $9,875,742 U.S.; (...) (b) 26 cheques dated March 30, 1998, in the total amount of $10,256,641.00 U.S.; (c) 16 cheques dated March 31, 1998, in the total amount of $5,265,012.00 U.S.; and (d) 16 cheques dated April 1, 1998, in the total amount of $5,022,600.00 U.S., a copy of the Dishonored Cheques being identified en liasse as **Exhibit R-7**;

19. On or about April 1, 1998, Global's Union Bank Account was closed;

20. As a result of the Dishonored Cheques, Tiagi's RBC Account became overdrawn, resulting in a negative balance in the account in the principal amount of $19,570,047 U.S. as of April 16, 1998 plus interest and related costs (collectively, the "**Indebtedness**");

❖ REPAYMENT OF THE OVERDRAFT, BANKRUPTCY OF GLOBAL ORBIT AND RECOVERY PROCEEDINGS BY THE TRUSTEE IN THE SAID BANKRUPTCY

[34] As mentioned earlier, on April 16, 1998 RBC found itself with an account overdraft and a potential loss of US$19 570 047 following the closure of the account held by Global Orbit at Union Bank, which refused to honour the cheques issued by Global on the ground of insufficient funds or an account closure. After numerous meetings between the officers of the Bank and representatives of Tiagi and Global Orbit, the total amount of the overdraft of principal and interest was repaid to RBC between April 1998 and October of that year.

[35] Following the repayment, the events more fully described in the Re-Amended Motion to Institute Proceedings occurred. The Court reproduces the relevant paragraphs:

26. On December 30, 1998, Global filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act,* R. S. C. 1985, c. B-3 ("**B.I.A.**");

27. On February 3, 1999, as Global had failed to file the proposal, the Official Receiver issued a Certificate of Assignment rendering Global bankrupt pursuant to paragraph 50.4(8)b) of the B.I.A. and appointed Richter & Partners, Inc. ("**Canadian Trustee**") as trustee to the estate of Global;

28. On December 11, 1998, Global filed a Voluntary Petition for Relief under Chapter 11 of the United States Bankruptcy Code, in the Bankruptcy Court for the Central District of California ("the **United States Court**"), case n° LA 98-60055 ("the **United States Case**");

29. On April 15, 1999, an Order of the United States Court converted the United States Case into a Chapter 7, liquidation case and Alfred H. Siegel ("**U.S. Trustee**") was appointed interim Chapter 7 trustee;

30. On December 5, 2000, the U.S. Trustee, on behalf of Heller (who replaced Capital Factors in providing factoring services to Global), filed an Adversary Proceeding against Royal Bank alleging fraudulent and preferential transfers in connection with the agreement to repay the Indebtedness referred to above, as appears from a copy of the Complaint to Avoid Fraudulent Transfers pursuant to 11 U.S.C. § 548 and, in the alternative, Preferences under 11 U.S.C. § § 548 and 547, identified as **Exhibit R-8**;

31. On July 17, 2001, Heller had the Trustee file a Second Amended Complaint which contained additional claims against Royal Bank for aiding and abetting, participating and conspiring in a fraud committed by Global's officers and directors and equitable subordination, as appears from a copy of the Second Amendment Complaint to Avoid Fraudulent Transfers pursuant to 11 U.S.C. § 548 and, in the alternative, Preferences Under 11 U.S.C. § § 544 and 547; For Damages For Aiding And Abetting , Joint Participation and Conspiring in Breach of Fiduciary Duties of Directors and Officers of Debtors to Debtors; and for Equitable Subordination of Any Claim Filed Pursuant to Bankruptcy Rule 3002(c) (3) Upon Avoidance of Transfers identified as **Exhibit R-9**;

32. On November 21, 2001, Royal Bank timely answered the Second Amended Complaint and denied all claims. At all relevant times, Royal Bank contested U.S. Trustee and Heller's claims vigorously, as appears from a copy of the Answer to Second Amended Complaint identified as **Exhibit R-10**;

33. On November 30, 2001, Royal Bank filed a Third Party Complaint against members of the Tabah family, Heller and Capital Factors, as appears from a copy of the Third Party Complaint (A) Against Members of the Tabah Family for: (1) Fraud; (2) Conversion; (3) Liability for Dishonored Checks; and (4) Indemnification; and (B) against Heller and Capital Factors for (5) Equitable subordination; and (6) Indemnification, identified as **Exhibit R-11**;

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34. On April 5, 2002, the Third Party Complaint against Capital Factors was dismissed on procedural grounds, the United States Court having clearly stated that the ruling was without prejudice to any claims that Royal Bank may have against Capital Factors that could be pursued in any other forum, as appears from a copy of the Order on Third Party Defendant Capital Factors, Inc.'s Motion to dismiss Third Party Claim pursuant to Federal Rules of Civil Procedure Rules 12 (B) (1) and 12(B)(6) and a copy of the transcript of the hearing on Capital Factors' Motion to Dismiss Royal Bank's Third Party Complaint identified en liasse as **Exhibit R-12**;

35. On October 29, 2002, an agreement was reached between Royal Bank and the Trustee according to which Royal Bank paid to the Trustee the sum of nine million dollars, U.S. Funds, ($9,000,000.00 U.S.), as appears from the Settlement Agreement and Release entered into as of October 29, 2002 between Royal Bank, U.S. Trustee, Canadian Trustee and General Electric Capital Corporation identified as **Exhibit R-13**;

36. The sum of U.S. Nine Million Dollars ($9,000,000.00) was paid by the Business Services Group of Royal Bank's Branch located at 1 Place Ville Marie, in Montreal;

37. A Motion of the U.S. Trustee and Heller for Order Approving Settlement Agreement and Release with Royal Bank was filed at the United States Court. Capital Factors was served with a copy of that Motion and did not object to it, as appears from a copy of the Certificate of Service dated October 29, 2002 identified as **Exhibit R-14**;

38. On November 22, 2002, the United States Court granted the Motion of the U.S. Trustee and Heller for Order Approving Settlement Agreement and Release with Royal Bank, approved the Settlement Agreement and confirmed that it is, in all respects, fair, reasonable and adequate to all interested parties, as appears from a copy of the Order Granting Motion of Trustee and Heller Financial, Inc. for Order Approving Settlement Agreement and Release with Royal Bank of Canada identified as **Exhibit R-15**;

39. Royal Bank's decision to settle out of Court was well founded, as appears from the expert's report of Professor Kenneth N. Klee dated August 13, 2003 identified as **Exhibit R-16**;

40. As a result of all of the above, Royal Bank has sustained a loss of $ 9,000,000.00 U.S., which was caused by the kiting scheme to which Capital Factors and Union Bank knowingly participated;

[36] All the facts described above were adequately established to the satisfaction of the Court, and the obligation to repay Global Orbit's trustee in bankruptcy the sum of $9 000 000 that is now claimed and that is the subject of an expert evaluation on both sides, was not really contested during the proof and hearing of this case.

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❖ THE FAULT ALLEGED AGAINST THE DEFENDANTS

[37] RBC alleged that Capital Factors was aware of the kiting scheme put in place by Tiagi and Global Orbit or that, at least, it should have continued its investigation and either closed Global Orbit's account or informed RBC that it had observed certain irregularities in the operation of the account in late January, early February 1998. This fault is alleged in particular in paragraphs 49 and 50 of the Re-Amended Motion to Institute Proceedings reproduced below:

> 49. Furthermore, in early 1998, Capital Factors noted a significant imbalance in the amount of the advances and the amount of the factored sales, as appears from a letter from Capital Factors to Global dated March 3, 1998 identified as **Exhibit R-20**;
>
> 50. It was the first time that MacMillan ever noticed this type of disparity in his experience in the commercial finance field. He was concerned that there might be something improper going on;

[38] The Bank's claim is based in particular on the testimony of Mr. Holtz, Mr. MacMillan and Ms. Ferri, who could not have been unaware of the imbalance described above, its impact and the risk faced by RBC.

[39] In addition to the testimony of these three witnesses, there is a very important document (Exhibit R-20), which the Court reproduces in full and which clearly states what Capital Factors may have known about the financial transactions conducted by Tiagi and Global Orbit, as at March 3, 1998:

120 East Palmetto Park Road 5th Floor
Boca Raton. Florida 33432
(561) 368-5011
Fax (561) 347-1276

CAPITAL FACTORS, INC.

Ellen E. Ferri
Vice President

March 3, 1998
Via fax: (514) 382-5986

Mr. Rami Chehata
President and Chief Operating Officer
Global Orbit Industries, Inc.
9420 L'Acadie Blvd.
Montreal, Quebec H4N 1L7

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Dear Rami:

As you are aware, Scott MacMillan's letter of January 9, 1998, provided Global Orbit Industries, Inc. ("Global') with sixty (60) days from that date to obtain an alternative source of financing that could provide Capital Factors, Inc. ("Capital") with an acceptable takeout commitment. According to your counsel, Bruce March, Esquire, it now appears that it may take Global up to an additional thirty (30) days to finalize an arrangement with a lender who can provide the required takeout commitment.

We have received copies of three financing proposals (from Congress, Heller Financial and First Union). Only the First Union proposal was signed, and each was contingent upon the lender's due diligence. You indicated in a telephone conversation that Global was also negotiating with BNY - Canada. Capital has received no indication that any of these lenders made a firm proposal subsequent to its due diligence, nor have you advised us if you have accepted any such proposal(s) if offered. We would appreciate knowing the status of each of the potential financing arrangements, and ask that you provide this information to us as quickly as possible.

As you know, we recently agreed to defer our audit in order to avoid "interfering" with the auditors of our prospective financing sources. However, there is certain audit information we need and I will be appreciative if you will arrange to have it provided to us promptly:

1. A list of all the bank accounts being used by Global Orbit and/or Tabah International ("Tabah").

2. Copies of the statements for all such accounts for the last four months.

3. Photo-copies of Global's and Tabah's general ledgers for the fast four months.

4. Photo-copies of Global's and Tabah's disbursements journals for the last four months.

5. A current accounts payable aging.

6. A copy of Global's and Tabah's financial statements for the quarter ended November 30, 1997.

In reviewing Global's activity with Capital Bank (now Union Planters Bank of Florida, hereafter “UPB”), we note the following (000's):

	Factored Sales	[1]Advances to Global's Account at UPB
Nov-97	$ 3,172	$ 5,211
Dec-97	3,736	20,604
Jan-98	6,123	26,155
Feb-98	1,400	44,600
Total	$ 14,431	$ 96,570

[1]Advances include wire transfers from the Royal Bank of Canada.

I am concerned by the fact that, during the period in question, advances into Global's UPB account (including wires from the Royal Bank of Canada) totaled almost $97 million, or nearly seven times Global's sales for the period. Please provide an explanation for this activity immediately.

As you are aware, we have advised George Tabah, Jr. that we would be in a position to make an advance to Global's account at UPB upon receipt of an actual wire from the Royal Bank of Canada. Scott MacMillan stated in his letter of January 9th that we could deposit funds upon timely receipt of a notice from your bank, which notice was to include a Fed Funds confirmation number. Although I made several deposits based on the bank's notices, I subsequently determined that what I believed to be a Fed Funds confirmation number was, in fact, merely a routing number. We have also determined that the wires we are receiving from the bank are arriving earlier in the day than were the bank's notices. It is unduly cumbersome to base deposits to your account on a notice from your bank when the funds needed to cover any such deposits have already been wired to our account. Also, given the magnitude of some of the recent overdrafts, we believe it only prudent to advance after the actual receipt of the wire transfer. I reiterate to you that, as indicated in Scott MacMillan's letter of January 9th, in offering to continue to provide advances and wire transferred funds to Global's UPB account, Capital continues to do so accepting no responsibility for any errors that may occur, and Global, by its acceptance of this accommodation, agrees to hold Capital harmless from any liability to which Capital might otherwise be subject absent the gross negligence or willful misconduct of its personnel.

I would appreciate a prompt response so that Capital can determine what is the most reasonable course of action to take when the sixty day termination period expires. I would also appreciate knowing if the Tabahs consummated the Counterparts ("Counterparts") transaction and, if so, if there is any commingling of funds between Global and Counterparts.

Yours truly,

Ellen E. Ferri

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EEF: mka

cc: Scott A. MacMillan, Senior Vice President
Michael G. Levine, Senior Vice President and Corporate Counsel
. . .

[40] Had Capital Factors been more diligent about continuing its investigation, according to RBC it would have concluded that Tiagi and Global Orbit were involved in kiting and closed the accounts with Union Bank and Capital Factors in February 1998 or at least notified RBC of the risks it faced, thereby preventing an account overdraft of the size of that covered by RBC in late March 1998.

[41] In short, over and above all the allegations of fault against the Defendants in the Amended Motion to Institute Proceedings, the Defendants' liability, according to the evidence presented, is based essentially on the knowledge that the aforementioned three main witnesses may have had about the imbalance, and on their lack of diligence when a more in-depth investigation would have made it possible to put an end to the imbalance without delay.

[42] Since RBC did not have a contractual relationship with the two Florida institutions, it based its claim in delict (tort in common law) on the principles of precaution and information and is of the opinion that the Defendants' liability must be assessed in accordance with Québec law. Given that RBC has its headquarters and principal place of business at Place Ville Marie, in Montréal, and that the foreseeable damage was caused by an account overdraft and the return of cheques that occurred in Québec, the conduct of the two Florida financial institutions should be assessed, according to the Bank, in light of the principles of liability applicable in Québec.

❖ THE DEFENCE

[43] In the defence to the proceedings instituted by RBC, the Defendants raised numerous points of fact and law that enabled them to assert that the Plaintiff's action had no factual or legal basis. More specifically, the Defendants raised the prescription of rights to pursue remedies, the absence of a legal basis for the action, which must be assessed in accordance with Florida law and makes no provision for any obligation or liability on the part of financial institutions in circumstances like those described above and the many faults committed by RBC, which has only itself to blame if it incurred a loss in the present case.

REASONS

❖ PRESCRIPTION

[44] As more than three years have elapsed between April 1998, date of the loss incurred by RBC, and October 1, 2003, date on which the notice of filing and RBC's

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action were served, the Defendants claimed that the Bank's action is prescribed under the law of Québec.

[45] In response to this argument, RBC contended that prescription was suspended or interrupted and that it was impossible to act between December 1998, when Global Orbit repaid in full the principal and interest, and the date on which it had to repay Global Orbit's trustee in bankruptcy the sum of $9 000 000 on the ground that the payment received was a preferential payment made to the detriment of Heller, such repayment having been completed on October 29, 2002 and approved by the Florida Court on November 22, 2002.

[46] According to RBC, it was therefore impossible to act and institute any proceedings whatsoever between December 1998, when it was repaid in full for the amount of its loss, and November 22, 2002, when the Court sitting in bankruptcy in the United States approved the transaction conducted with the trustee, thus obliging the Bank to repay the sum of US$9 000 000 as a preferential payment.

[47] According to the Bank, any proceedings instituted by RBC during that period would have been declared inadmissible on the ground that a repayment had been made and, therefore, no loss or damage had been incurred; it was only when it had to return the money thus received that it could claim it had valid recourse against the Defendants.

[48] In response to the Bank's arguments, the Defendants contend that there was no interruption or impossibility to act between 1998 and 2002, and that the repayment of the sum of US$9 000 000 to Global Orbit's trustee in bankruptcy constituted a *novus actus* and thus created a new debt that was completely independent from the original debt and that could in no way be attributable to the Defendants, thus severing the legal relationship between RBC and the Defendants.

[49] The Court cannot subscribe to such arguments; RBC properly argued that any action instituted against the Defendants between 1998 and 2002 would have been declared inadmissible on the ground that the debt was repaid in full in December 1998 and, therefore, that no damage had been incurred. The Bank's debt was the result of the loss incurred by the return of cheques in late March, early April 1998, and the repayment of up to US$9 000 000 by Global Orbit must be interpreted as not having occurred, thus putting the parties in the same position they were in immediately prior to the payment.

[50] It is the very essence of such a payment to be interpreted as null and void as regards the trustee since the creditor is obliged to return the money received. The parties are thus placed in the same position they were in prior to the completion of such payment which, generally speaking and barring exceptions, enables the creditor to present, in the bankruptcy, a claim equal in amount to the payment repaid and to participate, if applicable, in any dividends that might be distributed to all of the creditors.

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[51] In this case, RBC waived its rights in the bankruptcy of Global Orbit and there was no real debate before the undersigned about the merits of the trustee's request to repay, as a preferential payment, the amount improperly received by RBC, or about its renunciation to present proof of claim in Global's bankruptcy. Therefore, the Court finds that RBC's claim of US$9 000 000 was validly presented and stemmed from both the loss incurred in 1998 and its obligation to repay the said sum to Global's trustee in bankruptcy.

[52] Furthermore, the Defendants benefited considerably from the many steps taken by RBC to be reimbursed for its loss, which at the time of the account's closure and the return of the cheques stood at roughly US$19 570 047, and any proceedings served in April 1998 would have been premature and to the detriment of the parties to this dispute, to say the least.

[53] Therefore, the Court dismisses the plea of prescription raised by the Defendants and concludes that prescription was interrupted; it was impossible to act between December 1998 and November 2002. The prescriptive period of three years was thus respected since the proceedings began on October 1, 2003.

[54] Nor can the Defendants claim that there was a novation or *novus actus* in this case because it is the very essence of a preferential payment and the obligation to repay, to place the parties in the same position they were in prior to the repayment.

[55] While it is not perfect, a parallel may be drawn with the law of surety. Would a surety be completely relieved of its obligations in regard to a creditor who was obliged to repay a trustee a payment received as a preferential payment, the creditor having thus lost all of its recourses as regards the surety simply because the payment was made, even though the payment must be considered set up against the trustee with an obligation to repay the sum thus received?

[56] The Court does not think so and such repayment would revive the action against both the principal and the principal's surety and it would be too easy for principals to favour a surety through collusion by making a payment that would later prove to be clearly preferential.

[57] In *Précis de la faillite et de l'insolvabilité*, Mtre. Paul-Émile Bilodeau wrote the following:

> D- Effets de l'annulation
>
> Si le tribunal accueille la demande du syndic, toutes les parties doivent être remises dans l'état où elles étaient avant que la préférence ne soit accordée[82]. Le créancier restera donc avec une réclamation prouvable dans la faillite et il

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> devra rembourser le syndic ou remettre le bien. S'il s'agit dune garantie, elle sera annulée.[3]

---

[82] *Perrier* v. *140849 Canada Inc*., J.E. 96-1845 (C.A.).

[58] In the case cited, Robert J. wrote the following:

> Depuis cet arrêt, par mesure de prudence, certains auteurs recommandent d'impliquer les garanties et cautions comme défenderesses dans des litiges de cette nature.
>
> En terminant, dans l'arrêt Re Bernard Motors Ltd (précité), il fut suggéré que le créancier principal puisse réclamer aux cautions le montant du paiement jugé préférentiel à leur égard dans le cadre d'un recours en vertu de l'article 95 L.F.I. Cependant, dans les arrêts précités, Speedy Roofing Ltd (Re) et Bank of Montreal c. Kenny (1980) 33 C.B.R. (N.S.) 11 (Man, Co, Ct.) cette hypothèse fut écartée en raison de la compétence spécialisée de la Cour en matière de faillite. Selon ces arrêts la poursuite en remboursement contre la caution devrait être intentée par le créancier principal dans une instance civile. Voilà l'état de la jurisprudence.[4]

thus indirectly confirming that the parties will be placed in same the position they were in prior to the preferential payment and that an action can be instituted against a surety.

❖ JURISDICTION OF THE COURT AND THE LAW APPLICABLE IN THIS CASE

[59] The Court's territorial jurisdiction was the subject of a motion for declinatory exception on the ground that the operating company Global Orbit, which was directly involved in the fraud, had its principal place of business in Florida along with the two Defendants, Union Bank and Capital Factors, and that it would be much more appropriate to proceed in Florida than in Montréal.

[60] By judgment dated June 29, 2004, Jeannine M. Rousseau J. dismissed the motion for declinatory exception on the ground that the prejudice occurred by the Bank was in Québec and that faults on the part of the Defendants were also committed in Québec. Referring to paragraphs 57 and 58 of the motion, which read as follows, she added that:

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3 Paul-Émile Bilodeau, *Précis de la faillite et de l'insolvabilité* (Sherbrooke: Éditions Revue de droit, 2002), Université de Sherbrooke, at 378.

4 *Perrier* v. *140849 Canada Inc*., J.E. 96-1845 (C.A.) at 13 [Emphasis added.].

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. . .

> [57] Capital Factor and Union Bank played an essential role in carrying out a multimillion dollar cheque kiting scheme that resulted in Royal Bank's Indebtedness;
>
> [58] **Capital Factors and Union Bank should have notified the Royal Bank of the kiting scheme and should have put an end to same immediately upon learning of its existence**.
>
> (Emphasis added.)

[22] As to the site of a fault by omission, it is there where the notice should have been received:

> (2) *The Locus of the Cause of Action*
>
> [...]
>
> **The fault alleged by the respondents is an omission. An omission standing alone has no location for it is an act that, by definition, did not occur. Nonetheless, the omission must be given a location in order to determine the Superior Court's jurisdiction** pursuant to art. 68(2) C.C.P. [...]
>
> Since a failure to warn is an act which did not occur, some criterion, other than the omission itself, must be used to fix the location of the omission for the purposes of establishing jurisdiction pursuant to art. 68(2) C.C.P. A failure to warn constitutes a fault only when there is a pre-existing duty to inform of the existence of the danger. In my opinion, therefore, the *locus* of an omission to warn must be determined by reference to the place at which the pre-existing obligation or duty ought to have been performed. **An obligation to warn** the user of such goods **can only be performed by giving warning where the warning will be effective:** the nature of a warning is such that it must be received at a place and a time that allow the user of the goods to act to avoid the danger warned of. **The *locus* of a failure to warn is the place at which the warning ought to have been received**, and that place may be either where the user is located or where the goods are used.[4]
>
> (Emphasis added.)

---

[4] *Air Canada* v. *McDonnel Douglas Corp.*, [1989] 1 S.C.R. 1554, 1568-1569.

[61] The judge also determined that it was just as appropriate to proceed in Québec as it would have been in Florida; this judgment was upheld by the Court of Appeal of Québec in a decision dated October 29, 2004.

[62] Now that the Court's territorial jurisdiction has been established, what is the applicable law? RBC claimed that, according to article 3126 of the *Civil Code of Québec*, Québec law should be applied in this case and that the liability of the two Florida financial institutions should be assessed in the light of this law. On the other hand, the two Defendants contended that the loss suffered by RBC and the liability of the two defendant financial institutions must be determined in accordance with Florida law.

[63] It was admitted by the Plaintiff RBC that its action has some basis only to the extent that the Court concludes that Québec law should be applied to the events concerned, and that if the Court concludes that Florida law is applicable, no liability can be attributed to Capital Factors and Union Bank.

[64] Stated differently, the obligation for the two Defendants to conduct an investigation and notify RBC that the two businesses concerned, Tiagi and Global Orbit were conducting transactions between themselves that were comparable to kiting with a risk of loss for RBC has its basis only under Québec law, and that no such obligation exists under Florida law.

[65] Article 3126 of the *Civil Code of Québec* invoked by RBC reads as follows:

> **3126.** The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.
>
> In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.

[66] According to the general rule stated in this article, the applicable law is the law of the state where the injurious act occurred. In this case, the corporation directly involved in the kiting fraud, Global Orbit, had its head office, principal place of business and operations in Florida. The bank that returned the cheques because of insufficient funds or closure of the account is also located in Florida. Lastly, the financial institution that granted the company concerned, Global Orbit, the financing required for its operations, Capital Factors, is also located in Florida. In short, the whole cause of action originated in Florida and, in accordance with the general principle, Florida law would apply.

[67] Can RBC avail itself of the first exception provided for in article 3126, which states that "if the injury appeared in another country, the law of the latter country is applicable"? Considering that the injury appeared in Québec and, as contended by RBC, said injury caused to it was foreseeable, Québec law should apply.

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[68] There is no question that the injury appeared in Québec; moreover, the Court of Appeal recognized as much in its decision regarding declinatory exception[5]. However, in light of Global Orbit's operations in Florida, should it have foreseen that injury would be caused to RBC? What law will be applicable in determining whether either of the two Florida financial institutions, i.e. Union Bank and Capital Factors, had any obligation whatsoever toward the Plaintiff RBC?

[69] Numerous times during its proceedings, RBC alleges that not only were both Defendants aware of the kiting, but they also participated and were party to the kiting scheme. Such assertions have absolutely no foundation. Not only is there no evidence of the two Defendants' participation in the kiting scheme, but furthermore, in light of the testimony heard by the Court, the latter concludes that at no time did the Defendants suspect that Tiagi and Global Orbit were committing fraud. The only facts proven by RBC are the knowledge the executive officers at Union Bank and Capital Factors might have had about what the parties characterized as an imbalance created by the transfer of funds which, at first glance, was not connected to Global Orbit's day-to-day operations, and the lack of an investigation that would either have put an end to Global Orbit's financial activities more rapidly or informed RBC of the risks it faced.

[70] The burden of proving that the damage was foreseeable lies with RBC, and mere suspicion on the part of the representatives of Capital Factors and Union Bank with regard to Global Orbit's operations was, in the Court's opinion, not enough to conclude that there was a risk of injury to another financial institution, in this case the Plaintiff RBC.

[71] The Court would venture to point out that there was absolutely nothing improper about the operation of the Union Bank account, nor the operations related to the purchase of Global Orbit's accounts receivable through factoring or even in the operation of the stock-secured line of credit.

[72] Both Union Bank and Capital Factors oversaw all operations on a daily basis. The two Defendants had every right to assume that the Plaintiff was exercising the same control to ensure that the account was being operated in a risk-free manner and in accordance with the generally accepted rules that apply in such matters. This was far from the case here, as we will see below.

[73] In addition, not only was it up to RBC to prove that the injury caused in another country was foreseeable, but it also had to establish that the two Defendants committed a fault under the legislation and regulations applicable to them, in this case Florida law.

[5] Referred to in paragraph 61 above.

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[74] In the texts on the reform of the *Civil Code*[6] compiled by the Barreau du Québec and the Chambre des notaires du Québec, section 372 of Volume 3, which deals with the interpretation of article 3126, reads:

> **372.** Cependant, lorsque les règles des alinéas 2 et 3 s'appliquent, il faut aussi se référer à la loi du lieu de survenance du fait générateur du préjudice pour savoir si son auteur était fautif ou négligent, car les règles de sécurité et de comportement d'un individu ne peuvent être que celles en vigueur au lieu où il se trouve au moment où il agit.

[75] When the new *Civil Code* was adopted in January 1994, the Minister of Justice wrote the following comments regarding the new article 3126:

> Cet article, de droit nouveau, s'inspire de la *Loi fédérale sur le droit international privé* suisse de 1987.
>
> Aux termes d'un arrêt de la Cour suprême du Canada dans l'affaire *O'Connor* c. *Wray*, [1930] R.C.S. 231, une demande en responsabilité civile extracontractuelle n'est recevable au Québec que si la situation constitue une cause d'action suivant le droit québécois et ne peut être justifiée selon la loi du lieu où elle est survenue : il s'agit là d'une règle qui a son origine dans le droit anglais. Auparavant, la jurisprudence appliquait la loi du lieu où le fait générateur du préjudice était survenu, suivant l'interprétation donnée au troisième alinéa de l'article 6 C.C.B.C. et suivant le droit français.
>
> L'article 3126 renoue avec la tradition et fait régir la responsabilité civile extracontractuelle par la loi de l'État où le fait générateur du préjudice est survenu. Toutefois, étant donné la difficulté que pose ce rattachement dans l'hypothèse où le préjudice apparaît dans un autre État, l'article énonce qu'en ce cas s'applique la loi de l'État où le préjudice est apparu, à condition de prouver que l'auteur devait prévoir que le préjudice s'y manifesterait. Le principe de l'application de la loi de l'État où le fait générateur du préjudice est survenu se trouve ainsi renforcé.[7]

[76] In *Tolofson* v. *Jensen* [1994], the Supreme Court enunciated the following principles:

> On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. . . .

6 Barreau du Québec and Chambre des notaires du Québec, *La réforme du Code civil*, t. 3, Sainte-Foy, 1993, no 372 at 890 [Emphasis added.].

7 Ministère de la Justice du Québec, *Commentaires du ministre de la Justice, Le Code civil du Québec. Un mouvement de société*, t. 2, Québec, Publications du Québec, 1993 at 1993-1994 [Emphasis added.].

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. . .

> The major issue that arises in this case is this: once a court has properly taken jurisdiction (and this was conceded in both the cases in these appeals), what law should it apply? Obviously the court must follow its own rules of procedure; it could not function otherwise; see *Chaplin v. Boys*, *supra*. What is procedural is usually clear enough though at times this can raise difficult issues. In the *Tolofson* case, for example, the parties have raised the much debated question of whether a statute of limitation is of a procedural or substantive character. I shall deal with that issue later. I will here turn to the more common "choice of law" problem, and the principal issue in these appeals, namely, what is the substantive law that should be applied in considering the present cases?
>
> From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in *Phillips v. Eyre, supra*, at p. 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.
>
> I have thus far framed the arguments favouring the *lex loci delicti* in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities.[8] . . .

8 *Tolofson* v. *Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*, [1994] 3 S.C.R. at 1022, 1047 and 1049-1051 [Emphasis added.].

[77] This Supreme Court case was echoed in the *Hocking* v. *Haziza* and *HSBC Bank Canada* judgment, particularly in paragraphs 148 *et seq.*, in which the Court of Appeal states:

> [148] L'arrêt *Unifund* est particulièrement intéressant, exposant les deux volets du test du lien réel et substantiel : il ne suffit pas, en effet, d'appliquer ce test à la détermination de la compétence du for *(i.e.* le for saisi a-t-il la compétence nécessaire pour statuer sur le litige?), mais il faut également l'appliquer au fond de l'affaire, de manière à ce qu'en statuant sur le litige, on ne se trouve pas à donner une portée extraterritoriale au droit du for. D'ailleurs, on notera que cette approche est celle aussi que retient la Cour suprême dans l'arrêt *Morguard*, précité. À l'instar des auteurs McKee et Galway, on notera en effet que :
>
> > As such, it is significant that in Morguard, in finding a real and substantial connection between the action and Alberta, the Supreme Court of Canada noted that the property was in Alberta, the relevant contracts were entered into in Alberta at the time when both parties (including the defendant) resided in Alberta, foreclosure proceedings took place in Alberta where the property was located and the action for deficiency on the sale of the property needed to be consolidated with the foreclosure proceeding which took place in Alberta. [Renvoi omis] It is important to note that the Court did not find that the defendant's residence in Alberta alone at the time of the events giving rise to the action established sufficient contact with the province for it to assert jurisdiction. Nor did the Court find that either the plaintiff's residence at the time the suit was started, or the need to have the foreclosure and deficiency actions consolidated, alone constituted a sufficient connection.
>
> [149] Les arrêts *Morguard*, *Tolofson* et *Unifund* affectent-ils la façon dont on doit considérer les recours collectifs à portée nationale ou mutiprovinciale?
>
> [150] Les propos de la Cour suprême dans ces affaires, qui relevaient toutes de recours individuels, sont assurément applicables aux recours collectifs. Ainsi, lorsque le juge LaForest, dans *Tolofson*, écrit qu'il va “de soi, par exemple, qu'il n'appartient pas à l'État A de définir les droits et obligations des citoyens de l'État B à l'égard d'actes accomplis dans leur propre pays" (paragr. 45), il aurait tout aussi bien pu écrire qu'il va de soi qu'il n'appartient pas à une province de définir les droits et obligations des citoyens d'une autre province, et ce, quel que soit le moyen employé pour arriver à cette fin. De même, lorsque le juge Binnie écrit, au paragr. 56 de l'arrêt *Unifund*, précité, que "[l]a limitation territoriale de la portée du pouvoir de légiférer des provinces empêche les lois d'une province de s'appliquer aux affaires qui ne présentent pas de lien suffisant avec cette dernière", il aurait pu tout aussi bien écrire “[l]a limitation territoriale de la portée du pouvoir de légiférer des provinces empêche les lois d'une province de s'appliquer aux affaires, *y inclus les recours collectifs*, qui ne présentent pas de lien suffisant avec cette dernière". En effet, ce qui est vrai du recours individuel ne saurait l'être moins du recours collectif : ce dernier n'est qu'un véhicule procédural et ne saurait permettre d'ignorer ou de contourner le principe constitutionnel de la territorialité des lois et des compétences judiciaires provinciales.

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> [151] Or, c'est précisément ce qui paraît survenir en l'espèce : en autorisant un recours collectif sans même se poser la question de savoir s'il existe entre tous et chacun des membres du groupe visé (en l'espèce, les Canadiens ayant eu certains rapports contractuels avec HSBC) et le for saisi (celui de l'Ontario) un lien réel et substantiel sur le fond, le jugement ontarien qui est au cœur du litige fait apparemment en sorte de rendre applicable à tous les non-résidants de l'Ontario, et notamment aux Québécois, non seulement la procédure de reconnaissance applicable aux recours collectifs en Ontario, *mais surtout* le droit substantif de cette province : voilà en effet que par ce jugement ontarien dont on demande la reconnaissance au Québec, les droits des justiciables québécois ayant contracté au Québec, avec une succursale québécoise de HSBC, un contrat hypothécaire relatif à une propriété située au Québec se trouveraient déterminés par le droit ontarien, alors qu'aucun lien de quelque sorte ne les rattache à celui-ci. Ne peut-on croire qu'il y a là une atteinte directe au principe constitutionnel de territorialité.
>
> . . .
>
> [158] Le contournement, ici, ne semble pas qu'accessoire et on pourrait vouloir arguer que le jugement ontarien attente directement à l'ordre usuel des choses juridiques, tel que décrit par le juge LaForest dans *Tolofson* : "[l]es gens s'attendent habituellement à ce que leurs activités soient régies par la loi du lieu où ils se trouvent et à ce que les avantages et les responsabilités juridiques s'y rattachant soient définis en conséquence", écrit-il. Or, dans notre affaire, les justiciables québécois, qui pouvaient légitimement s'attendre à ce que leurs relations avec HSBC soient régies par la loi du lieu où ils ont passé contrat et à ce que les responsabilités juridiques s'y rattachant soient en conséquence régies par le droit québécois, se trouvent assujettis au droit ontarien. En outre, la reconnaissance du jugement ontarien par l'autorité québécoise aurait l'effet de priver ces mêmes justiciables québécois de conserver et d'exercer le droit d'action que la loi de leur province leur confère, et ce, en raison de l'ordonnance d'un tribunal ontarien, appliquant le droit ontarien. De ce point de vue, et pour reprendre encore une fois certains des propos du juge LaForest dans *Tolofson*, la situation ne se différencie guère, à première vue du moins, de celle où l'État ontarien se serait directement mêlé de définir les droits et obligations des citoyens de l'État québécois à l'égard d'actes accomplis dans cette dernière province : dans les deux cas, il risque de s'ensuivre "des résultats inéquitables et injustes". Par ailleurs, comme il ne s'agit pas ici d'un cas où l'État ontarien cherche à réguler les "opérations intervenues entre ses propres citoyens ou résidents dans d'autres États ou provinces", il n'y aurait donc pas lieu de faire exception au principe de la compétence territoriale limitée.[9]

[78] Thus it is recognized that the principles enunciated by the Supreme Court apply in Québec and established that a law cannot have extra-territorial effect even in cases of delicts or quasi-delicts, regardless of whether it is a matter of an ordinary civil action or a class action.

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9 *Hocking* v. *Haziza*, 2008 QCCA at 800 [Emphasis added. References omitted.].

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[79] In the present case, the Plaintiff RBC contends that the two Defendants should have an obligation to conduct an investigation and inform a third party that is liable to suffer injury as recognized under Québec law and jurisprudence, whereas these requirements do not exist under Florida law.

[80] How can defendants be liable for injury caused outside the United States when, not only are they under no obligation to investigate and inform, but the law governing them imposes a duty of confidentiality and discretion that prohibits them from disclosing any information concerning their customers under threat of penalty?

[81] Even if by applying the reasonable person test, as suggested by RBC, to establish the foreseeability of damage, foreseeability would have to be established on the basis of a fault, as recognized by the *lex loci delicti*.

[82] The Court finds highly credible the expertise report submitted by the Defendants and prepared by an attorney with an excellent reputation, Barkley Clark. The annotated conclusions considered by the Court read as follows:

> **1. Opinion #1: UPB Handled the Deposit Relationship with Global Orbit in Full Compliance with Florida Law.**
>
> It is my opinion that UPB handled the demand deposit account with its customer, Global Orbit, in a manner consistent with Florida law in all respects. UPB acted properly and in accordance with Florida law in the manner in which it opened the account in June 1997, in the manner it administered the deposit account throughout its life, and in the manner it closed the account (see Opinion #2).[10]
>
> **2. Opinion #2: Under Florida Law and the Contract of the Parties, UPB Properly Terminated the At-Will Deposit Relationship with Global Orbit in Marc/April 1998.**[11]
>
> **3. Opinion #3: Florida Law Precluded UPB and CFI from Reporting any Suspicion of Kiting to Royal Bank (even assuming it existed and was suspected).**
>
> . . .
>
> (a) **No True Kiting Scheme Existed.** It is my opinion that there was no check "kite" as that term is normally understood in the banking industry and American law. Kiting is a form of check fraud. A true kite requires the fraudulent drawing and depositing of checks in reciprocal deposit accounts (normally at two different banks) such that both banks assume the credit risk of paying checks drawn on uncollected funds. In a check kite, both banks give immediate credit for deposited

10 Expertise Report of Barkley Clark, dated December 8, 2009 at 5.
11 *Ibid.* at 12.

checks, even though the deposited checks are not drawn on sufficient cleared funds and in fact are worthless. Based on the clearing time between the two banks (the "float"), artificial ledger balances are created at both banks. In other words, a kite is supported by the appearance of good funds in both accounts based on both banks' providing immediate credit for the deposited checks, yet there are no good funds represented by the checks themselves. Typically, the fictional balances at each bank involved in the kiting scheme continue to grow while the fraudster diverts funds from the accounts. At some point, the kite crashes when one of the banks decides to dishonor and return checks drawn on it to the other bank. The first bank to dishonor and return checks drawn on it before its midnight deadline will avoid any loss and the other bank, which has provided immediate credit on items deposited with it, will sustain the loss due to its credit decision to provide immediate credit to its customer's account on deposited items. The loss is reflected by the true overdraft that is created in the account of the depositary bank when the other bank (the payor bank) dishonors and returns checks drawn on it. The leading United States Supreme Court decision describing check kiting as the reciprocal assumption of credit risk is Williams v. United States, 458 U.S. 279 (1982), discussed in detail in The Law of Bank Deposits, Collections and Credit Cards, ¶ 9.01.

There was no check kite in this case because during the fraud period UPB did not receive deposits of checks into the Global Account and did not give immediate credit to such deposits, which is the premise of a check kiting scheme. Instead, UPB insisted and acted on the deposit of fully collected, cleared funds in the form of wire transfers from Royal Bank and ACH credits from CFI to cover all checks that had been presented for payment the day before to UPB. Thus, the vital ingredient of a check kite—assumption by **both** banks of the credit risk arising from allowing payment of presented checks against an uncollected funds balance—is missing from this case. The only bank to have made and assumed an unsecured credit risk here was Royal Bank, which provided immediate credit on checks drawn on the Global Orbit account which were deposited with Royal Bank into the account of Tiagi-Tabah and acted on that credit decision by wire transferring its own funds either directly to UPB for credit to Global Orbit's deposit account or to CFI for credit to Global Orbit's factoring line. When only one of the two banks whose accounts are controlled by the fraudsters assumes the credit risk of uncollected funds, it is doomed to end up with an overdraft when the fraud ends. This is precisely what happened here, and the loss sustained by Royal Bank was inevitable.

In contrast to a traditional check kiting scheme, the checks that were presented to UPB for payment were always covered by incoming wires or ACH credit entries, not by "worthless checks" deposited to the Global Orbit account at UPB. Unlike UPB, which always acted on good funds in processing checks and other withdrawals from Global Orbit's account, Royal Bank relied on "worthless checks" deposited by Tiagi-Tabah in its account with Royal Bank. By authorizing outgoing wire transfers, either directly to UPB or to CFI for credit to Global Orbit's respective accounts, Royal Bank assumed the full credit risk associated with its customer's fraudulent scheme, although that scheme was not a true "kite".

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(b) **Florida Law Prohibited UPB and CFI from Disclosing Information concerning the relationship with Global Orbit to Royal Bank.**

For 40 years, the law in Florida has provided deposit customers of a bank with a right of confidentiality regarding the financial information in a deposit account. The leading case in Florida, and perhaps in the United States, is Milohnich v. First Nat'l Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969), where the court upheld a suit brought by a corporate customer for breach of an implied contractual duty not to disclose deposit account information to third parties. The court held that a bank has an implied duty not to disclose information concerning a customer's deposit account to a third party. In the course of its opinion, the Florida court broadly discussed the importance of a depositor's right of financial privacy: "Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors....It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account and that, unless authorized by law or by the customer or depositor, the bank must be held liable for breach of the implied contract." 224 So.2d at 760, quoting Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 290 (Idaho 1961). Based on the broad privacy principles enunciated in Milohnich, UPB was prohibited under Florida law from making any disclosures concerning Global's account activity, including any suspicions that Global Orbit was committing fraud in connection with the account. In my opinion, UPB's reporting of any suspected kite on the part of Global Orbit to Royal Bank would have been a clear violation of Florida law.

In an effort to codify and strengthen the broad privacy principle established in Milohnich, the Florida legislature in 1989 enacted a new bank privacy statute, one of the strongest in the country, codified at § 655.059, Fla. Stat. (1989). Section (2) (b) of that statute, captioned "confidentiality", provides as follows:

> (b) The books and records pertaining to the deposit accounts and loans of depositors, borrowers, members, and stockholders of any financial institution shall be kept confidential by the financial institution and its directors, officers, and employees and shall not be released except upon express authorization of the account holder as to her or his own accounts, loans, or voting rights. However, information relating to any loan made by a financial institution may be released without the borrower's authorization in a manner prescribed by the board of directors for the purpose of meeting the needs of commerce and for fair and accurate credit information. Information may also be released, without the authorization of a member or depositor but in a manner prescribed by the board of directors, to verify or corroborate the existence or amount of a customer's account when such information is reasonably provided to meet the needs of commerce and to ensure accurate credit information. In addition, a financial institution, affiliate, and its subsidiaries, and any holding company of the financial institution or subsidiary of such holding company, may furnish to one another information relating to their customers or members, subject to the requirement that each corporation receiving information that is confidential maintain the confidentiality of such information and not provide or disclose such information to any unaffiliated person or entity. Notwithstanding this paragraph, nothing in this subsection shall prohibit a financial institution from disclosing financial

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> information as referenced in this subsection as permitted by Pub. L. No. 106-102 (1999), as set forth in 15 U.S.C.A. s. 6802, as amended.

Section (2)(c) of the statute makes any willful violation a felony.

A bank is prohibited from divulging to another bank (other than an affiliate) any information about its customer's deposit account unless the customer gives "express authorization", or unless the information is intended to "verify or corroborate the existence or amount" of the customer's deposit account when such information is reasonably provided "to meet the needs of commerce and to ensure accurate credit information." None of these narrow exceptions would allow the report of a suspected kite to another bank. In short, a customer's right of privacy regarding the activity in its deposit account is protected by both the common law and statute in Florida.

Recently, a Florida court applied § 655.059 to prohibit the disclosure of financial information concerning a customer to a third party in a lawsuit. See Banc of America Investment Services, Inc. v. Barnett, 997 So.2d 1154 (Fla. 3d DCA 2008). The appellate court reversed the trial court's order, which had compelled Banc of America Investment Securities, Inc. to disclose financial information concerning its customer, chastising the lower court: "The court below departed from the essential requirements of law when it ordered production of documents concerning transactions in Mr. Day's account that are privileged pursuant to section 655.059(2)(b), resulting in a harmful invasion of privacy rights which cannot be remedied on appeal." 997 So.2d at 1157.

The teaching of the Banc of America decision is that the Florida privacy statute means what it says. The court also applied the statute to cover a non-bank affiliate like Banc of America Investment Services, even though that entity is not technically a "financial institution" as that term is defined in the Florida statute. The bottom line is that Florida law prohibited UPB and CFI from reporting any information in Global Orbit's account relationship, including any suspicion of a kite, to Royal Bank even if they had such a suspicion. For a more detailed discussion of a bank's duty of confidentiality regarding the deposit accounts of its customer, see The Law of Bank Deposits, Collections and Credit Cards, ¶ 3.12.[12]

4. Opinion #4: Neither UPB Nor CFI Had Any Duty to Inform Royal Bank of an Alleged Check Kiting Scheme.

. . .

The decisional law, which is discussed in detail in The Law of Bank Deposits, Collections and Credit Cards ¶ 9.03, overwhelmingly holds that there is no duty by one bank to report to the other bank a suspected kite or to take any other action on a kite. Instead, the loss remains on the bank that has the overdraft after

12 *Ibid.* at 14-18 [References omitted.].

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> the kite ends on the basis of the UCC check collection rules. See, e.g., Mid-Cal Nat'l Bank v. Federal Reserve Bank, 590 F.2d 761, 764 (9th Cir. 1979) (defendant bank had no duty to discover and report a kiting operation to plaintiff bank; no special relationship exists and banks are at arm's length in a kiting scheme, each responsible for its own decisions to provide credit for deposited items); Frost Nat'l Bank v. Midwest Autohaus, Inc., 241 F.3d 862 (7th Cir. 2001) (as a matter of law, there is no "duty of good faith" by which a bank must disclose its suspicions of a check kite to the other bank; each bank has its own means of detecting kiting schemes and of protecting itself from the uncollected funds credit risk); Citizens Nat'l Bank v. First Nat'l Bank, 347 So.2d 964 (Miss. 1977) (trial court correctly dismissed bank's complaint charging that defendant bank was liable for failing to disclose an ongoing kiting scheme and by permitting it to continue which caused a loss to plaintiff bank; banks owe no duty, fiduciary or otherwise, to each other in a kiting scheme); Alta Vista State Bank v. Kobliska, 897 F. 2d 930, 934 (8th Cir. 1990) (applying Minnesota law) (defendant bank, which discovered the kite, owed no duty to plaintiff bank to report its suspicions about the potential kiting; "We decline to find that one bank has a duty to notify a competing bank as soon as it suspects a mutual customer is kiting checks, especially where, as here, the other bank is in just as good a position to discover the kite.")[13] . . .

[83] The Florida legislation prohibiting any reporting of information, except as expressly provided for, reads as follows:

> THE 1997 FLORIDA STATUTES
>
> Tille XXXVIII — Chapter 655
>
> BANKS AND BANKING — Financial Institutions Generally
>
> 655.005 Definitions.—
>
> (1) As used in the financial institutions codes, unless the context otherwise requires, the term:
>
> (a) “Affiliate” means any financial institution holding company pursuant to federal law or any subsidiary or service corporation of such a holding company.
>
> . . .
>
> (f) "Executive officer" means an individual, whether or not the individual has an official title or receives a salary or other compensation, who participates or has authority to participate, other than in the capacity of a director, in major policymaking functions of the financial institution; the term does not include an individual who may have an official title and may exercise discretion in the performance of duties and functions, including discretion in the making of loans, but who does not participate in the determination of major policies of the financial

13 *Ibid*. at 19-20.

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institution and whose decisions are limited by policy standards established by officers other than such individual, whether or not such policy standards have been adopted by the board of directors. The chair of the board, the president, and every executive vice president of a financial institution, and the senior trust officer of a trust company, are presumed to be executive officers unless any such officer is excluded, by resolution of the board of directors or by the bylaws of the financial institution, from participating, other than in the capacity of a director, in major policymaking functions of the financial institution and the individual holding such office so excluded does not actually participate therein.

(g) "Federal financial institution" means a federally or nationally chartered or organized association, bank, savings bank, or credit union.

(h) "Financial institution" means a state or federal association, bank, savings bank, trust company, international bank agency, representative office or international administrative office, or credit union.

(i) "Financial institution-affiliated party" means:

1. Any director, officer, employee, or controlling stockholder (other than a financial institution holding company) of, or agent for, a financial institution, subsidiary, or service corporation;

2. Any other person who has filed or is required to file a change-of-control notice with the appropriate state or federal regulatory agency;

3. Any stockholder (other than a financial institution holding company), any joint venture partner, or any other person as determined by the department who participates in the conduct of the affairs of a financial institution, subsidiary, or service corporation; or

4. Any independent contractor (including any attorney, appraiser, consultant, or accountant) who knowingly or recklessly participates in:

a. Any violation of any law or regulation;

b. Any breach of fiduciary duty; or

c. Any unsafe and unsound practice,

which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the financial institution, subsidiary, or service corporation.

. . .

(n) "Officer" of a financial institution means any individual duly elected or appointed to, or otherwise performing the duties and functions appropriate to, any position or office having the designation or title of chair of the board of

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directors, vice chair of the board of directors, chair of the executive committee, president, vice president, assistant vice president, cashier or assistant cashier, comptroller, assistant comptroller, trust officer, assistant trust officer, secretary or assistant secretary (of a trust company), or any other office or officer designated in, or as provided by, the articles of incorporation or bylaws,

. . .

(q) "Subsidiary" means any organization permitted by the department which is controlled by a financial institution.

. . .

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THE 1997 FLORIDA STATUTES

Title XXXVIII Chapter 655

BANKS AND BANKING Financial Institutions Generally

655.059 Access to books and records; confidentiality; penalty for disclosure.—

. . .

(2)

. . .

(b) The books and records pertaining to the deposit accounts and loans of depositors, borrowers, members, and stockholders of any financial institution shall be kept confidential by the financial institution and its directors, officers, and employees and shall not be released except upon express authorization of the account holder as to her or his own accounts, loans, or voting rights. However, information relating to any loan made by a financial institution may be released without the borrower's authorization in a manner prescribed by the board of directors for the purpose of meeting the needs of commerce and for fair and accurate credit information. Information may also be released, without the authorization of a member or depositor but in a manner prescribed by the board of directors, to verify or corroborate the existence or amount of a customer's or member's account when such information is reasonably provided to meet the needs of commerce and to ensure accurate credit information. In addition, a financial institution and its subsidiaries, and any holding company of the financial institution or subsidiary of such holding company, may furnish to one another information relating to their customers or members, subject to the requirement that each corporation receiving information that is confidential maintain the confidentiality of such information and not provide or disclose such information to any unaffiliated person or entity.

> (c) A person who willfully violates the provisions of this section that relate to unlawful disclosure of confidential information is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.[14]

[84] Not only was RBC unable to establish that the Defendants had an obligation to conduct an investigation and inform RBC of the risk of loss under Florida law, but it has also been established that the Bank was not allowed to disclose any information whatsoever under threat of penalty.

[85] Under cross-examination, Mr. Clark admitted that the prohibition on disclosing certain information did not apply to information generated exclusively by Capital Factors separately from Union Bank, and RBC concluded from that admission that it was up to Capital Factors to complete its investigation and inform RBC of the risk it faced.

[86] According to Mr. Clark, this was not the case in this matter, where all of the information arose from the relationship between Union Bank and Capital Factors and, consequently, both Defendants were bound by the obligation of confidentiality provided by Florida law.

[87] Moreover, RBC itself, by bringing action jointly and severally against the two US financial institutions, acknowledges that the one cannot be dissociated from the other.

[88] The Court is of the opinion that Mr. Clark's credibility cannot be questioned and his conclusion to the effect that neither one of the institutions committed any fault under Florida law must be considered here.

[89] In his analysis of the scope of banking secrecy in the light of article 3079 C.C.Q., Professor Gérald Goldstein writes:

> Dans ce jugement, l'*existence* des obligations légales ou des droits découlant du secret bancaire (ses modalités, ses conditions, son étendue, les personnes qui y sont assujetties, ses bénéficiaires, etc.) dépend donc implicitement de la loi instituant ce secret. Mais la cour semble qualifier de façon autonome la question de l'*effet* de ces lois relatives au secret bancaire *sur l'obtention des preuves* au Québec comme une question relevant de la loi s'appliquant à la preuve. La raison en est que le juge applique la règle de conflit québécoise relative à cette matière (article 3130 C.c.Q.). Ceci ne veut pas dire que l'on doive faire régir *tous* les effets du secret bancaire par cette loi, loin de là. Par exemple, l'obligation pour les banques de ne pas dévoiler à des tiers — en dehors d'une procédure judiciaire d'obtention de preuve — des données sur les comptes de ses clients doit logiquement dépendre de la loi instituant le secret professionnel.[15]

14 Exhibit R-105B.

15 Gérald Goldstein, "La condition incertaine des lois de police étrangères et du secret bancaire en droit international privé québécois", (1997) 76 *Can. Bar Rev.* at 449, 456.

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[90] It is important to note that in the present case it is not a matter of evidence or procedure, but rather of substantive law in the light of which the Defendants' liability should be evaluated.

[91] To claim that the Defendants had an obligation to report information about their customer to RBC is tantamount to claiming that they should violate their own law when all of the banking transactions concerned took place in Florida, where the injurious act occurred. The Court cannot accept this argument.

[92] Lastly, section 3082 C.C.Q. states:

> **3082.** Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country. This provision does not apply where the law is designated in a juridical act.

[93] In the present case, it must be concluded that, considering all attendant circumstances, it is clear that the situation is only remotely connected with Québec law, since all of Global Orbit's and the Defendants' financial activities are governed by Florida law.

[94] In conclusion, in absence of any fault on the Defendants' part under the applicable legislation, in this case Florida law, the Court, as the Plaintiff admitted, has no choice but to dismiss the motion.

❖ CONDUCT OF THE PARTIES IN THIS CASE AS EVALUATED BASED ON THE EVIDENCE SUBMITTED BY EACH ONE

➢ SUMMARY OF THE FACTS

[95] Even though the Court has ruled to dismiss the motion on the ground that Florida law should apply and that no fault was committed by the Defendants under that law, it is appropriate, without going into all of the details and without examining each and every piece of evidence introduced in this case, to examine the conduct of the parties, irrespective of the applicable law. A very brief overview of the facts will provide a better understanding of the role of each party in the present case.

[96] Global Orbit, a subsidiary of Tiagi, is a company incorporated under Florida law that operates in that state. For the purposes of its operations, it opened a bank account with Union Bank and obtained a factoring line and stock-secured line of credit from Capital Factors. On a daily basis, Global would receive agreed upon advances from Capital Factors, based on its accounts receivable and inventory, to enable it to operate, and, on a daily basis, Union Bank would inform Capital Factors of the amount needed to cover the cheques issued by Global Orbit.

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[97] Informed of the amount needed to cover the cheques drawn on the Union Bank account, Capital Factors would contact Mr. Chehata, President and Chief Operating Officer for Global Orbit, so that he could transfer to Global's Union Bank Account or to an account held in the name of Capital Factors an amount equal to the sum required to cover the cheques drawn on the Union Bank account, and Capital Factors would transfer that sum to Union Bank.

[98] Concurrently, Global Orbit would draw on its account at Union Bank cheques made payable to Tiagi and deposited in its RBC account. As soon as the cheques were deposited by Tiagi in its RBC account, RBC would release the funds and transfer the daily sum needed to cover the amount transferred from Capital Factors to Union Bank.

[99] However, Tiagi did not have sufficient funds to cover the daily transfers to Capital Factors and it was only to the extent that the funds were immediately released by RBC, even before the clearing system was completed, that Global Orbit could have funds it would normally not have been entitled to, thereby committing fraud against RBC.

[100] In late March, early April 1998, Global Orbit ended its business relationship with Capital Factors and Union Bank, and Heller replaced Capital Factors as the new financial institution. Global Orbit's account with Union Bank was closed and the cheques drawn by Global Orbit, particularly those made payable to Tiagi, were returned marked "NSF" or "account closed".

[101] Since RBC did not place any hold on the cheques deposited by Tiagi until the clearing system was completed, and since the released funds significantly exceeded the cleared funds, RBC, as mentioned earlier, recorded a deficit of US$19 570 047.

[102] For the purposes of briefly examining the parties' conduct, the Court considered the following elements in the light of *viva voce* as well as documentary evidence on record:

- **DEFENCE**

1. DEFENDANT UNION BANK

[103] First, in the Court's opinion, the Union Bank account opened by Global Orbit was operated in accordance with the rules of good practice and the applicable legislation and regulations throughout the period concerned, and the Defendant Union Bank cannot be accused of any fault or irregularity in the operation of said account.

[104] Second, Global Orbit's account was monitored by Union Bank employees on a daily basis. At no time did Global Orbit's account at Union Bank pose a risk to the Defendant, and Union Bank always made sure to honour cheques issued by Global Orbit insofar as there were sufficient cleared funds available in the bank account to meet payment.

[105] Third, at no time did Union Bank see the cheques drawn by Global Orbit, the entire clearing system being carried out in accordance with US regulations.

[106] Fourth, at no time did employees of the Union Bank branch where the account was held suspect kiting fraud or money laundering on the part of Global Orbit or improper transactions in the account. The date chosen to close Global Orbit's Union Bank account and the transfer of sums between Capital Factors and Union Bank at the time of the account's closure are not, in the Court's opinion, connected in any way to the loss incurred by the Plaintiff. In fact, notwithstanding the testimony given by Mr. Holtz, which left the Court puzzled about all the circumstances surrounding the account's closure, the Court has no reason to dismiss the testimony given by expert witness Barkley Clark, who maintained that the account was closed in the proper manner and in accordance with the applicable legislation, including the notifying of Global Orbit by Union Bank of the account's closure when the account was transferred and financing was taken over by Heller.

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2. DEFENDANT CAPITAL FACTORS

[107] The business relationship between Capital Factors and Global Orbit effectively lasted just a few months, from November 1997 to March 1998. Although it was opened by Capital Factors in summer 1997, Global Orbit's account was barely active between the time it was opened and November 1997. This is a relatively short time.

[108] It was only in her aforementioned letter of March 3, 1998 (R-20) that Ms. Ferri requested more information regarding the account's operation, when Global Orbit was on the verge of entering into new arrangements with another financial institution. Can Capital Factors be accused of not expediting closure of the account and thereby compromising the transfer of the account to another financial institution to the detriment of its customer? The Court thinks not! Capital Factors respected the financing arrangements entered into with Global Orbit at all times, and cannot be blamed for any irregularities in the account's operation.

[109] Global Orbit always respected the credit limits and ratio calculations, and Ms. Ferri at Capital Factors reviewed the account every day and never once suspected cheque kiting.

[110] As confirmed by all of the witnesses heard by the Court and whose credibility cannot be questioned, at no time did the representatives of Capital Factors suspect fraud, kiting or money laundering.

[111] In short, the only thing that RBC can accuse Capital Factors of is any knowledge Mr. Holtz, Mr. MacMillan and Ms. Ferri may have had about what the parties characterized as an imbalance in the amount of factored sales and the advances to Global's account, as well as the Defendant's failure to conduct an investigation which, according to RBC, would have enabled Capital Factors to conclude that operating in this

manner was unacceptable and likely to cause injury to the Plaintiff, and their failure to inform RBC of the possible risk it faced.

[112] Capital Factors and Union Bank considered Global Orbit a good customer and, during the period in question, it represented no particular risk.

[113] Even though Mr. Holtz and the main people in charge of Global Orbit's account with Capital Factors, Mr. MacMillan and Ms. Ferri, noted—especially in late January, early February 1998—an imbalance in the account, the Court, considering:

1. all the attendant circumstances, in particular Global Orbit's dissatisfaction regarding the line of credit granted to it by Capital Factors, which it considered clearly too low,

2. Mr. George Tabah Jr.'s urging of Capital Factors to increase Global Orbit's stock-secured credit line in late January 1998 (1997 was most likely an error) (R-74) and Ms. Ferri's refusal to grant such a request, instead suggesting that Global devote its best effort within the next 60 days to find other financing without penalty (R-67),

3. the steps taken by Global Orbit to transfer its financial operations to another institution,

4. the daily verification of the account by Ms. Ferri, who always checked with RBC to make sure that funds were available for transfer to Capital Factors, and

5. the very short lapse of time between the March 3 letter (R-20) and the actual transfer of the account to Heller,

finds that it would have been entirely inappropriate for the Defendants to intervene and compromise the transfer of Global's account to another financial institution, thereby leaving the door open for Global Orbit to bring an action for damages, and that no acts of fault or negligence were committed by the Defendants against the Plaintiff RBC.

- **PLAINTIFF**

  - **LIABILITY OF THE PLAINTIFF RBC**

[114] At the time Tiagi's RBC account was opened, the Bank knew absolutely nothing about this corporative entity, and the account was opened without any assessment of potential risks to the Bank. The Bank relied solely on the fact that members of the Tabah family already did their personal banking with RBC. Since it was only a non-borrowing account, RBC did not carry out a due diligence review and decided to request just the documents needed to open such an account, i.e. copies of letters patent, the

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names of the administrators, and a card confirming the names of individuals with signing authority.

[115] Since it was only a non-borrowing account and the Bank considered there to be no risk in this type of account, no hold was placed on deposits, even though the clearing time in Canada is a few days and between 10 and 15 days for international transactions, particularly transactions with the United States.

[116] Yet, RBC's policy regarding the negotiation of instruments D-1, which stipulates the following in particular:

> Verify items — All items presented for negotiation must be verified for date, body & figure, signed by drawer, encoding, changes initialled and clearing eligibility. Endorsement as required.
>
> **Exception:** Business clients unless classified as doubted.
>
> Identify financially — The unit must ensure funds are available, no restrictions, etc., for any funds released from an Account Owner's account. Units must decide if a hold is required for an item drawn on another bank or unit where the client has not been deemed "Financially Responsible".
>
> **Note:** Clients considered "Financially Responsible" may have the funds on deposit to cover any released amounts, or have established and/or maintained a satisfactory account history/relationship.
>
> High risk items — Throughout this folio certain situations will be referred to as "High Risk", these situations warrant extra precautions/scrutiny.
>
> . . .
>
> Items drawn on another financial institution — If an item is drawn on another financial institution, be guided by the procedures below:
>
> 1. Calling another financial institution to verify funds, although not prohibited, is **strongly not recommended** for the following reasons:
>
>   - their confirmation is not binding
>
>   - maker of the cheque may still place a stop payment on the item, funds may be garnisheed or item may be returned NSF, etc.

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- customer service time is increased which incurs expenses such as telecommunication and staff costs.

2. If the presenter is financially responsible, negotiate the item or accept item on deposit.

3. If the presenter has not been financially identified, place a hold on the item for a minimum of 5 business days; items outside your Processing Area, hold at least 7 to 10 business days; US/Foreign currency items, hold a minimum 20 to 25 business days; or send on collection.[16]

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[117] Exhibit D-8 includes a review policy to prevent the Bank from being in an overdraft situation and the following policies in particular to enable it to foil any form of kiting:

CANADA - ROYAL BANK/ROYAL TRUST

RB/RT : Reminder - Overdraft and Activity Report is to be Verified Daily

Target Audience - MCS's, Operation Centre Staff and all Staff responsible for checking DDA - Overdraft and Activity report

Introduction — An increase in losses due to kiting activity has revealed that the officer responsible for reviewing the report is not always examining the Overdraft and Activity as required.

Details — Action Required
Debits-Posted
Fluctuations
Investigations/Activity
Client Relationships

Action Required — The officer responsible for reviewing the report must examine the Overdraft and Activity Report daily.

Review possible kiting activity and large balance fluctuations as outlined in Folio BBR-1-2-11 for Business Banking Units and P-3-1-6 for Personal Banking Units.

. . .

Purpose — The Overdraft and Activity Report provides 2 types of information:

16 Exhibit D-1 at 2, 41.

Overdraft section -	provides a daily record of overdrawn accounts
Activity section -	shows abnormal activity, such as large balance fluctuations which may indicate possible client "kiting".

Action — Use the activity section of the report to review possible kiting activity and large balance fluctuations.

The Manager is responsible for examining and initialling the report daily.

Note: These instructions also apply to branches which receive the report by account responsibility.

. . .

[118] Contrary to the aforementioned policies, the evidence revealed that RBC and its principal officers involved in overseeing commercial account transactions on a daily basis never reviewed the Activity Report, whereas a simple review in January or February would have enabled RBC to conclude that Global Orbit and Tiagi were likely engaged in kiting.

[119] Both Mr. Chapdelaine and Ms. Doucet, who are directly responsible for commercial accounts, were totally unaware of the kiting concept and the attendant risk of loss to RBC. However, RBC had adopted clear measures for preventing such activity from occurring. The RBC policy dealing specifically with kiting reads as follows:

B-8-1-7 Cheque Kiting

Introduction — Cheque kiting is the process of depositing a worthless cheque and covering it with another worthless cheque before the first one clears. The chain involves two or more financial institutions/branches, so at any given time there can be several cheques in the clearing system drawn on different accounts.

How cheque kiting is done — The process may include one or more of the following scenarios:

- a one time unauthorized "borrowing" situation for a customer in financial difficulty

- a large scale fraud by an individual or an organization

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	- regular drawings in even dollars on the same financial institution branch - high turnover of funds.
What you can do to prevent it	Early detection of "kiting" will minimize losses. Here's what you can do: - Examine the activity section of the Overdraft and Activity Report daily for suspicious activity. - Since kiting can also be done through an Automated Banking Machine (ABM), monitor suspicious activity closely.[17]

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[120] If the kiting was far from obvious for the two defendant US financial institutions, the same is not at all true for RBC, and if the Bank had paid the slightest bit of attention to how the account was being operated and had carried out the slightest verification, it could have prevented any and all overdrafts and loss, with little or no damage.

[121] In the Court's opinion, RBC is the author of its own misfortune and it must assume all risks associated with the immediate release of funds with no hold of any kind.

[122] Although RBC called the account opened by Tiagi at its commercial branch in Montréal a non-borrowing account, the immediate release of funds is equivalent to the Bank's granting its customers an unsecured loan with all of the inherent risks.

[123] The Plaintiff RBC devised a formula for computing the charges to be levied on customers' accounts precisely to take into account the use of funds during the clearing period.

[124] Millions of dollars flowed through Tiagi's RBC account during the period concerned, and no one who oversaw the account raised even the slightest question about the transactions in it, even though it would have been very easy to put an end to the kiting and avoid any overdraft losses.

[125] The expertise report prepared by Martin Fafard, a witness for RBC, is particularly telling in this regard. During the very short period concerned, from January to the end of March 1998, $240 000 000 flowed through Tiagi's RBC account. On February 2, 1998, for example, 22 cheques were drawn on Global Orbit's account at Union Bank for deposit in Tiagi's RBC account, and 25 cheques were deposited on February 9, all without either the teller or any of the account managers asking the slightest question, and all of the funds were immediately released without any kind of investigation or verification.

17 Exhibit D-14 at 13.

[126] On March 2, 1998, 26 cheques made payable to Tiagi were drawn on Global Orbit's account and all of them, varying between $270 000 and $285 000, were deposited in Tiagi's RBC account, without raising the slightest bit of suspicion at RBC! It went on like this throughout February and March 1998 without raising any red flags. The sole fact that 26 cheques drawn on Global Orbit's account were deposited in Tiagi's RBC account the same day was in itself highly irregular and totally unacceptable, and the Court cannot understand why RBC allowed the immediate release of such large sums using a highly irregular *modus operandi*, one that Martin Fafard, expert witness for RBC, characterized as transactions out of the ordinary course of business.

[127] Was it a matter of negligence, incompetence or even a lack of trained account managers at RBC? The Tribunal is afraid it cannot answer that!

[128] No other financial institution was better placed than RBC to suspect fraud and kiting, and RBC, under the circumstances, is in no position to blame Union Bank and Capital Factors for showing a lack of diligence or not conducting an investigation into accounts that were being operated in accordance with the applicable legislation and regulations.

[129] The Court finds that the two Defendants had the right to assume that RBC was aware of how the account was being operated and the potential risks involved and that it had all the means at its disposal to avoid any loss from overdrafts.

[130] During the hearing, RBC admitted that it bears a share of responsibility for its loss while stressing the fact that the Defendants committed a greater fault than it did: the only fault RBC committed was in not conducting a review. RBC is leaving it up to the Court to determine the parties' respective share of responsibility.

[131] The Court cannot take the same approach and finds that RBC bears sole responsibility for the loss and that the action should be dismissed even if the Court finds that the applicable law and concepts of liability where those of Québec.

[132] Indeed, the Court cannot accept RBC's claim that Union Bank and Capital Factors colluded to enable the fraud to continue and reach the scale it did. Nor can any knowledge either of the witnesses may have had of irregularities in the operation of the account with Union Bank or Capital Factors enable the Court to conclude that the two Defendants committed a fault in not undertaking an investigation and obtaining explanations as to the noted imbalance in the account's operation.

[133] It is paradoxical, to say the least, that RBC accuses the Defendants of willful blindness when the Bank itself and its employees did absolutely nothing to prevent such a loss from occurring. Indeed, if any fraud was committed in the present case it was because RBC released funds without knowing anything about the creditworthiness of the two corporations involved, and without the slightest monitoring of the two corporations' banking transactions between November 1997 and March 1998. If a loss

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was incurred, it was because RBC itself turned a blind eye by doing no verification, accepting the immediate release of funds and not daily verifying the transactions in Tiagi's account, which was operated from RBC's principal place of business in Québec, located at 1, Place Ville Marie, Montréal.

[134] Is there any need to reiterate that, as underscored at the beginning of this judgment, RBC is a major global financial institution and that it was fully equipped to avoid this kind of loss.

[135] Every day from November 1997 to January 1998, RBC would confirm to Ms. Ferri at Capital Factors that the funds were available, and from January until the time the account was closed, RBC would authorize the immediate wire transfer of funds.

[136] Under these circumstances, can one blame and accuse Capital Factors and Union Bank of not showing due diligence when RBC blindly released funds without putting a verification and protection system in place so as to prevent such a loss from occurring? The Court thinks not.

- **DUTY TO INFORM UNDER QUÉBEC LAW**

[137] The duty to inform only arises where there is informational vulnerability; i.e. where it is impossible for the creditor of the obligation to have informed itself.

[138] The Court adopts the ruling of the Supreme Court of Canada in *Bank of Montreal* v. *Bail Ltée*[18] which reads as follows:

> "The advent of the obligation to inform is related to a certain shift that has been taking place in the civil law. While previously it was acceptable to leave it to the individual to obtain information before acting, the civil law is now more attentive to inequalities in terms of information, and imposes a positive obligation to provide information in cases where one party is in a vulnerable position as regards information, from which damages may result. The obligation to inform and the duty not to give false information may be seen as two sides of the same coin. As I noted in *Laferrière* v. *Lawson*, *supra*, both acts and omissions may amount to fault, and the civil law does not make a distinction between them. Like P. Le Tourneau, "De l'allégement de l'obligation de renseignements ou de conseil", D. 1987. Chron., p. 101, however, I would add that the obligation to inform must not be defined so broadly as to obviate the fundamental obligation which rests on everyone to obtain information and to take care in conducting his or her affairs."

[18] [1992] 2 S.C.R. 554 at page 587.

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and at pages 586-587:

> "Without necessarily adopting that statement, I am of the opinion that Ghestin has correctly stated the nature and parameters of the obligation to inform. He describes the main elements of the obligation as follows:
>
> - knowledge of the information, whether actual or presumed, by the party which owes the obligation to inform;
>
> - the fact that the information in question is of decisive importance;
>
> - the fact that it is impossible for the party to whom the duty to inform is owed to inform itself, or that the creditor is legitimately relying on the debtor of the obligation.
>
> In my opinion, these elements are found in all cases where there is an obligation to inform.
>
> . . .
>
> The advent of the obligation to inform is related to a certain shift that has been taking place in the civil law. While previously it was acceptable to leave it to the individual to obtain information before acting, the civil law is now more attentive to inequalities in terms of information, and imposes a positive obligation to provide information in cases where one party is in a vulnerable position as regards information, from which damages may result. . . .
>
> [Emphasis added.]

[139] In the context of sophisticated financial institutions such as in the present instance, it is difficult if not impossible, to argue the existence of informational vulnerability, as stated by the Québec Court of Appeal in *Morgan Bank of Canada* c. *Gulf International Bank*[19] :

> [37] En l'espèce, j'estime que la présente affaire constitue l'un de ces cas où les appelantes n'avaient pas d'obligation de renseignement envers l'intimée. Premièrement, l'intimée, une banque rayonnant sur la scène financière internationale, disposait des moyens appropriés de se renseigner et n'était pas dans une *« position informationnelle »* vulnérable. . . .
>
> . . .
>
> [48] Dans l'ouvrage Les Obligations, 5e éd Cowansville, Y. Blais, 1998, Jean-Louis Baudouin décrit, dans le contexte d'une relation contractuelle, l'obligation pour une personne de *se renseigner* à titre de limite de l'obligation de renseignement dont bénéficie une autre personne:

[19] 2001 CanLII 7885 (Qc C.A.).

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> L'obligation de *se renseigner* est au fond la limite imposée à l'obligation de renseignement, l'envers de la médaille. Dans la mesure, en effet, où, d'une façon générale, le contractant a la possibilité de connaître l'information ou d'y avoir accès [...], l'obligation de se renseigner vient faire échec au devoir corrélatif de renseignement de l'autre partie. Le droit ne vient pas au secours de ceux qui dorment, disait la maxime romaine. [...]
>
> Dans l'obligation d'information, le droit entend protéger le contractant contre une inégalité situationnelle, mais non contre sa propre sottise ou négligence. Le contractant doit pouvoir présumer que, en effet, que l'information générale de base, normalement disponible, est connue de son cocontractant, ou alors qu'il a décidé de ne pas en tenir compte. Aussi la Cour suprême a-t-elle pris la précaution [dans Banque de Montréal c. Bail Ltée, précité] de situer l'obligation d'information dans le contexte général où toute personne a le devoir de se renseigner raisonnablement avant de conclure un contrat.

. . .

> [50] [L]'obligation de renseignement en matière bancaire, n'est pas destinée à compenser les défaillances d'un prêteur négligent, mais à équilibrer la relation d'affaires lorsqu'une partie est en position informationnelle précaire. Le test est d'autant plus exigeant lorsque les parties en présence sont des acteurs influents de la scène bancaire bénéficiant d'une vaste expérience et de conseillers avertis.

[140] The Court concludes that RBC was never in a position of informational vulnerability and that, at all times, it had all of the information necessary to detect the kiting activity.

[141] The Court cannot allow itself to end this judgment without underlining the outstanding work and the very high level of professionalism demonstrated by the attorneys for both the Plaintiff and Defendants, both in Montréal and during the commission held in Florida.

THEREFORE, THE COURT:

[142] **DISMISSES** the action brought by the Royal Bank of Canada;

[143] **THE WHOLE** with costs, including the following expert fees:

• Stinson Morrisson Hecker LLP:	Barkley Clark	$242 699.19
• Stutman Treister & Glatt:	Ralph Mabey	$66 931.11
• Ministère de la Sécurité publique:	Michèle Langlois	$846.56
	For total expert fees of:	$310 476.86

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as well as the costs for the commission to hear witnesses in Florida, totaling $44 818.55.

_____
JEAN GUIBAULT J.S.C.

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Attorneys for Defendants

Dates of hearing: November 5 to 30, 2012

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TAB 64

CITATION: Royal Bank of Canada v. Hejna, 2013 ONSC 1719
NEWMARKET COURT FILE NO.: CV-07-086210-00
DATE: 20130321
CORRIGENDA: 20130826

2013 ONSC 1719 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
ROYAL BANK OF CANADA	Plaintiff	M. Greenglass for the Plaintiff/moving party
– and –		
ROLAND HEJNA	Defendant	R. Klotz for the Defendant/responding party
		HEARD: December 21, 2012

The text of the original decision has been corrected with text of corrigendum (released August 26, 2013) appended.

REASONS FOR DECISION

HEALEY J.

Nature of the Motion

[1] This is a motion by the Royal Bank of Canada ("RBC") pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking an order for summary judgment in the sum of $6,373,897.53, calculated as of January 22, 2008, with such judgment to be declared to be a judgment in fraud within the meaning of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-5. In the alternative, RBC moves for judgment in the sum of $989,323.64, calculated as of November 22, 2006.

History of the Proceeding

[2] This proceeding has a lengthy history, having been commenced in October 2007, and accordingly the following outlines only partially the steps taken by each party before reaching the stage where this motion could be argued. The statement of defence was

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.

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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 costs[1]. It is from an affidavit of the defendant sworn January 22, 2008, filed in RBC's consolidated motion record[2], 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

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[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

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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, 2008[3] 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

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[3] Consolidated motion record, Vol. 1 of 3, tab 11(d).

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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

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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 Accounting[4] (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.

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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

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set out in an affidavit of Raymond Chang, a Vice-President with RBC[5] (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, 2006[6]. 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

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[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

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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, 2007[7]. 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, 2007[8], 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

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[7] Consolidated Motion Record, Vol. 2 of 3, tab 43
[8] Consolidated Motion Record, Vol. 1 of 3, tab 12

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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.

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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

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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 conduct[9]. 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.

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[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 financing[10]. 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 claimed[11].

[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 kiting[12]. 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 fashion[14].

[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 2006[15]. As alleged in the defendant's affidavit of September 18, 2008, Ms. Sprung told him that he should cover any shortfalls created by

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[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

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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

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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, 2006[17]. 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.

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[17] Brief of Productions, tab 22

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[52] The defendant also put before the court several Business Banking Transaction Requests relating to one or two of the companies comprising the Hejna Group[18]. 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 only[19]. 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 being tolerated[20]. 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 <u>when the cheque is released</u> (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

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> 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

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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

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[22] Transcript of cross-examination of Roland Hejna on December 16, 2008 page 20 to 26

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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

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> 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….

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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

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[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.

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[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 is 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.

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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:

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> 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 and 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*, (1989) 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

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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

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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

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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

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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.

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TAB 65

Date: 20140220
Docket: 10/120
Citation: *Ryan v. Dew Enterprises Limited*, 2014 NLCA 11

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IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

OTTO RYAN, OPERATING AS RYAN DESIGNS	FIRST APPELLANT

AND:

CARL KNIGHT	SECOND APPELLANT

AND:

DEW ENTERPRISES LIMITED	RESPONDENT

AND:

PAKARA APARTMENTS LIMITED	COURT-REQUESTED PARTICIPANT (PLAINTIFF AT TRIAL)

Coram: Green C.J.N.L., White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 200705T0065

Appeal Heard: September 14, 2011
Judgment Rendered: February 20, 2014

Reasons for Judgment by Green C.J.N.L.
Concurred in by White and Harrington JJ.A.

Counsel for the First Appellant, Otto Ryan: Michael Griffin
Counsel for the Second Appellant, Carl Knight: David Moores
Counsel for the Respondent, Dew Enterprises Limited: Gerry Wentzell
Counsel for Pakara Apartments Limited: Gerald Ralph and Stacy MacDonald

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Green C.J.N.L.:

[1] This appeal requires the Court to re-examine the principles applicable to joinder of third parties.

[2] The challenge on the appeal is to an application judge's decision to authorize the issuance and service of third party notices by a defendant contractor against a building designer and engineer in circumstances where the contractor was being sued by the building owner for breach of contract and negligence.

Case History

A. Relevant Pleading History

[3] The pleading history is tangled and confusing.

[4] Pakara Apartments Limited (Pakara) sued Dew Enterprises Limited (Dew) for breach of contract and negligence as a result of alleged delays and deficiencies in the construction of a septic system designed to service an apartment building being constructed for Pakara. Pakara alleged that Dew subcontracted the design of the sewage disposal system to Otto Ryan, operating as a sole proprietorship under the name "Ryan Designs." Both the proprietorship and Ryan personally were

named as additional defendants.[1] The statement of claim made allegations of both negligence and (even though no privity of contract was alleged between Pakara and Ryan Designs) breach of contract against Ryan Designs.

[5] In its defence, Dew took the position that it did not subcontract the design of the sewage disposal system to Ryan Designs and that, in fact, Pakara contracted directly with Ryan Designs for the performance of this work, thereby asserting that there *was* privity of contract between Pakara and Ryan Designs. Dew further denied any negligence with respect to the design or the choice of designer.

[6] Ryan Designs filed a defence in which they asserted that there was no contract between them and Pakara and that their contractual relationship with Dew was limited to providing drafting, not design, services. They then issued a third party claim against Dew claiming "indemnity and contribution" for damages for which they might be held liable to Pakara assuming (but not conceding) that there was a contract between them and Pakara as alleged by Dew. They took this position because they claimed that the drafting (but not the design) of the drawings was done by them at the request of Dew. Dew responded by reasserting that it was merely the "intermediary" between Pakara and Ryan Designs for the purpose of assisting Pakara to engage a sewage system designer.

[7] Ryan Designs subsequently issued a further third party claim against Carl Knight, an engineer and the Second Appellant in this appeal, alleging that Knight directed them to make changes to the drawings, which were stamped and approved by Knight, and that if the drawings were deficient, the responsibility lay with Knight. They claimed that if, as alleged by Dew, there was a contract between Pakara and them for the preparation of the drawings and they were in some manner responsible to Pakara for any deficiencies, Knight should indemnify them because the drawings were changed at Knight's direction. Knight responded by denying any contractual relationship with any of the parties.

---

[1] Although the sole proprietorship, "Ryan Designs," and its principal, Otto Ryan, were named as separate defendants, the allegations against them are identical and their interests in the litigation are the same; indeed, they are legally one and the same entity. This was recognized by the applications judge in the order under appeal when he ordered that that they be "merged as one party in the style of cause." Thenceforward, they appear in the style of cause in the Trial Division as "Otto Ryan, Operating as Ryan Designs". In like manner, during the hearing of the appeal, all parties consented to an amendment in the same terms to the appeal style of cause. For convenience, I will refer to this party in this judgment as simply "Ryan Designs."

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[8] Subsequently, Ryan Designs applied to be removed as defendant in the action. That would have involved the incidental discontinuance of their third party claims against Dew and Knight.

[9] By Order dated June 28, 2010, over the objection of Dew but with the consent of the other parties, Pakara's claim against Ryan Designs was discontinued, with respect to both the negligence and breach of contract claims. This Court was not told the reason for Pakara's consent to removal of Ryan Designs as a defendant. It would be improper, therefore, to speculate that Pakara concluded it had no direct claim against Ryan Designs, or perhaps had reached an undisclosed Perringer-style settlement agreement with Ryan Designs, or was animated by some other motive.

[10] As a result of the removal of Ryan Designs as a defendant, Ryan Designs' third party claims against Dew and Knight for contribution and indemnity were necessarily also discontinued. In addition, Dew was given leave to "make application" to join Ryan Designs, as well as Knight, as third parties in respect of a claim by Dew against them.

B. The Result of the Pleading History

[11] When the dust settled from this convoluted pleading history, what remained was a claim by Pakara against Dew for breach of contract and negligence. Although Ryan Designs was no longer named as a defendant, Pakara's statement of claim still alleged that Dew subcontracted the sewerage design work to Ryan Designs. The body of the statement of claim also continued – inconsistently with the removal of Ryan Designs as defendant and the absence of any allegation of a contractual relationship with them – to claim breach of contract (as well as negligence) against them. Counsel for Pakara confirmed during the appeal hearing, however, that it was his client's intention to amend the statement of claim to remove all claims and allegations of negligence and breach of contract against Ryan Designs.

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[12] For the purposes of this appeal, it will be assumed that Pakara's proposed amendments are effective, thus leaving Pakara's claim simply as one in contract or negligence against Dew on the basis that Dew subcontracted the work to Ryan Designs. Counsel for Pakara confirmed that Pakara was pursuing claims against Dew for both breach of contract and negligence.

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[13] Dew's defence continued to maintain that the contract for the provision of septic design services was between Pakara and Ryan Designs and not between Dew and Ryan Designs, as Pakara alleged. There remained, therefore, a fundamental factual disagreement between the parties as to the nature of the contractual and business relationship among Pakara, Dew and Ryan Designs and, to a lesser extent, Knight. It does not appear that any of these relationships were documented in writing.

C. The Interlocutory Application

[14] In accordance with the Order of June 28, 2010, Dew applied to bring Ryan Designs and Knight back into the litigation as third parties to a claim by Dew "to ensure that all parties having potential liability in this matter be brought in as parties before the Court so that the matter may be fully adjudicated" (paragraph 7 of the Application).

[15] The application was brought under Rule 12 of the *Rules of the Supreme Court, 1986*, which reads in pertinent part as follows:

> **12.02(1)** Where a defendant claims against any person, who is a co-defendant or who is not a party to the proceeding, that the latter is or may be liable to the defendant for all or any part of the plaintiff's claim against the defendant, the defendant may, before the defendant issues a defence or appears on a hearing under an originating application, issue and serve a third party notice without the leave of the Court, and thereafter with leave.
>
> …
>
> **12.03(2)** An application for leave to issue a third party notice shall be supported by an affidavit stating

(a) the nature of the claim made by the plaintiff in the proceeding;

(b) the stage which the proceeding has reached;

(c) the nature of the claim made by the applicant and the facts upon which the third party notice is based; and

(d) the name and address of the person against whom the third party notice is to be issued and served.

[16] Dew described the basis for the application in this way:

> In essence [Dew] claims that [Ryan Designs] … and Carl Knight were the parties who designed [Pakara's] septic disposal system and were accountable directly to [Pakara]. Further, Ryan Designs, Otto Ryan and Carl Knight are the parties responsible for the preparation and certification of the design. They were also the parties responsible for any flaws, correction of errors and the timely submission of the design to [Pakara]. Therefore, [Dew] is claiming indemnity from the proposed Third Parties should any of the claims by [Pakara] against [Dew] for breach of contract and negligence be successful.
>
> [Application, paragraph 8; underlining added.]

[17] Ryan Designs opposed the application, as did Knight. Ryan Designs submitted that the claim was "a contract case and not one of fault or negligence". On this basis, they argued that because Dew took the position in its defence that it was not contractually obligated to Pakara to design the sewer system nor to subcontract out the work to anyone, and that the contract was between Pakara and Ryan Designs directly, Dew could not, on its pleadings, have any liability to Pakara and therefore there were no potential damages which Dew could pass on by way of indemnity to Ryan Designs. Accordingly, the stated objective of Dew to have all parties with potential liability before the court was not a justification to add a third party, because Pakara itself discontinued any direct claim against Ryan Designs.

[18] Knight, for his part, took the position that in addition to Ryan Designs' arguments (which he adopted), there was no pleaded relationship at all between Dew and him that could justify any third party claim.

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D. The Ruling under Appeal

[19] In an oral judgment, the applications judge granted the application and ordered that Ryan Designs and Knight be joined as third parties. The formal order did not state the basis upon which the third party claims could be made.

[20] The judge explained the purpose of Rule 12 as follows:

> …The purpose of rule 12 in large part is to avoid several difficulties in procedure, one of which is the multiplicity of actions…[T]he procedure…provides a substitute for multiple actions and disposes of issues that have some common thread to a transaction that's before the court, a transaction where there is a common thread between the plaintiff and the defendant and then the defendant and a third party and then further down, if necessary, by a third party against a fourth party and so on.
>
> It's also meant to avoid the possibility that there could be multiple actions with inconsistent findings in the different actions based on the same transaction or set of facts. It's also meant to try and avoid and save costs to the litigants.
>
> [Transcript, p. 46]

He then described the scope of the Rule:

> The rule, as I understand it, is divided into two parts and…the applicant…would have to either fall under the category of qualifying as…claiming a contribution or, in the alternative that he is claiming or falling under the category of an indemnity. The rule is split in two. It can be either/or that would ground the right of the applicant to proceed with the third party notice.
>
> [Transcript, pp. 46-47]

[21] Dealing with "the indemnity situation," the applications judge adopted the comments of Goodridge J. in *Memorial University of Newfoundland v. Lundrigan*

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Group Ltd. (1985), 57 Nfld. & P.E.I.R. 85 (Nfld. S.C.T.D.) as stating the current law:

> [15] Referring to indemnity, Lamonte J.A. mentioned the case of *Wynne v. Tempest*, [1897] 1 Ch. 110, and said that a right to indemnity is a right to be saved from loss. In the great majority of cases the right arises from a contract, express or implied, but it may be statutory or it may arise out of a relationship existing between the parties which make[s] it equitable that one should save the other from loss.

[22] The judge then explained his conclusion that a third party claim for indemnity existed in this case:

> In the present case, it appears to me that a relationship existed between all of the parties that are now before the court. [Pakara] was involved with [Dew] in the construction of a building. [Ryan Designs and Knight] in some manner provided a service for the completion of that building, all related to the same area. It wasn't like an electrician and a plumber. These were people who worked on the same design, the sewer disposal field or the sewer design, septic design and the things that went along with it. Each one of them played a role in that which is alleged by [Pakara] to have been performed wrong by [Dew]. They're saying they're primarily responsible. Initially, they've said the plaintiff [sic; should be the defendant, Dew?] was responsible as well as [Ryan Designs] but have come to an accommodation or have somehow discontinued that…
>
> Clearly, since 2007, when the first defence was filed…and then the third party notices went out, [Ryan Designs] and then later…Knight were all aware that there were allegations swirling that they had a contract with [Pakara] to do this work and they were responsible for this loss…
>
> I say that because that's part of…looking at something that arises out of the relationship between the parties which makes it equitable, that one should save the other from the loss. It's not just dealing with what's right or wrong in equity and not in a vacuum. In the context of this particular set of facts, as I know them to be from the pleadings that have been filed, there was a construction project in which all three parties, and the fourth party being [Dew], played a role in the provision of the same type of service to [Pakara] which [Pakara] is alleging went wrong. So there could be a multiplicity of actions and individual costs. There could be, on the same facts, the possibility of different findings in a situation where actions are not either amalgamated or if they're not, as in this case, the parties brought before the court in the form of third party action.
>
> …
>
> … I have to weigh it on the basis that I believe Goodridge J. outlined [in *Memorial University of Newfoundland v. Lundrigan Group Ltd.*], that if there is a relationship

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> arising and existing between the parties which in equity, in fairness, could save one from loss, then that third party notice should be granted.
>
> [Transcript, pp. 48-50; 52; underlining added.]

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E. The Third Party Notices

[23] It is apparent from the reasoning of the applications judge that the application to issue the third party notices was based on the notion that Dew had a potential claim to be indemnified by either Ryan Designs or Knight or both. However, the judge's reasons did not make it clear what the basis of the cause of action in indemnity was.

[24] The third party notice issued against Ryan Designs following the judge's order[2] alleged-contrary to what Pakara alleged in its original statement of claim-that Pakara contracted with Ryan Designs, not Dew, to design the sewage disposal system for Pakara's building, and Ryan Designs contracted with Knight to "review and place his professional stamp" on Ryan Designs' drawings. It alleges, further, that Ryan Designs and Knight "are solely responsible for the sewage system design that [Pakara] alleges was defective…" [and] that "it (Dew) has no liability for any of the delays and damages claimed by [Pakara] in relation to the sewage disposal system…". On those allegations, the third party notice claims :

> Indemnity from [Ryan Designs] with respect to any damages, costs or interest which [Dew] may be ordered to pay to [Pakara] in relation to the damages, interest or costs arising from the faulty design or approval of the septic sewage disposal system for [Pakara's] building.

[2] Dew had, in fact, purported to issue and serve third party notices on Ryan Designs and Knight following the judge's order of June 28, 2010, believing that leave to issue had been granted at that time. When it was subsequently discovered that all that had been ordered on June 28 was that Dew had leave to "make application" to issue third party notices, Dew made the application, resulting in the order under appeal. The Third Party Notices issued pursuant to the latter order used different language than in the prematurely-issued Notices to describe the claims Dew was making against Ryan and Knight. It is the claims set out in the latter Notices which must be considered when determining whether the judge ought to have allowed the third party claims to proceed, as they are the ones which will be used to define the issues on the pleadings for the purpose of proceeding with the action.

[25] The Third Party Notice issued against Knight contains similar allegations, to the effect that Ryan Designs engaged Knight to review and certify the drawings, following which Ryan Designs submitted the plans to Pakara. It further alleges that as a result of errors of Ryan Designs and Knight, the approval of the sewage disposal design by government authorities was delayed but that Pakara is claiming damages and costs against Dew for those delays that were caused by Ryan and Knight. The Notice then asserts that "in the event [Dew] is found liable for any damages to [Pakara]," Dew claims indemnity from Knight with respect to those damages.

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Leave to Appeal

[26] This case involves an appeal from an interlocutory order that requires leave to appeal pursuant to rule 57.02(1)(a) of the *Rules of the Supreme Court, 1986*. The parties were content to argue the issue of leave at the time of hearing of the appeal itself, as is permitted by rule 57.02(5)(c).

[27] I am satisfied that this case involves issues that require further consideration by this Court. The appellants have submitted that the applications judge did not apply the proper criteria for determining whether leave to issue a third party notice should be granted. As will become evident from the analysis contained later in these reasons, there is reason to doubt whether the applications judge described or applied the proper test. As well, other decisions in the Trial Division have expressed concern as to whether the practice followed in the course of joining third parties in some cases has in fact been within the scope of the rules. For example, Goodridge J. in *Collavino v. Newfoundland* (1985), 56 Nfld. & P.E.I.R. 265 (Nfld. S.C.T.D.), commenting on the operation of the pre-1986 rules of court, observed:

> [19] There certainly have been cases heard in this Court where claims against third parties were not strictly claims for either contribution or indemnity. The prevalence of the practice does not justify it…

[28] Cases from this jurisdiction relied on by the parties in this appeal discuss the issue of joining third parties in the context of the language of the pre-1986 rules.

That language is different from the current Rule 12. Those cases cannot now be said to be controlling on the issue of joinder in the current context.

[29] There is a further reason for dealing with this interlocutory appeal at this juncture. As is evident from the foregoing discussion, the parties are mired in a morass of confusing, and in some cases inconsistent, pleadings. Each step in the process so far has compounded the number of permutations and combinations the parties have to consider and argue in the alternative whenever a further procedural step is taken. If the third party proceedings are allowed to stand at all or in their present form, it would be helpful, in my view, to attempt to define with clarity what issues are in fact at stake so that future proceedings and the resulting trial itself may operate with a clearer focus.

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[30] Accordingly, leave to appeal should be granted pursuant to rule 57.02(4)(a), (b) and (e) as well as rule 57.02(6).

The Appeal

A. Issues

[31] The parties each expressed the issues on appeal differently. The essence of the appeal, however, can be expressed in the following question:

> Did the applications judge err in his application of the applicable principles in exercising his discretion to join Ryan Designs and Carl Knight as third parties in respect of claims by Dew?

B. Standard of Appellate Review

[32] Issuance of a third party notice may be made as of right if the defendant does so before filing a defence (subject, of course, to a subsequent application by the third party to strike out the notice on the ground that no cause of action is disclosed or its issuance is otherwise improper). Thereafter, application for leave must be made to the court. Such an application involves a judicially-exercised discretion.

[33] On appeal, the court will only interfere with such a discretionary order where the judge who made it has exceeded his or her jurisdiction, has failed to apply or has misapplied an applicable principle or made a palpable and overriding error in his or her appreciation of the facts, or the failure to interfere would otherwise cause a manifest injustice: *Langor v. Spurrell* (1997), 157 Nfld. & P.E.I.R. 301 (NFCA) at para. 33.

Analysis

A. Scope of the Authority to add Third Parties

[34] This application in front of the applications judge and the argument in this Court were presented on the basis of the applicability of Rule 12. No arguments were made on the basis of the relevant provisions of the *Judicature Act*, RSNL 1990, c. J-4 or the *Contributory Negligence Act*, RSNL 1990, c. C- 33. It is necessary, however, to consider the statutory basis of the scope of third party procedure before proceeding to the rules.

i. Statutory Jurisdiction

a. Judicature Act

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[35] The starting point in considering the power of the court to authorize the issuance of a third party notice is the interrelation of sections 93 and 94 of the *Judicature Act*:

> 93. The court may grant to a defendant
>
> (a) in respect of an equitable estate or right, or other matter of equity; and
>
> (b) in respect of a legal estate, right or title claimed or asserted by that defendant,
>
> all the relief against a plaintiff or petitioner that the defendant has properly claimed and that the court might have granted in a proceeding instituted for that purpose by the same defendant against the same plaintiff or petitioner.

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[36] This section, which is not directly related to the disposition of the current appeal, provides the authority for a defendant in a proceeding to counterclaim against the plaintiff in the same proceeding instead of commencing a separate action. There is nothing in this provision that restricts the ability of a counterclaiming defendant to raise issues arising out of the subject matter of the plaintiff's initial claim. Thus, *as against a plaintiff*, as opposed to a subsequently-joined third party who is not also a plaintiff, a defendant can make any unrelated counterclaim (subject, of course, to the power of the court to sever such a counterclaim and order that it be tried separately, if the original claim and counterclaim cannot be conveniently tried together: Rule 40.12; *Bank of Montreal v. H. O. House Ltd*. (1978), 15 Nfld. & P.E.I.R. 33 (NFCA)).

[37] Section 94, which is more directly relevant to the current appeal, provides:

> 94.(1) Relief
>
> (a) claimed under section 93;
>
> (b) related to or connected with the original subject matter of the proceeding; and
>
> (c) in a similar manner claimed against another person whether a party to the same proceeding or not,
>
> may be granted against a person who has been served with written notice of the claim under a rule or an order of the court, and that might have been granted against that person

> if that person had been made a defendant to a proceding instituted by the defendant seeking relief under section 93 for a similar purpose.
>
> (2) A person served with a notice under subsection (1) is considered to be a party to the proceeding with the same rights in respect of that person's defence against the claim as if that person had been sued in the ordinary way by a defendant seeking relief under section 93.

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[38] Section 94 is the provision that authorizes a defendant to include in existing litigation a separate issue involving a claim by him or her against a person not then a party to that litigation, i.e. a third party claim. The right is not open-ended, however. Such a third party claim must be, as section 94(1)(b) indicates, "related to or connected with the original subject matter of the proceeding". Thus, unlike the right to counterclaim, which could involve a claim completely unrelated to the original action, a third party claim must arise out of, in the sense of being "related to or connected with", the original litigation. The classic situation where this connection exists is where a defendant seeks, by way of a claim for indemnity or contribution, to pass any liability to which he or she might be subject at the hands of the plaintiff on to another person.

[39] Other aspects of section 94 are problematic from an interpretation point of view. It will be noted that the section, by its terms, only authorizes third party proceedings where relief is being "claimed under section 93". Read literally, that would mean that a defendant wishing to claim against a third party must also be making a counterclaim against the plaintiff and it is only *that* relief that can also be claimed against the third party. Read this way, the section makes no sense, since the purpose of third party proceedings is usually not to make a claim against an existing plaintiff but against someone not already a party, and such a claim, e.g. a claim for indemnity or contribution, by its nature will not be the same cause of action forming the basis of the counterclaim.

[40] The answer to this conundrum is found in the legislative history of sections 93 and 94. Their genesis is found in the English *Judicature Act, 1873*, 36 & 37 Vict., c. 66, which essentially encompassed the essence of both sections 93 and 94 in one provision. The English provision found its way into section 13(3) of the Newfoundland *Judicature Act* of 1889, 52 Vict., c. 29 which under the heading "Counterclaims and third parties" provided:

13…

(3.) The said Court and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Court, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; *and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claims as if he had been duly sued in the ordinary way by such defendant*.

(Italics added.)

[41] The non-italicized words correspond to the current section 93. The italicized words correspond to section 94. It will be seen that the original section was attempting to deal with two related but *different* issues: the assertion of counterclaims between existing parties and the assertion of third party claims against non-parties. It did not tie the scope of one jurisdiction to that of the other.

[42] This provision remained unchanged in all material respects through the statutory consolidations of 1896 (CSN 1896, c. 50, s. 13(3)), 1916 (CSN 1916, c. 83, s. 25(3)), 1952 (RSN 1952, c. 114, s. 25(3)) and 1970 (RSN 1970, c. 187, s. 21(c)). At the time of the re-enactment of the judicature provisions in 1986, however, the section was split into the two related sections that today are sections 93 and 94: *Judicature Act*, SN 1986, c. 42, ss. 91 and 92. It was at this point that the reference to relief claimed under what is now section 93 was inserted. This is the only substantial change in the language of the sections.

[43] When viewed from this historical perspective, it appears that, in the effort by the consolidator to divide a very long one-sentence section into two, the reference in section 94 to relief claimed under section 93 was an attempt to maintain some linguistic continuity between the two sections in accordance with the original

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legislative scheme. Arguably, the change in the structure of the provisions was not intended to affect the substance of the original language. The infelicitous manner in which it was done should not be allowed to effect a major substantive change to the original intent as to the scope of third party procedure. Where a statute is consolidated or re-enacted, the presumption is that the legislature did not intend to make any substantive change in the law; rather, it is treated as declaratory of the existing law. See *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: Lexis Nexis, 2008), pages 653-659; Pierre-André Coté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto, ON: Carswell, 2011), pages 112-113; *Interpretation Act*, RSNL 1990, c. I-19, s. 31(2); *Statutes and Subordinate Legislation Act*, RSNL 1990, c. s-27, s. 5(1)(d) and (g). While the 1986 enactment was not technically undertaken as part of a general statutory consolidation and revision, the 1986 statute did involve a general consolidation and reorganization of all Supreme Court judicature provisions that had been enacted since 1970, including the previous creation of appeal and trial divisions of the Court, and, as well, provided for the merger of the District Court into the Supreme Court. In so doing, it did not appear to change substantively any of the other foundational provisions of the Court relating to its procedural jurisdiction.

[44] I am satisfied, therefore, that the insertion of the references to relief being claimed under section 93, in section 94, was not intended to attenuate substantively the scope of the previous jurisdiction of the Supreme Court to permit third party proceedings. I would read the reference to relief being claimed in section 93 as meaning simply that relief of the type ("such relief") that could be claimed in a counterclaim can also be claimed against a third party ("against any other person, whether a party to the same cause or matter or not") provided it is "relating to or connected with" the original subject of the action. Alternatively, had I not reached this conclusion, I would have been prepared, in the special circumstances of this case, to treat paragraph 94(1)(a) as being omitted from the statute completely on the ground that to retain it would produce an absurdity in that it would virtually eliminate the possibility of utilizing third party proceedings, a result that would make the procedural law in this jurisdiction completely out of step with that in every other Canadian jurisdiction. That could not have been intended by such an incidental linguistic change. Where it appears that the words chosen by the drafter of the statute lead to an absurd result or one that could not have been intended, the court is entitled to disregard them. See *Sullivan, supra*, pages 173-177.

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[45] I conclude, therefore, that section 94 of the *Judicature Act* continues to confer jurisdiction on the Supreme Court to allow for independent claims to be initiated by third party procedure regardless of whether they amount to claims for indemnity or contribution, provided the claim is related to or connected with the original subject matter of the action.

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b. Contributory Negligence Act

[46] The other statutory provision that is tangentially relevant to the issues engaged here is the *Contributory Negligence Act*, which provides:

> 3. Where damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each was at fault, and where 2 or more persons are found at fault they shall be jointly and individually liable to the person suffering damage or loss, but as between themselves, in the absence of a contract express or implied, they shall be liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.
>
> …
>
> 7. Where it appears that a person not a party to an action is or may be wholly or partly responsible for the damages claimed, that person may be added as a party defendant or may be made a 3rd party to the action, upon the terms that are considered just.

[47] At common law, there was no contribution between tortfeasors: *Merryweather v. Nixon* (1799), 8 T.R. 186; 101 E.R. 1337 (K.B.); *Churchill v. Young* (1981), 35 Nfld. & P.E.I.R. 412 (NFCA). In other words, a concurrent tortfeasor did not acquire any rights, merely by paying the whole of the judgment, against any other tortfeasor who was partly responsible for the damage. The right to claim contribution or indemnity as between concurrent tortfeasors therefore depends solely on the *Contributory Negligence Act.*

[48] These provisions create a right to contribution between two or more tortfeasors who cause damage by their "fault" (section 3) and provide the procedural mechanism by which the right can be asserted and adjudicated if all tortfeasors have not been brought before the court at the suit of the plaintiff

(section 7). Section 7 allows a non-party in a tort claim to be brought in as a third party with a view to ensuring that the person so brought in will contribute to any judgment that might ultimately be made, if the third party is also found to be at fault. This procedure exists outside of the procedures set out in the Rules of Court which apply in other circumstances.

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[49] A defendant seeking to invoke the provisions of section 7 must allege in his defence that the putative third party is at least partly at fault. Alleging simply that the defendant is not responsible at all and that the putative third party is wholly responsible is not sufficient: *Seabord Construction Ltd. v. Pack & Noel Ltd. & Canadian National Railway* (1970), 1 Nfld. & P.E.I.R. 331 (Nfld. S.C.); *Churchill v. Young*. There must be an issue, even if it is an alternative claim, of some kind of potential joint responsibility for the tort alleged by the plaintiff. (It may be possible to have joinder of a non-party *as an additional defendant* where it is alleged that that person is wholly responsible for the damage or loss claimed by the plaintiff, but it is not necessary to say any more about this in the context of the current case.)

ii. Rules

[50] Rule 12.02 (1) provides that where a defendant claims against any person "who is not a party to the proceeding" that that person is or may be liable to the defendant "for all or any part of the plaintiff's claim against the defendant", the defendant may (with or without leave, depending on the circumstances) join that person as a third party.

[51] It is to be noted that the rule is not limited in express terms to claims for indemnity or contribution from the third party. There is only a requirement that the defendant assert some sort of claim "for all or any part of the plaintiff's claim against the defendant".

[52] The wording of this provision is to be contrasted with the pre-1986 rule. Order XV, rule 43 provided in pertinent part:

> 43. Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal of the Court.

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[53] Under the former rule, the only basis for asserting a third party claim was if the claim could be fitted under the rubric of a claim for indemnity or contribution. This was the ruling of Goodridge J. in *Canadian Acceptance Corp. v. Victoria Insurance Co. of Canada et al.* (1983), 46 Nfld & P.E.I.R. 44 (Nfld S.C.T.D.) where he wrote at paragraph 161 that "third party procedures under the rules of this court involve contribution and indemnity only", and in *Collavino Inc. v. Newfoundland* (1985), 56 Nfld. & P.E.I.R. 265 (Nfld. S.C.T.D.) at paragraph 19 where he observed, as quoted earlier, "the prevalence of the practice [of making third party claims that were not strictly claims for either contribution of indemnity] does not justify it." See also *Memorial University of Newfoundland v. Lundrigan Group Ltd.* (1985), 57 Nfld. & P.E.I.R. 85 (Nfld. S.C.T.D.) at paras. 6-11 and 35.

[54] A claim for indemnity is a claim that another party save the indemnity-claimant harmless against loss or damage which the indemnity-claimant has incurred or suffered or will incur or suffer at the hands of another, and to reimburse the claimant in respect of such loss or damage. The claim may arise from an express contract, by implication of law or from statute. An example of a claim to indemnity arising from implication of law is where an act is done at the request of another, the act turns out to be injurious to a third party and in consequence of doing the act the doer incurs liability to the third party (*Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261 (C.A.)). Other diverse examples include: (i) where an agent incurs loss while lawfully carrying out the mandate of his or her principal; (ii) where a principal suffers loss by incurring liability to a third party as a result of the wrongful actions of his or her agent or employee; (iii) where a trustee causes a co-trustee to incur costs through the trustee's negligent management of the trust; and (iv) where an obligation arises in equity from the relationship between the parties, such as between trustee and beneficiary. While the circumstances where an obligation to indemnify arises by implication of law are diverse, they are not open-ended. The obligation cannot be imposed simply by the exercise of *ad hoc* discretion. As noted by Goodridge J. in *Collavino*, at paragraphs 18-21, just because a party may have a claim for damages over against a third party does not entitle him or her to a claim in indemnity or contribution. This was the traditional English position as

enunciated in *Birmingham and District Land Co. v. London and North Western Railway Co, supra.*, at pages 272 and 274-275, which was cited and relied on by Goodridge J. in *Collavino* at paragraphs 15-16 and *Lundrigan* at paragraphs 18-19.

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[55] A claim for contribution, on the other hand, is in one sense a claim to a partial indemnity. However, the basis of the right is different. As noted by Goodridge J. in *Collavino* at paragraph 18, the right to contribution is based on general principles of justice involving the equitable sharing of responsibility among persons who are jointly responsible for a claimed loss. It usually arises as between joint debtors, contractors, trustees, sureties or tortfeasors. In the case of contribution between joint tortfeasors, that type of third party claim is now governed by the *Contributory Negligence Act*.

[56] The application of the former rule respecting joinder of third parties therefore focused on whether a recognized category of indemnity or contribution was claimed. If not, the rule was inapplicable and the procedure was unavailable even if there was potentially a claim over against a third party for damages in negligence or under a separate contract. The question now arises whether the scope of the right to join someone as a third party is so limited under the current rule.

[57] The current rule does not, as noted, refer to the words "contribution or indemnity". It does, however, focus on circumstances where the putative third party "is or may be liable to the defendant for all or any part of *the plaintiff's claim* against the defendant" (emphasis added). It could be said, therefore, that the only circumstance where a person could be brought into the litigation as a third party is where the defendant is claiming to pass on to the third party all or a part of what the defendant is found liable for to the plaintiff. The traditional way in which that could be done was, of course, by way of claims for contribution or indemnity. On this analysis, the phrase "is or may be liable to the defendant for all or any part of the plaintiff's claim against the defendant" is simply another way of saying "contribution or indemnity" and the scope of the current rule has not been effectively expanded.

[58] I do not accept this interpretation. In the first place, there appears to have been a conscious change in use of language in the drafting of the rule. That is

normally taken as an indication of an intention to change the law. Secondly, a more expansive interpretation is consistent with the broader language of section 94 of the *Judicature Act* . As noted, this section is the statutory authorization for third party procedure. It contemplates a person being joined as a third party whenever the defendant is making a claim "related to or connected with the original subject matter of the proceeding". That language extends beyond contribution or indemnity claims, inasmuch as it does not require the defendant to claim to pass on liability for the plaintiff's claim to the third party. All that would appear to be required is to show that the defendant's cause of action against the third party arises out of the same general factual and/or legal matrix of the extant issues between the plaintiff and defendant.

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[59] In England the case law recognized that the English equivalent of section 94 was broader in scope than was specifically authorized by their "contribution and indemnity" rule (which was essentially the same as Newfoundland's previous rule). However, the English Court of Appeal regarded the rules of court as limiting the application of the broader statutory language. See *McCheane v. Gyles*, [1901] 1 Ch. 287 (C.A.) and *Wynne v. Tempest*, [1897] 1 Ch. 110. In this jurisdiction, the decisions in *Collavino* and *Lundrigans* can also be said to stand implicitly for the same proposition, although there was no express reference to section 94 in those decisions.

[60] With all due respect to the early English authorities (the English rules were amended in 1929 to allow third party claims, in addition to contribution and indemnity, where the defendant claimed relief "relating to or connected with the original subject matter of the action", i.e. in substantially the same terms as the authorizing statute), I would approach the matter differently. In my view, if the statutory provision confers jurisdiction on the Court to allow third party procedure where the claim is "related to or connected with the original subject matter of the proceeding", then that is the scope of the third party jurisdiction that the Court has. The rules of court are merely the means whereby the Court purports to give guidance as to how the Court's adjudicative jurisdiction will generally be exercised. If the rules are expressed or interpreted to circumscribe more narrowly the circumstances where third party proceedings will be allowed, that would effectively involve the Court in wrongfully declining its jurisdiction. Thus, even if the rule is expressed in a manner that, if literally applied, would be tantamount to

declining jurisdiction, that does not mean that the Court cannot exercise its jurisdiction in other circumstances not contemplated by the rule.

[61] Accordingly, the provisions of section 94 are controlling and should inform the interpretation and application of the current rule 12.02. The touchstone for determining whether the court should exercise its discretion to allow a third party claim should therefore be whether the third party claim is related to or connected with the original subject matter of the proceeding.

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[62] A third reason why the rule should be given a more expansive interpretation is found in case law construing similarly worded provisions in other jurisdictions. In *Burry et al. v. Centennial Properties Ltd. et al.* (1979), 38 N.S.R. (2d) 450 (N.S.S.C., App. D.), motion for leave to appeal to SCC refused (1979), 35 N.S.R. (2d) 630, a condominium corporation sued the developer under a homeowner's warranty for building deficiencies. The developer-defendant third partied the contractor for damages for breach of contract and negligence, claiming the deficiencies were attributable to the contractor's faulty workmanship. There was no express contract of indemnity between the developer and the contractor. The contractor argued that it could be found liable as a third party only when the third party was bound by an agreement to indemnify the defendant from liability to the plaintiff (which was not the case on the facts) and not when their claim was based merely on a contractual obligation which happened to be similar to the one under which the defendant was liable to the plaintiff. This argument was rejected.

[63] The Nova Scotia Court of Appeal held that Nova Scotia's rule 17.02, the equivalent of our rule 12.02, should be construed to allow the claim. After tracing the history of the linguistic development of the English and Nova Scotian judicature provisions and rules, Hart J.A. explained:

> [31] I am unable … to confine the rule so narrowly [i.e. to encompass only claims for indemnity and contribution]. There are no words, as in the former rule, that limit proceedings to cases of "contribution or indemnity", and, in my opinion, the wording of s. 17.02 is broad enough to cover the situations envisaged by the rule adopted in this province in 1960 [i.e. a provision similar to the revised English rule which contemplated, in addition to contribution or indemnity claims, claims for relief "related to or connected with the original subject-matter of the action"]. All the defendant must show is that the plaintiff is claiming against him something for which the third party is liable to the

> defendant and it then becomes convenient to have the common issues tried at the same time unless good reason is shown by one of the parties to convince the Court that it would be unfair to have a joint trial of the two causes. The wording of our present rule encompasses not only situations in which contribution or indemnity is involved but also those other circumstances referred to in…the modern English rule.
>
> [32] The only real limitation on the use of third party proceedings is contained in the *Judicature Act* where the second cause of action must be "relating to or connected with the original subject of the proceeding", but once that connection is established then procedurally all common issues should be tried and disposed of at the one time.
>
> …
>
> [35] Surely, as here, where one party undertakes an obligation to provide a housing unit to its customer "constructed in a thorough and workmanlike manner" and then contracts with another party to construct that unit in a similar manner, and it was subsequently alleged that the unit was not properly constructed, there are sufficient common issues to justify the holding of a single trial in which all parties may participate and in which the rights of all parties will be determined in accordance with the findings of the Judge.
>
> [36] The defendant would simply know that if he was liable for failure to live up to his contractual obligation to the plaintiff he could pass this obligation over to the third party, who did not agree to indemnify him, but did agree to do all the things necessary to enable him to meet his obligations to the plaintiff. This, in my opinion, is the plain meaning of the words in rule 17.02.
>
> (Emphasis added.)

[64] Although the conclusion reached in *Burry* was helped by the fact that the Nova Scotia Judicature Act had been amended in 1960, in language which tracked English amendments, to refer not only to indemnity and contribution claims but also other claims for relief "relating to or connected with the original subject-matter of the action", the reasoning in the case – to the effect that the language of Nova Scotia's rule 17.02 encompassed more than indemnity and contribution – is equally applicable to the Newfoundland rule. Furthermore, section 94 of our *Judicature Act* contains the same critical language as the Nova Scotia and English statutory provisions both before and after their 1960 amendment.

[65] *Burry* stands, at the least, for the proposition that a rule of court in the words of our rule 12.02 encompasses claims by a defendant against a third party where

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the defendant is seeking to recoup from the third party for losses to which the defendant is exposed as a result of a claim by the plaintiff regardless of whether, technically, the defendant's claim is for indemnity or contribution (see paragraphs 35 and 36 in *Burry* quoted above). In fact, the analysis and comment in paragraphs 31 and 32 reproduced above can also support an even broader interpretation which gives primacy to the statutory language rather than to the language in the rule, namely, that a claim could be made against a third party by a defendant even though he is not seeking to pass on to the third party the losses associated with the plaintiff's claim against the defendant but instead wishes to assert a completely separate cause of action that happens to arise out of the same factual matrix of the claim made by the plaintiff and the defendant and to use that claim to offset his losses associated with the plaintiff's claim against him.

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[66] It should also be noted that Hart J.A. in *Burry* also commented by way of *obiter dicta* that had a claim been made by the defendant against the third party in negligence as well as in contract, third party joinder might well have been justified on that basis as a claim of apportionment of liability, or contribution, under the Nova Scotia equivalent of our *Contributory Negligence Act* on the basis that both the defendant and third party owed a duty of care to the plaintiff. See paragraphs 20 and 34. Since negligence had not been pleaded against the third party, however, it was not necessary to decide that point in that case.

[67] A fourth reason to construe rule 12.02 to encompass claims additional to those of contribution and indemnity is that such a construction is more consonant with the underlying purpose of third party procedure. The purpose of the procedure is to prevent multiplicity of actions and to enable the Court to prevent the same question or claims resulting from the same factual circumstances from being tried twice with possibly different results. (See also *Fitzpatrick v. A. Harvey & Co. Ltd. et al.*(1986), 59 Nfld. & P.E.I.R. 144 (Nfld. S.C.T.D.) at para. 147 where the additional related purposes of allowing the third party to defend the plaintiff's claim saving costs and preventing the plaintiff from enforcing a judgment against the defendant before the third party issue is determined, are mentioned at paragraph 14.) Claims against third parties arising out of the circumstances surrounding the plaintiff's claim against the defendant but not strictly involving claims for contribution and indemnity can also fall within these policy objectives. This is certainly the view expressed in *Burry*, when the Court concluded on the facts of that case that "there are sufficient common issues to justify the holding of a

single trial in which all the parties may participate and in which the rights of all parties will be determined…" (paragraph 35).

[68] Accordingly, I conclude, contrary to the assertion in *Canadian Acceptance Corp. v. Victoria Insurance Co. of Canada et al., supra* to the effect that third party procedure "should not be used in 'claims over' grounded in negligence" (paragraph 161), (or, I would add, claims for damages under a separate contract that did not provide for indemnity), the current rule now allows for those types of claims to be asserted within the third party procedure contemplated by rule 12.02. This means that one does not approach the question of whether the claim is "for all or any part of the plaintiff's claim against the defendant" on the basis of whether, within the rules relating to contribution or indemnity, such liability as a matter of law can be passed on to the third party. Rather, the question is, as a practical matter, can the defendant, by asserting a separate claim arising out of the same factual circumstances and by recovering damages from the third party on the basis of the third party's involvement in those circumstances, effectively make the third party ultimately answer in whole or in part for the losses that have occurred? To the extent that *Canadian Acceptance, Collavino* and *Lundrigan* stand for the narrower proposition that third party claims are limited to contribution and indemnity, they should now be regarded as overruled.

[69] Whether third party procedure as contemplated by section 94 of the *Judicature Act* would also allow, outside the words of rule 12.02, a third party claim that is not "for all or any part of the plaintiff's claim against the defendant" and not dependent in any sense on liability between plaintiff and defendant (provided it still can be said to be "related to or connected with the original subject-matter of the proceeding") is not necessary to be decided in this case and is better left for another day.

B. Procedure for Making a Third Party Claim

[70] The current rules allow a defendant to issue and serve a third party notice without leave of the Court at any time before the defendant files a defence. Once a defence has been filed, however, leave of the Court must be obtained. In situations where leave is not required, therefore, it is possible that a third party notice that

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makes claims that do not fall within the scope of rule 12.02 may be issued. In those cases, the appropriateness of making a third party claim may nevertheless be raised on an application for directions under rule 12.06(1) or on an application to strike the notice under rule 14.24. In situations where leave to issue is required, the appropriateness of the proposed third party procedure may be dealt with on the leave application. In either situation the considerations are the same.

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[71] It is common practice for a defendant who wishes to third party another person to set out in the statement of defence the factual circumstances that justify the claim. Dew has not done so here. However, subject to any irremediable prejudice that may be caused to other parties, that is not fatal to its position. There is nothing in the rules that makes it mandatory.

[72] The nature of the third party claim and "the facts upon which the third party notice is based" must, however, at the very least, be set out in the affidavit supporting the third party application: rule 12.03(2)(c). Furthermore, the facts so relied on must not be inconsistent with the facts pleaded in the defence (rule 14.10) unless they are pleaded in the alternative (rule 14.08: *Montana Band v. Canada*, [1991] 2 F.C. 273 (Fed. T.D.), aff'd on appeal [1993] 2 C.N.L.R. 134 (FCA)). Failing that, a party must seek leave to amend the factual substratum of the defence before proceeding with the third party application.

[73] On the third party application, the Court must address whether the nature of the claim falls within the scope of third party claims allowed by the rules (or by the *Contributory Negligence Act* where the claim alleges joint tortfeasors). Although the rules require that all existing parties be given notice of the application, the intended third party (unless already a party in another capacity) need not be given notice or be heard at that stage. This means that if, following service of the notice, the third party believes the procedure is not appropriate, the objection can be raised on an application for directions or for striking out. In practice, notice to the intended third party is often given and the third party appears and may be heard. In the current case, the third parties were heard on the application.

[74] In addition to determining whether the nature of the claim is within the scope of third party procedure, the Court must also consider practical questions

related to whether, from a logistical and timing point of view, the third party claim can be accommodated within the contemplated litigation between the plaintiff and defendant. The granting of leave, or the determination of whether a third party claim should be set aside, is a discretionary matter. In exercising the discretion the court must be animated by considerations of justice and fairness to all parties or potential parties. Thus, if the timing of the application to join the third party may compromise a trial between the plaintiff and defendant that is imminent, the Court may exercise its discretion to refuse joinder even if the claim is such that it falls within the scope of the rule: *Chain Stores Limited v. Blundon's Realty Limited et al.* (1976), 17 Nfld. & P.E.I.R. 327 (Nfld. S.C.T.D.).

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[75] Although the third party issues substantively only involve the defendant and third party, the plaintiff nevertheless has an interest in the outcome of a third party joinder application because he or she might be adversely affected both with respect to delay of the proceedings and costs: *Canadian Paraplegic Assn. (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.* (1997), 150 Nfld. & P.E.I.R. 203 (NFCA) at para. 20.

[76] Factors other than delay of the proceeding and proximity to an existing trial date that may be considered include the possibility that the inclusion of third party issues in the trial would unduly complicate the disposition of the trial (*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* (1991), 93 Nfld. & P.E.I.R. 104 (Nfld. S.C.T.D.) or would "embarrass or delay the trial or [be] otherwise inconvenient" within the meaning of rule 40.13. It has also been suggested in some cases that a lack of an explanation for delay in making an application to join the third party may justify exercising the discretion to deny the application (*Stanford v. Lawton's Drug Stores Ltd.*, 2013 NLTD(G) 161 at para 20); in most cases, however, delay in applying would not normally, in itself, result in refusal unless another party can show prejudice as a result of the joinder (*Congregation of the Sisters of Mercy of Newfoundland v. Stokes Management Ltd.* (2002), 217 Nfld. & P.E.I.R. 153 (Nfld. S.C.T.D.) at para. 22; *Churchill v. Eveleigh*, 2012 NLTD(G) 39, 320 Nfld. & P.E.I.R. 342 at paras. 25-27), such as substantial increased cost or interference with an existing trial date or significantly prolonging the time before the matter would get to trial.

[77] On an application to join a third party, the accompanying affidavit should not be "limited to a perfunctory recitation of the chronology of events that have occurred to date but [should encompass] a requirement that the applicant make serious efforts to provide the judge information to enable the judge to have as good an overall sense as possible of the impact of the application on the future progress of the proceeding" (*Canadian Paraplegic Assn.* at paragraph 20).

[78] At the end of the day, the burden is on the applicant for the issuance of the third party notice to justify its issuance.

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Considerations

A. Positions of the Appellant

[79] Ryan Designs and Knight take the position that Dew, as the applicant for the issuance of the third party notice, did not show and could not have shown any reason for joining them as a third party. They argue that the judge's expressed reasoning for ordering joinder (because a relationship existed between all parties which makes it fair and equitable that the third parties save Dew from loss) cannot form a sufficient basis of a decision to join them. It is not simply a sense of perceived fairness and equity which can provide a justification; there must, instead, be a recognized cause of action that is apparent from the pleadings. Without that, it is not enough merely allow third party proceedings solely because it might be more convenient to have all parties involved before the court.

[80] Essentially, Ryan Designs claims, citing *Collavino*, that Dew must show that there was a contract, either express or implied by law, between Dew and Ryan Designs whereby Ryan Designs was obligated to indemnify Dew with respect to any potential claims made by Pakara, the plaintiff, against Dew. Relying on Dew's defence, to the effect there was no sub-contract between Dew and Ryan Designs but, rather, a direct contract between Pakara and Ryan Designs, Ryan Designs submits that no possible claim for indemnity could be made out. Again relying on *Collavino*, Ryan says there must be an obligation to indemnify and not simply a

right to claim damages over against the third party. Implicit in this argument is that rule 12.02 is limited to claims for contribution and indemnity.

[81] Ryan Designs also submits that Dew could not claim contribution from Ryan Designs on the basis that they were joint tortfeasors because "the parties in this case are not joint tortfeasors as it is a contract case" (Appellant's Factum, paragraph 8).

[82] While supporting Ryan Designs' submissions, Knight additionally submits that on the pleadings and in the affidavit supporting the application there is even a more tenuous connection between Knight and Dew and/or Pakara than there is involving Ryan Designs. The absence of a pleaded relationship of responsibility is, Knight submits, fatal to any claim by Dew that would justify being dragged in as a third party.

B. Analysis of Applications Judges' Approach

[83] The applications judge erred when he concluded that "the applicant…would have to either fall under the category of qualifying as…claiming contribution or, in the alternative that he is claiming or falling under the category of indemnity". For reasons expressed above, rule 12.02 is not limited to claims for indemnity or contribution. That said, it does not follow that the judge had an open-ended discretion to join parties based solely on a perception that it would be "equitable", based on the relationships of the parties and intended third parties, to join a person as a third party even if it might have the incidental effect of eliminating a multiplicity of actions and possible inconsistent findings.

[84] The applications judge ultimately concluded that a third party claim for indemnity existed in this case. He reached that conclusion on the basis of the quotation from *Wynne v. Tempest* referred to by Goodridge J. in *Lundrigan* to the effect that a right to indemnity "may arise out of a relationship existing between the parties which makes it equitable that one should save the other from loss." Read in context, that statement does not allow a judge, whenever he thinks it equitable, to declare a right to indemnity to exist just because there is a close

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relationship between or among the parties. There are established relationships where the principles of equity recognize that a person may, because of the relationship, be obligated in conscience, i.e. in equity, to indemnify another from loss. An example given by Chitty J. in *Wynne* was:

> Such an obligation [to indemnify] arises in equity from the relation of the parties where two trustees are liable for a breach of trust and one has applied the trust fund to his own use; in that case the trustee who has so misapplied the fund is liable to indemnify his co-trustee. (p. 113).

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[85] By concluding that a right to indemnity existed on the pleaded facts without considering whether the relationship was one which was recognized in equity as imposing on the conscience of the potential third party an obligation to save the defendant from loss, the applications judge also erred.

[86] It does not follow from these conclusions of error, however, that the decision reached by the applications judge was necessarily incorrect. There may be other bases, considering the true scope of rule 12.02 or the application of the *Contributory Negligence Act*, on which the issuance of third party notices could be justified. It is necessary to consider the third party claims against Ryan Designs and Knight separately.

C. Third Party Claim Against Ryan Designs

[87] The starting point in determining whether a third party claim by a defendant is supported by a recognized cause of action is the initial statement of claim. That pleading identifies the nature of the claim to which the defendant is exposed and which the defendant wishes to pass on, in whole or in part, to the putative third party or for which the defendant wishes the third party to face ultimate responsibility. In this case, Pakara claims damages from Dew based on breach of contract and negligence with respect to the construction and design of the apartment septic system by engaging Ryan Designs by way of subcontract to design the system. Pakara therefore claims that Dew engaged Ryan Designs by contract to do the work at issue.

[88] The second place of focus is the defence of the defendant. This defines the position of the defendant and helps identify whether the defendant is asserting that there is a risk of liability to him or her which could be passed on to the third party or for which the defendant considers the third party is ultimately responsible in a chain of responsibility. In this case, Dew's fundamental position is that it did not agree to subcontract the impugned work to Ryan Designs but that Pakara contracted directly with Ryan. That is an assertion that Dew had nothing to do by way of contract or breach of tortious duty with respect to the septic design work. Dew's position is summarized in paragraphs 8 and 19 of its Defence as follows:

> 8. … [Dew] denies it ever had any responsibility for the subcontracting of the sewage disposal design or for ensuring the sewage disposal design was put through the proper government approval process. [Dew] states that responsibility for preparing a sewage disposal system for [Pakara's] apartment complex was the sole and exclusive responsibility of [Ryan Designs].
>
> 19. In summation, [Dew] denies that his work on the design of [Pakara's] apartment building was done negligently or in breach of contract with [Pakara].

The defence is a straightforward denial of any liability with a request for dismissal of the action. In essence, Dew is saying that Pakara has sued the wrong party.

[89] Viewed in isolation, this position does not justify any third party pleading. There is nothing to which, on Dew's position, it can be exposed that needs to be passed on to anyone else. Viewed against Pakara's statement of claim, however, it is obvious that there *is* a risk of exposure to Dew because the court might ultimately side with Pakara's version of the facts. In that scenario, Dew would face potential liability which it might wish to try to pass on.

[90] Although there is nothing in Dew's defence that pleads any position in the alternative to Dew's stated position that it has no contractual or tortious relationship with Ryan Designs, that is not, as indicated previously, fatal to Dew's position. The basis for a third party claim need not be stated in the defence. It is necessary, however, for a basis for a claim to be disclosed and asserted in the third party notice that is ultimately issued (especially where it can be issued without leave of the court) and as well in the affidavit supporting an application for leave to issue a notice: rule 12.03(2)(c).

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[91] It is necessary therefore to examine Dew's third party application to see if a potential third party claim has been set up. The only assertions in Dew's Interlocutory Application, which was verified by affidavit, that are germane to the current discussion involve four points: (i) a reference to Pakara's statement of claim against Dew (paragraph 1); (ii) the assertion that Ryan Designs and Knight should be joined "to ensure that all parties having potential liability in this matter be brought in as parties before the Court so that the matter can be fully adjudicated" (paragraph 7); (iii) the assertion that Ryan Designs and Knight were "directly accountable" to Pakara and were "the parties responsible for the preparation and certification of the design" and "for any flaws and correction of errors" (paragraph 8); and (iv) a conclusory statement that "therefore" Dew claims indemnity from Ryan Designs and Knight "should any of the claims by [Pakara] against [Dew] for breach of contract and negligence be successful" (paragraph 8).

[92] Item (i) is relevant because it indicates the potential exposure of Dew to liability at the hands of Pakara, if Pakara's version of the facts is ultimately accepted, on the basis that Dew engaged Ryan Designs by virtue of a subcontract and requested them to do the septic design work. Item (ii) is irrelevant because, as noted previously, the prospect of having all involved parties before the court so that the matter can be "fully adjudicated" is not in itself a sufficient justification for joining third parties. Item (iii) does not, by itself, assist a third party claim because it is in effect a disclaimer of all responsibility; although it could be said to assert a possible tortious duty of care ("directly accountable") owed by Ryan Designs to Pakara, it does not also assert that a duty of care is owed jointly by Ryan Designs to Dew as well as Pakara. Item (iv) is an assertion of a right to indemnity as an alternative position if Pakara is successful in its claim that there was a contract between it and Dew and a corresponding subcontract between Dew and Ryan Designs.

[93] The third party notice may also be looked at to glean how the applicant conceptualizes the third party claims. Regrettably, in this case, it is of little help. The notice asserts that Dew has "no liability" for the damages claimed by Pakara and that Pakara's claims "are entirely the responsibility" of Ryan Designs and Knight. It does go on, however, and claim "indemnity" from Ryan Designs for damages, costs and interest "which [Dew] may be ordered to pay to [Pakara]", without stating the basis on which the right to indemnity is being asserted.

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[94] This is very thin pleading indeed. It may well leave Dew open to being required to respond to a demand for particulars. It would have been preferable for the applications judge to have required Dew to submit particulars of its proposed third party claim before considering the application further. Nevertheless, it is enough of an indication as to the nature of the type of claim that Dew is asserting. While Dew does not state anywhere the basis on which the indemnity claim is made, it is a fair inference from a reading of Pakara's statement of claim, Dew's defence and the third party application as a whole that Dew is claiming, *in the alternative to its view of the facts*, that if Pakara's assertions of a contract with Dew, followed by a request by Dew, by way of subcontract with Ryan Designs, that Ryan Designs prepare the septic system design, a right of indemnity arises in the event Ryan Designs did not do the design properly. It is this assertion, which is implicit in the approach Dew has taken to this matter in the pleadings, that must be evaluated as to whether a basis for third party proceedings exists.

[95] In the first place, there is no basis for Dew to claim that it has a claim for damages over against Ryan Designs for negligence (which even though such a claim does not fall within the concept of indemnity is nevertheless covered, in principle, by the scope of rule 12.02 as discussed earlier). Dew does not plead, even in the alternative, a duty of care in tort owed by Ryan Designs to Dew nor are any particulars of negligence asserted. Furthermore, there is nothing in Pakara's statement of claim which could be said, even on Pakara's version of the facts, to allege any tortious relationship between Dew and Ryan Designs as the basis of a duty of care owed by Ryan Designs to Dew. The pleadings are completely deficient with regard to setting up such a claim.

[96] Secondly, in the circumstances, the contribution provisions of the *Contributory Negligence Act* do not provide a basis for a third party claim here. Those provisions depend on their being alleged, either directly or in the alternative, that the claimed loss was caused "by the fault of 2 or more persons" (section 3). It is only in such circumstances that it could be argued that one tortfeasor can claim contribution from the other for losses to which both contributed. In this case, that would mean there must be a possibility that both Dew and Ryan Designs could be held jointly responsible on the basis of a duty of care owed by each of them to Pakara. See *Stanford v. Lawton's Drug Stores Ltd.*, 2013 NLTD(G) 161 at para. 13. No duties of care have been pleaded by Dew, even in the alternative, as owing by Dew and Ryan Designs to Pakara. Dew has supplied no pleaded facts which

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would go to support the scenario of fault of both Dew and Ryan Designs contributing to the loss to Pakara.

[97] While it is true that Pakara, in its yet-unamended statement of claim, alleges negligence against both Dew and Ryan Designs, thereby setting up a potential for contribution claims between Dew and Ryan Designs if Pakara's version of the facts is ultimately accepted, Pakara has since discontinued its action against Ryan Designs and has, as indicated earlier, stated its intention to amend the statement of claim to remove all allegations of negligence and breach of contract against Ryan Designs. This appeal proceeded on that basis. There is nothing arising from Pakara's pleading, therefore, that can be relied on by Dew to raise the possibility of a contribution claim against Ryan Designs (indeed, Dew based its application on indemnity alone, not contribution) without Dew amending its own pleadings and re-applying to make a third party claim on this basis.

[98] Thirdly, no express or contractual indemnity is pleaded, simply an obligation to indemnify without asserting how such obligation arises on the facts. Consequently, there is no basis for claiming an express right of indemnity.

[99] That leaves two questions: (i) whether it can be said Dew has sufficiently claimed an indemnity arising by operation of law, and (ii) whether Dew may third party Ryan Designs on the basis of a claim of breach of contract not amounting to an indemnity. While, as I have said, the pleadings leave a lot to be desired, the indemnity claim may be able to be supported on the basis of a claim by Dew, in the alternative, that if Dew is responsible to Pakara under a contract between them, and Dew in fact requested Ryan Designs to perform the design work, a right to claim indemnity from Ryan Designs arose if Ryan Designs did not perform their work adequately, thereby causing Dew to breach its contract with Pakara. While the evidence at trial might well not establish this factual scenario, it remains a possible conclusion to which the court might come.

[100] In *Birmingham and District Land Co.*, Cotton, L.J. observed in *obiter* at p. 272:

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> [I]f A. requests B. to do a thing for him, and B. in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A. to indemnify B. from the consequences of his doing it.

[101] The situation thus described is, of course, the reverse of the situation here, where the indemnity is being sought from the requested party. It does not follow in the reverse situation, however, that an implied obligation to indemnify would necessarily arise simply from the party being requested undertaking the work. In *Birmingham*, Fry L.J. observed at p. 276:

> When a man contracts that he will do a thing, it can hardly be taken as implying a contract as to what will arise if he does not do the thing. In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everyone has to damages for a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity…

Something more is required before a right to indemnity can arise. The situation has to be such that from the relationship of the parties, it was understood or implied that by doing the work the requested party was undertaking that if it was done incorrectly, he or she would stand behind the work and indemnify the requestor from resulting loss. It was put this way by Bowen L.J. in *Birmingham* at p. 274:

> [A right to indemnity arises] by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given on an assumed promise by a person to do what, under the circumstances, he ought to do.

[102] While it is impossible to tell at this point whether this scenario is a likely result, it cannot be discounted entirely. Even if such an implied indemnity cannot be said to have been contemplated, however, a claim by Dew against Ryan Designs for damages for breach of contract for failing to design the septic system properly clearly remains a possibility on Pakara's version of the facts and as an alternative claim by Dew. As noted previously, rule 12.02 permits a claim over for damages even if the claim does not amount to a claim for indemnity. This is recognized in *Burry*, where Hart J.A. commented:

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> [35] Surely, as here, where one party undertakes an obligation to provide a housing unit to its customer "constructed in a thorough and workmanlike manner" and then contracts with another party to construct that unit in a similar manner, and it was subsequently alleged that the unit was not properly constructed, there are sufficient common issues to justify the holding of a single trial in which all parties may participate and in which the rights of all parties will be determined in accordance with the findings of the judge.

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[103] In the current context, therefore, depending on how the evidence unfolds and what findings the trial judge makes, it is possible that Dew could have a claim against Ryan Designs to be indemnified for losses Dew faces at the hands of Pakara on the basis that, having been requested to undertake the work in a competent manner and undertaking it, Ryan Designs was implicitly undertaking that if it was not competently performed, Ryan Designs would indemnify Dew from any resulting loss. Alternatively, and perhaps more likely, Dew could have a claim against Ryan Designs for damages for breach of contract. Either of these types of claims can be the subject of third party proceedings.

[104] Of course, at this point all of this is speculative. One of the reasons for this is the high level of abstraction with which all of the claims have been made and the fundamental disagreement between Dew and Pakara as to who contracted with whom (presumably - and surprisingly - because the engagements were not reduced to writing or evidenced in writing). The result has been an absence of particulars that might better define the scope of claims being advanced, especially against third parties in the event alternative scenarios come to pass.

[105] Nevertheless, given the state of the pleadings and the possibility that a third party claim could arise for the reasons earlier expressed, it would be inappropriate not to allow the third party claim to proceed against Ryan Designs on the bases mentioned. It would be important, however, for further particulars of the claim to be provided on the alternative basis that Dew will not be able to establish its claim of lack of any responsibility. Perhaps when further discoveries are undertaken or the basis of Pakara's position otherwise becomes clearer, it will be easier to flesh out such alternative claims. This Court has the power on appeal to allow amendments to pleadings, especially where the matter has not yet proceeded to trial and the substantive issues between the parties remain to be decided: rules 15.09 and 57.23(1)(b); *Kavanagh v. Newfoundland (Minister of Education)*, 2000

NFCA 2, 183 Nfld. & P.E.I.R. 282 at paragraph 15. Dew should therefore be given leave to amend its third party claim.

[106] Finally, I would observe in passing that none of the discretionary factors that might nevertheless justify the Court in refusing leave to issue the third party notice – even if a potential third party claim was disclosed as discussed previously in paragraphs 74-77 – were not raised on the original application and hence do not need to be addressed here.

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D. Third Party Claim Against Knight

[107] Many of the foregoing comments also apply to Knight except in one important respect. There is nothing in any of the pleadings, including Pakara's statement of claim, to suggest that Knight's engagement was as a result of any request from or subcontract with Dew. Thus, the bases upon which Dew could justify third party proceedings against Ryan Designs do not apply to Knight. There is no basis therefore for allowing the third party claim in that respect to proceed. The third party notice against Knight should therefore be set aside.

Conclusion and Disposition

[108] The appeal should be allowed in part. The order of the applications judge authorizing the joinder of Carl Knight as a third party should be set aside with costs on a party and party basis being paid by Dew.

[109] The appeal against the order of the applications judge authorizing the joinder of Otto Ryan, operating as Ryan Designs should be dismissed with costs payable by Otto Ryan to Dew on a party and party basis.

[110] Counsel for Pakara Apartments Ltd. appeared at the request of the Court to clarify certain pleading and procedural matters but did not participate in the

substantive issues engaged on the appeal. No costs order should be made for or against their client.

[111] Dew Enterprises Ltd. should also be granted leave to amend its third party claim against Otto Ryan to further particularize, as an alternative claim, the bases upon which its claim for indemnity is being pursued.

_____

J.D. Green C.J.N.L.

I Concur: _____

C.W. White J.A.

I Concur: _____

M.F. Harrington J.A.

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TAB 66

SAID *v.* BUTT.

[1919. S. 3219.]

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June 11, 14, 25.

Contract—Formation—Identity of contracting Party—Material Element—Sale of Theatre Ticket—Procuring Breach of Contract—Servant of contracting Party—Liability.

The plaintiff desired to be present at the first performance of a play at a theatre. He knew that, in consequence of his having made certain serious and unfounded charges against some members of the theatre staff, an application for a ticket in his own name would be refused. He therefore obtained a ticket through the agency of a friend who bought the ticket at the theatre without disclosing that it was for the plaintiff. By order of the defendant, the managing director of the theatre, the plaintiff was refused admission to the theatre on the night in question. The plaintiff claimed damages from the defendant for maliciously procuring the proprietors of the theatre to break a contract for the admission of the plaintiff to the theatre, alleged to have been made by them with the plaintiff by the sale of the ticket:—

Held, that the non-disclosure of the fact that the ticket was bought for the plaintiff prevented the sale of the ticket from constituting a contract as alleged, the identity of the plaintiff being in the circumstances a material element in the formation of the contract; and that the action therefore failed.

Semble, a servant who, acting bona fide within the scope of his authority, procures the breach of a contract between his employer and a third person, is not liable to an action of tort at the suit of that third person.

ACTION tried by McCardie J. without a jury.

The facts, material to this report, were as follows: The plaintiff was a Russian gentleman of independent means. The defendant was the chairman and managing director of the Palace Theatre, Ld. (hereinafter referred to as the company), the proprietors of the Palace Theatre, London.

In July, 1919, a light opera was produced at the Palace Theatre by the company under an agreement with the plaintiff. During the run of the opera differences arose between the plaintiff and the defendant, and the plaintiff made serious charges against the defendant and other officials of the theatre with regard to the sale of tickets for the performances of the opera. These charges were in fact without foundation, though the plaintiff believed them to be true, and they were deeply resented by the defendant

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and other officials of the theatre. The opera was withdrawn on October 18, and December 23 was fixed as the date of the first performance of a new play at the Palace Theatre. The plaintiff desired to be present at the performance on December 23. He twice applied to the company in his own name for a ticket, but his application was refused. The plaintiff, therefore, knowing that any application in his own name would be rejected asked a friend of his, a Mr. Pollock, to buy a ticket for him. Mr. Pollock accordingly bought, in his own name, a ticket from the company for a seat at the performance on December 23 without disclosing, and the company and its staff did not know, that the ticket was bought for the plaintiff. If they had known they would have refused to supply the ticket. The plaintiff paid Mr. Pollock for the ticket, and on the evening of December 23 the plaintiff went to the theatre in order to occupy during the performance of the new play the seat for which the ticket had been bought by Mr. Pollock. The defendant happened to see the plaintiff in the vestibule of the theatre, and he thereupon gave orders to the attendants that if the plaintiff had a ticket he was not to be allowed to occupy his seat and his money was to be returned to him. In consequence of these orders the plaintiff was refused admission to the performance, and he left the theatre. The money paid for the ticket was offered to him but he declined to take it.

The plaintiff claimed in this action damages against the defendant on the ground that he wrongfully and maliciously procured the company to break a contract made by the company with the plaintiff by selling to the plaintiff a ticket for a seat entitling him to witness the performance at the theatre on December 23.

Disturnal K.C. and *St. John Field* for the plaintiff.
Patrick Hastings K.C. and *Beyfus* for the defendant.

Cur. adv. vult.

June 25. MCCARDIE J. delivered a written judgment which after stating the facts continued as follows: Upon

the above facts the plaintiff claims damages against the defendant upon the ground that he wrongfully and maliciously procured the Palace Theatre, Ld., to break the contract made by selling to the plaintiff a ticket entitling him to witness the first performance of "The Whirligig" on December 23, 1919. The circumstances (so far as I have as yet narrated them) appear to be simple, but the questions of law raised by the able arguments of counsel are in many ways novel, and one at least is of great general importance. It is well to state at once one or two points with regard to theatres which seem to be well established. In the first place it is settled by *Hurst* v. *Picture Theatres* (1): (*a*) that the purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the whole performance provided that he behaves properly and complies with the rules of the management; and (*b*) that the licence granted by the sale of the ticket includes a contract not to revoke the licence arbitrarily. This was the view of Buckley and Kennedy L.JJ., and is now the law, although I confess that I recognize the weighty nature of the dissenting judgment of Phillimore L.J. based on *Wood* v. *Leadbitter*. (2) If therefore the purchaser of a ticket is physically removed without adequate reason from his seat, and turned out of the theatre, he may bring an action for assault. This is a cogent decision, and it certainly affords a large measure of protection to the purchasers of tickets (whether for reserved or unreserved seats) at theatres or the like places of entertainment. The plaintiff in *Hurst's Case* (1) had paid sixpence, and had received a metal check which entitled him to an unreserved seat. So, too, the purchaser of a ticket is protected if he fails to find an unoccupied seat. In that case he may leave the theatre and demand the return of his money: see *Lewis* v. *Arnold*. (3) On the other hand the theatrical proprietor is safeguarded by the rule of law (inter alia) that every contract for admission is subject to the implied condition that the person admitted shall behave properly. This rule I do not dwell upon. I need only say,

(1) [1915] 1 K. B. 1. (2) (1845) 13 M. & W. 838.
(3) (1830) 4 C. & P. 354.

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however, that a member of the audience is entitled to express either his approval or his disapproval of the performance, provided he acts reasonably and with due regard also to the rights of the other members of the audience. If he abuses his privilege, then the management, upon his refusal to leave after being requested to do so, are justified in removing him from the theatre, and in using a reasonable amount of force for the purpose: see per Scrutton J. in *Jay* v. *New Bedford Palace of Varieties.* (1) The limits to the rights of approval or disapproval are incidentally referred to in *Clifford* v. *Brandon* (2) and *Gregory* v. *Duke of Brunswick.* (3)

Now in the present case there is no claim for assault, inasmuch as no assault was actually committed; nor is it suggested that there was any false imprisonment. The case against the defendant rests solely on the ground that he procured the Palace Theatre, Ld., to break its contract with the plaintiff. Before the plaintiff can succeed he must establish that there was a binding and subsisting contract between the Palace Theatre and himself on December 23: see *Long* v. *Smithson* (4), per Avory and Shearman JJ. In other words, the plaintiff must bring himself within the words of Lord Macnaghten in *Quinn* v. *Leathem* (5), who there said: "A violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference."

Mr. Hastings submitted that no valid contract existed on December 23 between the Palace Theatre, Ld., and the plaintiff. Broadly put, he contended that the Palace Theatre had never knowingly contracted with the plaintiff for the sale of a ticket for his own use, and that upon discovering that the plaintiff was in fact the purchaser of a ticket for the stalls they would be entitled to put an end to any apparent contract upon the ground that where personal considerations enter into a contract error as to the person with whom the

(1) Times Newsp., June 30, 1910.
(2) (1809) 2 Camp. 358.
(3) (1843) 1 C. & K. 24.
(4) (1918) 118 L. T. 678.
(5) [1901] A. C. 495, 510.

contract is made annuls the contract. This contention rested on the case of *Smith* v. *Wheatcroft* (1), decided by Fry L.J., then Fry J. In that case the learned judge cited with approval Pothier, Traité des Obligations, s. 19, where it is said: "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand." This passage was also cited with approval by Smith L.J. in the well-known case of *Gordon* v. *Street*. (2)

Before I mention the other authorities on the matter it is best to state some further facts which bear on this branch of the case. A first night at the Palace Theatre is, as with other theatres, an event of great importance. The result of a first night may make or mar a play. If the play be good, then word of its success may be spread, not only by the critics, but by the members of the audience. The nature and social position and influence of the audience are of obvious importance. First nights have become to a large extent a species of private entertainment given by the theatrical proprietors and management to their friends and acquaintances, and to influential persons, whether critics or otherwise. The boxes, stalls and dress circle are regarded as parts of the theatre which are subject to special allocation by the management. Many tickets for those parts may be given away. The remaining tickets are usually sold by favour only. A first night, therefore, is a special event, with special characteristics. As the plaintiff himself stated in evidence, the management only disposes of first night tickets for the stalls and dress circle to those whom it selects. I may add that it is scarcely likely to choose those who are antagonistic to the management;

(1) (1878) 9 Ch. D. 223, 230. (2) [1899] 2 Q. B. 641, 647.

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or who have attacked the character of the theatre officials. [The learned judge stated in detail the facts with regard to the ticket obtained by the plaintiff through Mr. Pollock and continued:] The Palace Theatre officials had no idea that they were selling a ticket to an agent of the plaintiff. If they had known it, they would at once have refused to supply a ticket. I find as a fact that the plaintiff used the name of Mr. Pollock in order to disguise that he himself was the purchaser; and I also find that the plaintiff well knew that the Palace Theatre would not have sold him personally a ticket for December 23, 1919. I am satisfied that Mr. Pollock himself was aware of the above-mentioned circumstances. I may point out that a theatre stands on a wholly different footing from a public inn, or a public service such as a railway. A public inn, for example, is under a common law duty to supply to all who come provided that accommodation exists; and provided also that the guest is of proper character and behaviour. But a theatre stands upon a wholly different footing. It may sell or refuse to sell tickets at its own option. The public cannot compel a theatre to grant admission.

Under these circumstances, the question is whether the plaintiff, as an undisclosed principal of Mr. Pollock, can claim that a binding contract existed between the Palace Theatre, Ld., and himself. Now, the principle stated in Pothier on Obligations (already cited) is a broad one. It should not, of course, be unduly applied; but it is one of practical utility. The matter is thus put in Fry on Specific Performance, s. 229: "The law seems now to be that where one person is deceived as to the real person with whom he is contracting, and that deception either induces the contract or renders its terms more beneficial to the deceiving party, or more onerous to the deceived, or where it occasions any other loss or inconvenience to the deceived party, there the contract cannot be enforced against him; but that where none of these circumstances can be shown to follow from the deception, the contract may be enforced." This passage seems to accord with *Fellowes* v. *Lord Gwydyr*. (1) The principle

(1) (1826) 1 Sim. 63.

was recognized by Knight Bruce V.-C. in *Nelthorpe* v. *Holgate* (1); and the observations of that distinguished judge are most instructive. It is the basis of the decision in *Boulton* v. *Jones*. (2) It was actually applied by North J. in *Archer* v. *Stone*. (3) It is cogently illustrated by the decision of the Court of Appeal in the well-known case of *Gordon* v. *Street* (4) (already cited), the facts of which I need not state. It is not impaired but merely distinguished by the decision of Horridge J. in *Phillips* v. *Brooks*. (5) It may be usefully considered in the light of such cases as *Hill* v. *Gray* (6) and *Whurr* v. *Devenish*. (7)

In my opinion the defendant can rightly say, upon the special circumstances of this case, that no contract existed on December 23, 1919, upon which the plaintiff could have sued the Palace Theatre. The personal element was here strikingly present. The plaintiff knew that the Palace Theatre would not contract with him for the sale of a seat for December 23. They had expressly refused to do so. He was well aware of their reasons. I hold that by the mere device of utilizing the name and services of Mr. Pollock, the plaintiff could not constitute himself a contractor with the Palace Theatre against their knowledge, and contrary to their express refusal. He is disabled from asserting that he was the undisclosed principal of Mr. Pollock.

It follows, therefore, that the plaintiff has failed to prove that the defendant caused any breach of a contract between the Palace Theatre, Ld., and himself.

I realize, however, that the question is one of difficulty; and I, therefore, deem it right to mention the other legal points which arose in the case. One of those points is of such importance that I feel it my duty to deal with it. Let me, therefore, assume that the plaintiff had established a valid contract between the Palace Theatre, Ld., and himself, upon which he could have sued as a principal. The defendant's

(1) (1844) 1 Coll. 203, 214, 218.
(2) (1857) 2 H. & N. 564.
(3) (1898) 78 L. T. 34.
(4) [1899] 2 Q. B. 641.
(5) [1919] 2 K. B. 243, 249.
(6) (1816) 1 Stark. 434.
(7) (1904) 20 Times L. R. 385.

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counsel submitted that even upon such assumption the present action must fail, because the defendant in procuring the breach of contract was acting only as the managing director of the Palace Theatre, Ld. This submission was ably and fully argued by counsel on both sides. It is well to point out that Sir Alfred Butt possessed the widest powers as the chairman and sole managing director of the Palace Theatre, Ld. He clearly acted within those powers when he directed that the plaintiff should be refused admission on December 23. I am satisfied, also, that he meant to act and did act bona fide for the protection of the interests of his company. If, therefore, the plaintiff, assuming that a contract existed between the company and himself, can sue the defendant for wrongfully procuring a breach of that contract, the gravest and widest consequences must ensue. This is the more apparent when it is remembered that it is not necessary to prove actual malice against a defendant in order to establish a cause of action against him for knowingly procuring the breach of a third person's contract with the plaintiff, whereby the plaintiff suffers pecuniary damage: see *Pratt* v. *British Medical Association* (1), citing *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (2)

If the plaintiff is right in his contention, it seems to follow that whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages, upon the principle of *Lumley* v. *Gye* (3), as for a tortious act. So, too, with the manager or other agent of a private firm, who does the like thing. This far-reaching result of the principle here suggested by the plaintiff is emphasized, when it is remembered that in an ordinary action for breach of contract the plaintiff recovers his pecuniary loss only; whereas in an action for wrongfully procuring a breach of contract the damages against the wrongdoer are at large, and may vastly exceed the sum recoverable in a mere claim for breach

(1) [1919] 1 K. B. 244, 254, 625. (2) [1905] A. C. 239.
(3) (1853) 2 E. & B. 216.

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of contract against the contractor: see *Pratt* v. *British Medical Association* (1) and *Exchange Telegraph Co.* v. *Gregory*. (2).

Mr. Disturnal for the plaintiff argued with great vigour that though the results may be remarkable, yet the principle asserted by the plaintiff is sound. He points out the breadth of the language employed in the well-known cases on the subject from *Lumley* v. *Gye* (3) to the present time. I agree that the language is wide in its scope. The proposition is stated with unrestricted diction: that a person who without just cause knowingly procures a man to commit a breach of his contract with another, whereby the latter suffers pecuniary damage, is liable to an action for tort. But I conceive that none of the judges was thinking of such a case as the present. I have searched in vain for any decision which indicates that a servant is liable in tort for procuring a breach of his master's contract with another. If such a cause of action existed, I imagine that it would have been successfully asserted ere this. The explanation of the breadth of the language used in the decisions probably lies in the fact that in every one of the sets of circumstances before the Court the person who procured the breach of contract was in fact a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties. If he is in the position of a stranger, he will be prima facie liable, even though he may act honestly, or without malice, or in the best interests of himself; or even if he acts as an altruist, seeking only the good of another: see the decisions cited in *Pratt's Case* (4) and the *Glamorgan Coal Case*. (5)

But the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking

(1) [1919] 1 K. B. 281.
(2) [1896] 1 Q. B. 147, 153.
(3) 2 E. & B. 216.
(4) [1919] 1 K. B. 265, 266.
(5) [1905] A. C. 239.

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the contract he has made, and in my view an action against the agent under the *Lumley* v. *Gye* (1) principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer to the ingenious arguments of Mr. Disturnal on behalf of the plaintiff upon this point. To hold otherwise might create at least three actions whenever a managing director or other authorized agent knowingly procured a breach of the employer's contract. First, an action based on contract against the employer for the pecuniary loss caused by the breach of contract; secondly, an action for tort against the agent who had procured the breach of contract, wherein the damages would be at large and might include every element of annoyance, inconvenience, or indignity; and thirdly, an action against the employer himself for the tortious wrong committed by his authorized agent in procuring the employer to break his contract with the plaintiff. This extraordinary result shows, I think, that the contention of the plaintiff in this case cannot be sound. If the plaintiff here be right in his submission, then the flood-gates of litigation would indeed be widely opened.

I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. I abstain from expressing any opinion as to the law which may apply if a servant, acting as an entire stranger, or wholly outside the range of his powers, procures his master to wrongfully break a contract with a third person. Nothing that I have said to-day is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong. This point was incidentally dealt with by the Court

(1) 2 E. & B. 216.

of Appeal in the recent case of *Belvedere Fish Guano Co.* v. *Rainham Chemical Works.* (1)

If I had been in favour of the plaintiff on the preceding points the question as to whether he had what is technically known as "just cause" for procuring a breach of contract would have arisen for decision. I ventured to refer to that most difficult question in *Pratt's Case.* (2) It was touched upon by Astbury J. in his luminous judgment in *Valentine* v. *Hyde* (3), and by P. O. Lawrence J. in his cogent observations in *Davies* v. *Thomas* (4), just affirmed by the Court of Appeal. (5) It is not necessary to deal with the point in this litigation; I need only say that it may well be that "just cause" exists in the present case. If the plaintiff had here established a cause of action I should have been called on to assess damages. Upon the whole circumstances of the matter, and in the view I form that the defendant did not act with any actual malice to the plaintiff on the night of December 23, I should have assessed those damages at the nominal sum of 40*s.* only. But for the reasons I have given, this action fails, and it must be dismissed with costs.

Judgment for defendant.

Solicitors for plaintiff: *Kenneth Brown, Baker, Baker & Co.*
Solicitors for defendant: *Beyfus & Beyfus.*

(1) [1920] 2 K. B. 487.
(2) [1919] 1 K. B. 265, 266.
(3) [1919] 2 Ch. 129, 144.
(4) [1920] 1 Ch. 217, 231.
(5) [1920] 2 Ch. 189.

F. O. R.

TAB 67

Court of Queen's Bench of Alberta

Citation: Re: SemCanada Crude Company (Celtic Exploration Ltd. #2), 2012 ABQB 489

Date: 20120731
Docket: 0801 08510
Registry: Calgary

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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 SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc. and 1380331 Alberta ULC

(Re: Celtic Exploration Ltd.#2)

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Celtic Exploration Ltd. applies for relief arising from the suspension of an inlet gas purchase agreement (the "IGPA") that it had entered into with SemCAMS ULC. The IGPA was suspended in July, 2008 in connection with SemCAMS' filing for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and was the subject of reasons for decision dated August 27, 2010, cited as 2010 ABQB 531 (the "IGPA decision"). Leave to appeal the IGPA decision was denied on December 17, 2010.

[2] Celtic seeks an order (i) permitting it to file a late amended claim for damages arising from the suspension of the IGPA for the period from July 22, 2008 (the date of the Initial Order in the CCAA proceedings) to and including November 30, 2009 when the Plan of Arrangement (the "Plan") came into effect and SemCAMS emerged from the protection of the CCAA (the "CCAA Period"), and (ii) declaring that its claims for suspension damages for the periods from December 1, 2009 to and including September 30, 2009 (the "Post Plan Implementation Period") and from October 1, 2010 onwards (the "Post October 2010 Period") are not Affected Claims compromised, barred and released by the Plan or otherwise.

[3] Alternatively, in the event that the Court finds that the suspension damages claims for the Post Plan Implementation Period and the Post October 2010 Period are subject to the claims process established under the CCAA proceedings (the "Claims Process") and are therefore Affected Claims as defined in the Plan, Celtic seeks an order permitting it to file a late amended claim for those damages.

[4] SemCAMS objects to Celtic's application and, in response, has brought an application pursuant to which it seeks an order declaring that (i) Celtic's proposed damages claim, including its claim for suspension damages arising from the CCAA Period, the Post Plan Implementation Period and the Post October 2010 Period, is subject to the Claims Process, (ii) the proposed damages claim is an Affected Claim within the meaning of the Plan that was comprised, released and barred by the Plan and the order approving and sanctioning the Plan dated October 27, 2009 (the "Sanction Order"), and (iii) Celtic is precluded from filing a late or amended claim. SemCAMS also seeks an order declaring the Statement of Claim filed by Celtic with respect to the proposed damages claim to be a breach of the Plan and the Sanction Order, and directing that it be struck out.

[5] The Bank of America (the "BA") as Agent on behalf of the Secured Lenders of SemCAMS (as defined in the Plan) supports SemCAMS' application in so far that it submits that, if the proposed damages claim by Celtic is an Affected Claim, it should be declared to be barred, extinguished and released by the Plan and Sanction Order and Celtic should not be allowed to file any late or amended claim.

Issues

[6] The main issues arising from these applications are as follows:

a) Are Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period "Affected Claims" under the CCAA proceedings, and therefore subject to the Claims Process?

b) Should Celtic be allowed to file a late amended claim for suspension damages during the CCAA Period? If Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period are "Affected Claims", should Celtic be allowed to file a late claim for these damages?

c) Should Celtic's Statement of Claim be struck out?

Analysis

a) Are Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period "Affected Claims" under the CCAA proceedings and therefore subject to the Claims Process?

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[7] As part of a Settlement Agreement dated March 18, 2011 and approved by the Court, Celtic agreed that, if its claim for suspension damages for the CCAA Period was found not to be barred by the Claims Process Order, it would not take the position that this portion of its damages claim would be other than an unsecured claim compromised by the Plan. Thus, the only issue with respect to any damages that Celtic submits it may have a claim to during the CCAA Period is whether Celtic should be allowed to amend its previously filed Proof of Claim to include damages arising from the suspension of the IGPA during this period. This issue will be discussed later in this decision.

[8] However, Celtic submits that its claims for damages arising from the suspension of the IGPA for the Post Plan Implementation Period and/or the Post October 2010 Period are not subject to compromise under the Plan.

Relevant Facts

[9] To understand the submissions that have been made on this issue, it is necessary to refer to some of the long and complicated history of this claim and the prior litigation between the parties. I described in paragraphs 3 through 53 of the IGPA decision the nature of the contractual relationship between SemCAMS and Celtic and what occurred between July 22, 2008, the date of the Initial Order under the CCAA, and February, 2010 when the application that resulted in that decision was heard, and those paragraphs are incorporated into this decision for clarity.

[10] I found in the IGPA decision that an agreement had been reached between SemCAMS and Celtic to suspend the IGPA because of SemCAMS' inability to market sales gas and related product as a result of the CCAA proceedings: para. 103. I found that parties to a contract may by mutual agreement suspend a contract even if the contract itself does not specifically provide for suspension: para. 110. Specifically, I found that Celtic purported to suspend the IGPA, given SemCAMS' anticipatory breach of its obligations to market the sales gas and products, and that SemCAMS agreed to the suspension.

[11] Celtic submits that I made a finding of fact in the IGPA decision that Celtic had exercised a right under the IGPA to suspend delivery of natural gas, and identifies that right as arising from Section 10.2 of the Gas EDI Base Contract for Sale and Purchase of Natural Gas that forms part of the IGPA. This is an out-of-context interpretation of paragraph 111 of the IGPA decision. Section 10.2 of the Gas EDI Base Contract was not in issue before me at the time of the IGPA decision, and I made no finding that the mutual agreement to suspend the contract arose from any right specifically referred to in the IGPA. At any rate, as SemCAMS notes, the precondition of notice of the intention to exercise Section 10.2 required by the contract was never given by Celtic to SemCAMS at the time of suspension. There was only an anticipatory, and not an actual, breach of the IGPA at the point of suspension. In its submissions on this point, Celtic ignores the fact that Section10.2 of the Gas EDI Base Contract only allows a short-term suspension, and not

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the lengthy suspension that I found the parties had agreed to. This provision has no connection or application to the finding of suspension I made in the IGPA decision.

[12] Celtic submits that it had a unilateral right to reinstate performance under the IGPA effective October 1, 2010 for various reasons. SemCAMS disagrees, but submits that whether or not Celtic had that unilateral right makes no difference to the issue of whether the damages claims for either the Post Plan Implementation Period or the Post October 2010 Period are subject to the CCAA proceedings and should have been part of the Claims Process, or whether these claims were released and discharged by the Plan and the Plan Sanction Order. I agree that, given the decisions I have reached on these issues, it is not necessary that I make any findings with respect to the merits of the reinstatement issue, other than the comments I have made with respect to the applicability of Section 10.2 of the Gas EDI Base Contract and comments made in the IGPA decision.

[13] Prior to the Claims Bar Date of December 1, 2008 set out in the Claims Process Order, Celtic filed a Proof of Claim against SemCAMS that did not include a contingent or other claim for suspension damages arising from the IGPA.

[14] SemCAMS held a meeting of its creditors to consider the Plan on October 8, 2009. It received the requisite creditor support and applied for, and was granted, the Sanction Order on October 26, 2009. Celtic voted on the Plan and was served with a copy of the Sanction Order. The Plan Implementation Date was November 30, 2009.

[15] After the application that resulted in the IGPA decision was heard, but before a decision was released, Celtic purchased an interest in the KA Plant and became a party to the CO & O Agreement with SemCAMS and the other joint owners of the KA Plant. In July, 2010, correspondence was exchanged between SemCAMS and Celtic on the issue of whether gas delivered by Celtic to the KA Plant would thenceforth be processed pursuant to the CO & O Agreement or the IGPA. Celtic advised SemCAMS on September 7, 2010 that it proposed to reinstate deliveries under the IGPA effective October 1, 2010 for all of its gas other than gas that was dedicated to the KA Plant by reason of the CO & O Agreement. On September 30, 2010, SemCAMS advised Celtic that Celtic's change in status to a joint owner of the KA Plant and a counterparty to the CO & O Agreement made it impossible to reinstate the IGPA unless it was first amended to address certain issues, including exclusion of Plant Area Gas. Further correspondence followed.

[16] On October 15, 2010, SemCAMS set out the terms of an amended IGPA that at the time SemCAMS was willing to execute. Celtic did not accept these offered terms.

[17] On February 14, 2011, Celtic advised SemCAMS that it took the position that it had unilaterally reinstated performance of the IGPA effective October 1, 2010, and that SemCAMS was therefore in breach of the agreement. The following day, it filed a Statement of Claim alleging that the granting of the Initial Order under the CCAA Proceedings was an event of

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default under the IGPA, and that Celtic, as the non-defaulting party, suspended performance of all transactions under the IGPA with the agreement of SemCAMS. Celtic claims damages arising from this suspension.

[18] SemCAMS advised Celtic on March 17, 2011 that, in its opinion, the IGPA could not be reinstated unilaterally, and restated its pervious position. SemCAMS also advised Celtic that, if it was found that Celtic could unilaterally reinstate the IGPA effective October 1, 2010 (which SemCAMS denied was the case), SemCAMS gave notice of termination of the IGPA effective March 31, 2013.

[19] Pursuant to the Settlement Agreement, SemCAMS and Celtic jointly instructed the Monitor to hold the amount of $900,000 of surplus funds in the SemCAMS' Ordinary Creditors Pool under the Plan as a reserve for the damages claims. The Settlement Agreement also provides that in the event the damages claims, or any portion of such claims, are determined to be Affected Claims compromised by the Plan and that such Affected Claims are not determined to be barred by the Claims Process Order, the Plan or the Plan Sanction Order, Celtic will only be entitled to a distribution from the damages reserve of the lesser of 4% of such proven damages claim and the amount in the damages reserve, if any. The Monitor is currently holding the damages reserve.

Analysis

[20] On the issue of whether the damages claims for the Post Plan Implementation Period and the Post October 2010 Period are compromised or otherwise affected by the CCAA proceedings, Celtic references Section 19 of the CCAA, the Plan itself, the Plan Sanction Order and what it refers to as the purpose of the CCAA.

[21] The relevant portions of Section 19(1) of the CCAA are as follows:

> 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
>
> . . .
>
> (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) . . . [emphasis added]

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Section 19(2) does not apply in this case.

[22] As noted by SemCAMS, Section 19(1) was not proclaimed in force until September 18, 2009, which was after the Initial Order was granted, but prior to the Sanction Order. It may thus be argued that Section 19(1) does not apply to this issue, but I am satisfied that it would not make a difference to Celtic's application if former Section 12 was the applicable statutory provision, and I have conducted the analysis under Section 19.

[23] Celtic submits that Section 19(1) permits the compromise of debts and liabilities in respect of two time periods: the period up to commencement of proceedings under the CCAA and claims that relate to debts or liabilities to which the debtor may become subject before the Sanction Order in respect of obligations incurred by the debtor before the commencement of proceedings.

[24] This interpretation of Section 19(1) ignores the words "that relate to liabilities, present or future" that modify the term "claims". It is clear that SemCAMS was subject to the possibility of liability under the IGPA before the CCAA proceedings commenced. The claims for suspension damages are claims that relate to the IGPA and to the suspension of the IGPA that occurred as a result of the CCAA proceedings. Section 19(1) does not limit the claims that may be dealt with by a Plan under the CCAA to presently existing liabilities. This is made clear by the addition of the word "future" in both Section 19(1)(a) and Section 19(1)(b).

[25] The claims relating to the suspension of the IGPA during the CCAA Period and beyond are exactly the kind of anticipatory, future claims that are referenced in Section 19(1). A "claim" for the purpose of the CCAA includes any indebtedness, liability or obligation that would be provable under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended: Section 2(1) of the CCAA. Section 121(1) of the BIA defines "provable claims" as being:

> . . . (a)ll debts and liabilities, present and 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 reasons of any obligation incurred before the day on which the bankrupt becomes bankrupt . . .

[26] Section 121(2) of the BIA makes it clear that this includes contingent or unliquidated claims, with the procedure for evaluating contingent or unliquidated claims described in Section 135. Section 20(1)(a) of the CCAA describes how the amount of an unsecured claim that is a provable claim under the BIA may be determined by a court on summary application if it is not admitted by the debtor company.

[27] It may well have been difficult to value a contingent claim for future suspension damages that was filed before the Claims Bar Date, but that is often the nature of a contingent or future claim. In particular, there may have been issues relating to when the IGPA could reasonably be

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reinstated. As noted by SemCAMS, contingent claims are routinely filed in CCAA proceedings and in proceedings under the BIA.

[28] In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp*, [1992] 4 WWR 309 (AltaCA), a fact scenario that occurred after the date of bankruptcy based on a pre-bankruptcy contract was held to give rise to a claim provable in the bankruptcy. The issue was whether mortgagees could claim in the bankruptcy for costs incurred after the date of bankruptcy, where the claims for costs were based on indemnities by the bankrupt found in pre-bankruptcy mortgages.

[29] The trustee in *Abacus Cities* submitted that future claims had to be limited to those that could be valued before they arise, and that a future liability that could not be calculated in advance could not be a provable claim. The Court commented as follows at page 318:

> I agree that this rule can limit future claims that otherwise fall within the scope of entitlement. In fact, some may not be provable when the trustee calls for proof . . .
>
> One must take care not to overstate the rule. It does not eliminate contingent or future claims. It merely subjects them to a valuation process: . . .

[30] SemCAMS concedes that Celtic would not have known by the Claims Bar Date if and when the IGPA would be reinstated, but argues that Celtic could have claimed damages on the assumption that the IGPA would not be reinstated. There could have been a summary determination of the claim or a reservation for the full amount of claimed damages. Or, the Court may have determined that the contingent claim was too remote or speculative to be properly considered a contingent claim and thus not a provable claim: *Re Confederation Treasury Services Ltd.* 1997 CarswellOnt 31 43 CBR (3d) 4, (sub nom. Confederation Treasury Services Ltd. (Bankrupt), Re) 96 OAC 75 at para. 4.

[31] Celtic submits that, if this was an ordinary action alleging breach of contract, it could not claim continuing damages for any future period of time in the absence of a repudiation of the contract. It therefore submits that it would not have a claim for the alleged suspension damages after the Plan Implementation Date that could be subject to compromise. While it may be true that a creditor cannot sue for contingent damages in the ordinary course, the legislative framework of the CCAA and the BIA allows debtor companies to deal with contingent claims in insolvency proceedings. There was no reason why Celtic could not have filed such a claim.

[32] In a similar argument, Celtic submits that, in order for its claim for suspension damages to be a claim that arises prior to the Plan Implementation Date, it must be an amount of damages that Celtic would have been entitled to recover within the CCAA Period. Again, this ignores the fact that the provisions of the CCAA and the BIA allow the debtor to deal with future and contingent claims within the ambit of the CCAA proceedings.

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[33] Celtic also submits that its claim for suspension damages does not fall within the type of claim that can be compromised as set out in Section 19(1) because it is not a "debt". That is true, but a provable claim may be a "debt" or a "liability". As noted by the British Columbia Court of Appeal in *Re West Bay SonShip Yachts Ltd.*, 2009 Carswell BC 139, 2009 BCCA 31, [2009] BCWLD 1230, 71 CCEL (3d) 45, 49 CBR (5th) 159, [2009] 4 WWR 415, 89 BCLR (4th) 82, 265 BCAC 203, 446 WAC 203, 306 DLR (4th) 294 at para. 22, "liability" is a broad term that is most often used to describe an unliquidated or unspecified legal obligation, and "debt" is a narrower term that means a specific kind of obligation for a liquidated or certain sum. The definition of "claim" under the CCAA includes both.

[34] Celtic relies in its submissions on the fact that the IGPA was not repudiated. Section 19(1) does not restrict the type of claims that may be compromised under CCAA proceedings to claims arising solely from repudiated contracts. Section 19(1)(b) anticipates that claims may arise by virtue of the CCAA proceedings themselves, and allows the debtor company to put forward for approval by its creditors an arrangement that would compromise those claims. The claim for damages for suspension of the IGPA is that type of claim. It arises from and relates to the suspension of the IGPA that occurred by reason of the CCAA filing, and the inability of SemCAMS as a result of such filing to continue to market the Celtic gas.

[35] Celtic itself concedes that there is no basis in the IGPA itself to distinguish its right to damages before the Plan Implementation Date of November 30, 2009 and after. The obligation to pay damages arising from the suspension is not a a new breach of the IGPA that occurred after the Plan Implementation Date, but a claim of continuing damages that arise from the suspension of the IGPA, whether or not Celtic has the right to unilaterally reinstate the agreement.

[36] I find that the claim for suspension damages as it relates to the Post Plan Implementation Period is a claim that may be dealt with by a compromise under Section 19(1) of the CCAA.

[37] Celtic seeks to distinguish its claim for suspension damages for the Post October 2010 Period onward on the basis that SemCAMS' alleged refusal to accept deliveries under the IGPA after Celtic unilaterally purported to reinstate the agreement was a "distinct" breach of the IGPA, and not the same as either the failure to make payments under the IGPA which precipitated the suspension, or the suspension itself which gives rise to an obligation to pay damages as long as it remains in effect.

[38] I cannot agree that this alleged refusal to reinstate the IGPA was a fresh breach, even if Celtic was entitled to act unilaterally. The issue of reinstatement of the IGPA and whether it could be accomplished unilaterally or required the consent of both parties is an issue that arises from the suspension, and is not a new issue under the IGPA. Celtic seeks to distinguish the IGPA as an executory contract, the non-performance of which can give rise to new breaches, but it is not the non-performance of a properly reinstated executory contract that is at issue here, but when and how the IGPA is to be reinstated. The damages claimed for the alleged breach in the Post October 2010 Period are the same type of damages claimed for the preceding periods. It is

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not necessary for the analysis of the issue before me that I decide whether Celtic was entitled to unilaterally reinstate the IGPA, and I do not do so. However, I find that the claim for suspension damages in the Post October 2010 Period also is a "claim" that may be dealt with by a compromise under Section 19(1) as this claim does not arise from a fresh breach.

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[39] I turn next to the portions of the Plan that may be relevant to the issue of whether the damages claim for the Post Plan Implementation Period and the Post October 2010 Period were compromised; Section 8.1 of the Plan states as follows:

> On the Plan Implementation Date . . . the Company . . .shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages . . .on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or other Person may be entitled to assert . . .whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connect with the Claims, the business and affairs of the Company whenever or however conducted, . . the Plan, the CCAA Proceedings, any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law; . . .

[40] As I have found that the claim for suspension damages during the Post Implementation Period and the Post October 2010 Period are claims that may be subject to compromise under Section 19(1) of the CCAA, it is clear that they are caught by Section 8.1 of the Plan. Paragraphs 28 and 45 of the Sanction Order give effect to Section 8.1 as follows:

> 28. Pursuant to and in accordance with the Plan, any and all Affected Claims of any nature against the Company, . . . shall be forever compromised, discharged and released, and the ability of any Person to proceed against the Company in respect of or relating to any Affected Claims shall be forever discharged and restrained, and all proceedings with respect to, in connection with or relating to such Affected Claims are hereby permanently stayed, subject only to the right of Affected Creditors to receive the distributions pursuant to the Plan and this Plan Sanction Order in respect of their Affected Claims.
>
> . . .
>
> 45. Pursuant to and in accordance with Section 8.1 of the Plan, on the Plan Implementation Date the Released Parties shall be released and discharged from any and all demands, claims, actions, causes of action . . .on account of any liability, obligation, demand or cause of action of whatever nature which any

> Creditor or other Person may be entitled to assert. . .whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, obligation, dealing or other occurrence existing or taking place on or prior to the Plan Implementation Date in any way relating to, arising out of or in connection with the Claims, the business and affairs of the Company whenever or however conducted . . .any Claim that has been barred or extinguished by the Claims Process Order and all Claims arising out of such actions or omissions shall be forever waived and released, all to the full extent permitted by Law: . . .

[41] As noted by SemCAMS, the only potential events of default under the IGPA at the time it was suspended were SemCAMS' insolvency and its commencement of CCAA proceedings. Any claim for damages arising from the suspension constitute an Affected Claim. Those potential events of default were cured by the stay imposed under the Initial Order and by the Sanction Order, which provided for a waiver of all defaults. The Affected Claims are caught by the release and discharge contained in section 8.1 of the Plan, which was given effect by the Sanction Order.

[42] Celtic submits that it would be inconsistent with the general purposes of the CCAA if SemCAMS and its counterparties remained bound by existing contracts, but SemCAMS could not be compelled to fully perform its obligations as they arise as a result of the Sanction Order. That would certainly be true if it was in fact the case. However, while Celtic and SemCAMS have not been able to resolve their difference over what is required or necessary to reinstate the IGPA, that does not mean that SemCAMS has been relieved of its obligations under the agreement, or relieved from a claim for damages arising from the suspension.

[43] The fact that the IGPA was suspended by mutual agreement and not terminated implies an obligation to reinstate the agreement when the impediment to performance, here the CCAA proceedings, has ceased to exist. However, changes in the status and positions of the parties in the interim must also be taken into consideration, and it is on that issue that the parties are unable to agree. If SemCAMS failed to agree to the reinstatement of the IGPA on terms that adequately reflected the changed circumstances, the continued suspension would give rise to a damages claim.

[44] However, such a claim would be an Affected Claim within the meaning of the CCAA proceeding that could be, and was, compromised by the Plan and the Sanction Order.

b) Should Celtic be allowed to file a late amended claim for suspension damages during the CCAA Period? If Celtic's claims for suspension damages for the Post Plan Implementation Period and/or the Post October 2010 Period are "Affected Claims", should Celtic be allowed to file a late claim for these damages?

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[45] Celtic submits that, in the event its claims for suspension damages are found to be Affected Claims under the CCAA proceedings, it should be permitted to amend its previously-filed Proof of Claim to claim such damages. While Celtic divides its claims into three periods: the period it characterizes as the "CCAA Period", the Post Plan Implementation Period and the Post October 2010 Period, I have found that the claims for damages for suspension of the IGPA for all of these periods fall within the definition of "claims" for the purpose of Section 19 and were thus subject to compromise by the Plan and the Sanction Order.

[46] The only distinction that may be made among these three periods of time with respect to a late filing application relates to whether the claim for suspension damages for the CCAA Period would be an amendment to the Proof of Claim filed by Celtic on November 28, 2008 or a new claim.

[47] I find that the claims for suspension damages for all three periods of time are new claims. The previously filed Proof of Claim related to amounts owing for the delivery of raw gas to the KA Plant in the months prior to the Initial Order. The proposed claims for suspension damages relate to losses incurred as a result of the suspension of the IGPA after the Initial Order was granted, arising from Celtic's inability to sell its gas to third parties at the same price it would have received under the IGPA. Thus, there is no reason to distinguish among the three periods of time with respect to the question of whether Celtic should be allowed to file a late claim.

[48] I must agree with the BA and SemCAMS that Celtic's application to file a claim or claims for suspension damages at this late date is extraordinary. Celtic did not file its application until April, 2011, approximately two and a half years after the Claims Bar Date of December 1, 2008 and approximately one and a half years after the Plan Implementation Date of November 30, 2009.

[49] In para. 26 of *Re Blue Range Resources Corp*, 2000 ABCA 285, the Court of Appeal set out the appropriate criteria to apply to late claims in CCAA proceedings:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing?

[50] As I noted in *Re BA Energy Inc.*, 2010 ABQB 507 at para. 34:

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> . . .in identifying these criteria and applying them to specific late claims, Wittmann, J.A. favoured a "blended approach", taking into consideration both the standards set out under the *Bankruptcy and Insolvency Act*, and the U. S. Bankruptcy Rules, and informed by concepts drawn from the approaches taken in a variety of areas of law when dealing with late notice or delays in process. It is clear from the nature of the criteria that the question of whether a late claim should be accepted is an equitable consideration, taking into account the specific circumstances of each case.

1. *Inadvertence and Good Faith*

[51] Celtic submits that "inadvertence" should not be taken too literally. However, Wittmann, J.A. noted at para. 27 of *Blue Range* that "inadvertence" in the context of the first criterion includes carelessness, negligence or accident and is unintentional.

[52] Celtic's failure to make a timely claim was not unintentional. It submits that it "simply" did not perceive it had a right to damages because it did not believe that the IGPA had been suspended. Celtic was aware of the CCAA proceedings from the time of the Initial Order and retained counsel with respect to the proceedings throughout. It filed a Proof of Claim for a different kind of claim. It cannot argue that its failure to file a claim was careless, negligent or accidental: it was Celtic's deliberate choice, acting with the advice of counsel, to maintain its position that the IGPA had not been suspended, but amended, without providing for the possibility that this position would be found to be incorrect and that it may have a claim for damages arising from a suspension. The financial implications to Celtic if the IGPA was found to be suspended were made clear to it when it received draft third party gas processing agreements from SemCAMS on August 26, 2008. In fact, Celtic itself calculated its suspension losses for the period from July 22, 2008 to September 30, 2009 in an affidavit filed in response to the application that resulted in the IGPA decision.

[53] Celtic submits that the possibility of suspension damages must also have been apparent to SemCAMS and the BA before the Plan was negotiated and presented to creditors. That is beside the point: the Claims Process in CCAA proceedings requires creditors to identify and to file their claims or be barred from pursuing them. It is not up to the debtor company to guess at potential claims, or whether creditors will decide to pursue them.

[54] Celtic also submits that its claims for suspension damages are not claims for a "debt". While this is true, the Claims Process provides for contingent claims for liabilities and that is what SemCAMS submits Celtic should have filed.

[55] The Claims Process Order of October 22, 2008, which was served on Celtic and its counsel, makes it clear that "claim" includes contingent claims, defining "claim" as including:

> . . . any . . . claim . . . made, <u>in connection with any indebtedness, liability or obligation of any kind whatsoever</u>, and any interest accrued thereon or costs payable in respect thereof,

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> including without limitation . . . by reasons of any breach of contract or other agreement (oral or written) . . . and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown . . . and whether or not any right or claim is executory or anticipatory in nature including . . . with respect to any matter, action, cause or chose in action whether existing at present or commenced in the future . . .[emphasis added]

The Monitor's Seventh Report dated October 21, 2008 provided a thorough summary of the claims process.

[56] Had Celtic filed its claim for suspension damages, current and future, such claim would have been determined during the Claims Process or there would have been a reservation for the full amount of its claimed damages.

[57] The first criterian of the *Blue Range* analysis requires that I consider whether Celtic acted in good faith.

[58] SemCAMS and the BA submit that Celtic knew it had a potential claim for damages arising from the suspension of the IGPA as early as August 28, 2008, more than three months prior to the Claims Bar Date, or at any rate, by September 22, 2008, when it sent a letter to SemCAMS asserting that it had not in fact suspended the sale of gas under the IGPA. Celtic had by August 21, 2009 received the Plan and the Monitor's 20th Report, which identifies and alerts stakeholders to the fact that Affected Claims, which by definition include contingent claims, will be compromised, discharged and released under the Plan. Certainly, the question of suspension damages was a live issue during the application that led to the IGPA decision of August 27, 2010, and Celtic was well aware from submissions that were made that SemCAMS took the position that any such claim was barred by the Claims Process Order and compromised under the Plan. Despite all this, Celtic did not bring its application to file a late claim until April, 2011. I cannot find that Celtic acted in good faith by delaying its claim.

2. *Prejudice Caused by the Delay*

[59] Celtic submits that, since during the application that gave rise to the IGPA decision, SemCAMS has indicated that it may, under certain conditions, consider agreeing to a late - filed claim for suspension damages. It argues that this is an indication that there is in fact no prejudice to SemCAMS or the ordinary creditors from its late claims. SemCAMS' offer to accept a late filed claim was made at a far earlier date than this application for leave to file a late claim, and at a time when the claim was for far less than the amount now claimed.

[60] SemCAMS points out that several of the conditions to this offer to accept a late claim have not been met. The mere fact that SemCAMS considered agreeing to a late claim at an earlier time and under different circumstances does not indicate lack of prejudice now.

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[61] Celtic concedes that a late claim will prejudice the BA and its group of secured creditors, but submits that this should not be a factor since the BA has already agreed to an Ordinary Creditors' Pool, and the size of that pool will not increase as a result of granting leave to Celtic to amend its Proof of Claim.

[62] As I indicated in *Re BA Energy*, the objective of a claims procedure order is to attempt to ensure that all legitimate creditors come forward on a timely basis. A claims procedure provides the debtor company and the Monitor with the information necessary to fashion a plan that may prove acceptable to the requisite majority of creditors, given the financial circumstances of the debtor, and that may be sanctioned by the Court. The fact that accurate information relating to the amount and nature of claims is essential for the formulation of a successful plan requires that the specifics of a claims procedure order should generally be observed and enforced, and that the acceptance of a later claim should not be an automatic outcome. The applicant for such an order must provide some explanation for the late filing and the reviewing court must consider any prejudice caused by the delay.

[63] The claims procedure process was developed to give creditors a level playing field with respect to their claims and to discourage tactics that would give some creditors an unjustified advantage. Situations that give rise to concerns of improper manipulation of the process by a creditor must be carefully considered.

[64] Celtic's proposed suspension damages claim would represent an approximately 22% increase in the total value of Ordinary Claims filed against SemCAMS. The new claim increases Celtic's total claims by about 66%. The Plan and the Monitor's Report made it clear that the Secured Lenders represented by the BA agreed to refrain from making a claim against SemCAMS in respect of their first-ranking, fully secured claim in part because they would receive the surplus remaining in the Ordinary Creditors Pool after the claims of ordinary creditors had been satisfied. It is a reasonable inference that this decision was made on the basis of claims that had been filed as of the Claims Bar Date, which did not include the Celtic $22.5 million suspension damages claim.

[65] One of the tests for prejudice is whether a late claim causes another creditor to lose a realistic opportunity to do something it might otherwise have done: *Blue Range* at para. 40. While it is true that the secured lenders as represented by the BA were likely aware that Celtic may have a potential claim for suspension damages, they were also entitled to rely on the Claims Bar Process, the release provisions of the Plan and the Sanction Order to expect some finality.

[66] In *Blue Range*, the applications to accept late claims were made within a few months of the plan sanction order. Here, the delay is much longer, and the decision in *Blue Range* is clear that the timing of the late claim with respect to the stage of proceedings is a key consideration: para. 36.

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[67] If Celtic is able to file a late claim for suspension damages, the Secured Lenders could receive up to $900,000 less than they otherwise would. This is a material and significant claim, in contrast to the relatively minor value of late claims in *Blue Range* that were filed after that plan was implemented.

[68] It is noteworthy that the Secured Lenders did not have to consent to the amount that was made available to Ordinary Creditors in the Ordinary Creditors' Pool, as they had clear priority for their claim of approximately US $2.939 billion.

[69] This application also gives rise to a potential issue of unequal treatment among creditors. There were other unsecured creditors with claims arising from inlet gas purchase agreements. If Celtic's application is successful, it is not impossible that such creditors would seek to file similar late claims for suspension damages.

[70] I find that there is relevant prejudice to other creditors arising from the delay, and I am not satisfied that such prejudice can be alleviated by attaching any conditions to an order permitting late filing.

3. *Other Considerations*

[71] It is relevant that Celtic brings its application to file a late claim after the Plan has been sanctioned and implemented. In *Re T. Eaton Company Limited et al*, May 5, 1999 98-CL-2586 (Ont. S.C.J.), Blair J. noted, in a case where notification of the claims bar process had "fallen through the cracks" with respect to one creditor such that she had no opportunity to file a claim, that permitting a creditor to file a late claim after plan sanction and implementation "is tantamount to altering or modifying the Plan", and that the jurisdiction to allow such a late claim should thus be "exercised sparingly and in exceptional circumstances only", citing *Algoma Steel Corp. V. Royal Bank* (1992), 11 C.B.R. 3d 11. While these comments pre-dated *Blue Range*, which is now the law in Alberta on this issue, the timing of such an application with reference to plan implementation is relevant to the issue of prejudice.

[72] As previously described, this claim would be paid out of the Ordinary Creditors' Pool. It is clear that this large claim was not anticipated when the Pool was structured as part of the Plan and the BA consented to the Plan. The Plan specifically provides that it cannot be modified without the prior consent of BA as Agent of the secured creditors, acting reasonably, and, in the circumstances, it cannot be said that BA is acting unreasonably in opposing the application.

[73] SemCAMS and the BA submit that to allow a creditor with full knowledge of the CCAA Proceedings and the Claims Process to ignore the Claims Bar Date and file a significant new claim more than two years after such date would throw the entire CCAA restructuring process into disrepute. I must agree. Celtic has no good or satisfactory reason to offer as to why it failed to file a contingent claim for suspension damages within a reasonable time. It decided on this strategy for its own reasons, and at its own peril. None of the factors set out in *Blue Range* or in

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BA Energy favour its application. The policy reasons that emphasize the need for certainty and finality in an approved and sanctioned plan and fairness of treatment to all creditors outweigh the prejudice to Celtic of disallowing a late claim. The application to file a late claim for suspension damages is thus dismissed.

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c) Should Celtic's Statement of Claim be struck out?

[74] Celtic alleges in its Statement of Claim that the granting of the Initial Order in the CCAA Proceedings was an event of default under the IGPA and that Celtic, as non-defaulting party, suspended performance of all transactions under the IGPA with the agreement of SemCAMS. I have found that the suspension damages claimed under the Statement of Claim are Affected Claims that may be, and were, compromised by the Plan and the Plan Sanction Order. Paragraph 44 of the Plan Sanction Order provides as follows:

> Any and all Persons shall be and are hereby stayed from commencing, taking, applying for or issuing or continuing any and all steps or proceedings . . . declarations or assessments, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Party in respect of all Claims and any other matter which is released pursuant to paragraphs 45 to 47, inclusive, of this Plan Sanction Order and Article 8 of the Plan.

[75] The filing of the Statement of Claim is thus a breach of the Plan Sanction Order and accordingly is struck out.

Conclusion

[76] In summary, I find that Celtic's claims for damages arising from the suspension of the IGPA, whether they arose during the CCAA Period, the Post Plan Implementation Period or the Post October 2010 Period are "Affected Claims" under the CCAA proceedings, subject to the Claims Process and to being compromised by the Plan. I dismiss Celtic's application to file an amended or new late claim for these damages. I find the Statement of Claim claiming such suspension damages to be a breach of the Sanction Order and, accordingly, I direct that it be struck out.

[77] If the parties are unable to agree on costs, that issue may be addressed through written submissions filed with 45 days.

Dated at the City of Calgary, Alberta this 31st day of July, 2012.

B.E. Romaine
J.C.Q.B.A.

Appearances:

A. Robert Anderson, Q.C.
Doug Schweitzer
Osler, Hoskin & Harcourt LLP
for SemCAMS ULC

Anthony Jordan, Q.C.
Gowling Lafleur Henderson LLP
for Celtic Exploration Ltd.

Ashley John Taylor
Erica Tait
Stikeman Elliott LLP
for the Bank of America, N.A.

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TAB 68

CITATION: Siegel et al v. Hibbert et al, 2012 ONSC 2767
COURT FILE NO.: CV-10-642-SR
DATE: 2012/05/07

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HEIDI SIEGEL and ROGER SIEGEL	)	M. Jaeger, for the Plaintiffs
	)	
	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
MARLON GARY HIBBERT also known as GARY HIBBERT, VERNA HIBBERT also known as SHELLEY HIBBERT, ASHANTI CORPORATE SERVICES INC., MARLON GARY HIBBERT and VERNA HIBBERT operating as KABASH RESOURCE MANAGEMENT, POWER TO CREATE WEALTH INC.	)	Self Represented
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** January 10, 11, 12, 13, 19, February 1 and 28, 2012

AND

Court File No. CV-10-651-SR

B E T W E E N:

NITIN JESSE SOLOMAN and LALETTA CHANG-SOLOMON, and SOLOMON CHANG CAPTIAL MANAGEMENT INC.

Plaintiffs

- and –

MARLON GARY HIBBERT also known as GARY HIBBERT, VERNA HIBBERT also known as SHELLEY HIBBERT, ASHANTI COPRORATE SERVICES INC., MARLON GARY HIBBERT and VERNA HIBBERT operating as KABASH RESOURCE MANAGEMENT, POWER TO CREATE WEALTH INC.

Defendants

AND

Court File No. CV-10-652-SR

B E T W E E N:

ISAIAH SOLOMON and TAMMY MARIE SOLOMON

Plaintiffs

- and –

MARLON GARY HIBBERT also known as GARY HIBBERT, VERNA HIBBERT also known as SHELLEY HIBBERT, ASHANTI CORPORATE SERVICES INC., MARLON GARY HIBBERT and VERNA HIBBERT operating as KABASH RESOURCE MANAGEMENT, POWER TO CREATE WEALTH INC.

AND

Court File No. CV-11-251-SR

B E T W E E N:

DIADEM CONSULTING INC.

Plaintiff

- and –

MARLON GARY HIBBERT also known as GARY HIBBERT, VERNA HIBBERT also known as SHELLEY HIBBERT, MARLON GARY HIBBERT and VERN HIBBERT operating as KABASH RESOURCE MANAGEMENT, ONTARIO CORPORATION 2124329 operating as ASHANTI CORPORATE SERVICES INC., POWER TO CREATE WEALTH INC., POWER

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TO CREATE WEALTH INC. (PANAMA), DOMINION INTERNATIONAL RESOURCE MANAGEMENT INC., and DOMINION WORLD OUTREACH MINISTRIES DOMINION WORSHIP CENTRE INC.

Defendants

AND

CV-11-631-SR

B E T W E E N:

MARCIA DIXON

Plaintiff

- and -

MARLON GARY HIBBERT also known as GARY HIBBERT, VERNA HIBBERT, also known as SHELLEY HIBBERT, MARLONG GARY HIBBERT and VERNA HIBBERT operating as KABASH RESOURCE MANAGEMENT, ONTARIO CORPORATION 2124329 operating as ASHANTI CORPORATE SERVICES INC., POWER TO CREATE WEALTH INC., POWER TO CREATE WEALTH INC. (PANAMA), DOMINION INTERNATIONAL RESOURCE MANAGEMENT INC., and DOMINION WORLD OUTREACH MINISTRIES DOMINION WORSHIP CENTRE INC.

Defendants

The Hon. Mr. Justice Arrell

JUDGMENT

Introduction:

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[1] Greed is a vice that makes normally rational people act irrationally. It plays exceeding well into the old maxim “If it looks too good to be true it usually is”. This case proves that both theories are alive and well.

[2] The plaintiffs invested funds with the defendant Marlon Hibbert and his assorted companies, all of which are also defendants.

[3] The investments were lost. The defendants have consented to judgment for the principal amount but not interest. The plaintiffs now seek interest and a declaration that they were defrauded of these funds by the defendant Hibbert and his wife, the defendant Verna Hibbert, and assorted defendant companies. They also seek a declaration that the defendants fraudulently conveyed their home from a joint tenancy to Verna solely contrary to *The Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29.

Facts:

[4] Marlon Hibbert is a Pastor and founder of Dominion World Outreach Ministries. Verna is his wife and they owned as a joint tenants 48 Reginald Lamb Crescent in Markham, Ontario. The corporate defendants were all incorporated by the defendant Marlon Hibbert at various times with him as the sole shareholder, president and directing mind.

[5] There are 5 sets of plaintiffs, all of whom invested various sums of money with the defendant Marlon Hibbert in and around late 2006 through 2008. All heard of the defendant generally by word of mouth through members of the defendant’s church or his brother-in-law, Jessie Solomon, also a plaintiff.

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[6] There is no evidence that the defendants actively recruited any of the plaintiffs. Indeed I find as a fact that the plaintiffs approached the defendant Marlon Hibbert. It does appear, however, that he would pay a referral fee to an investor who referred another investor. It is unclear from the evidence before me as to whether any of the plaintiffs ever received such a referral fee. There was also evidence of some workshops put on by the defendant and a video produced by him. There is no evidence any of these plaintiffs invested because of such programs.

[7] The defendant Marlon Hibbert traded in the currency exchange market. He had no training, experience or formal education in investments other than self taught. Neither he, nor any of his companies, were ever registered with any regulatory body or government agency.

[8] The plaintiffs would not be considered sophisticated investors, however, they generally had some post secondary education, families and responsible jobs.

[9] In all cases the plaintiffs would hear of the defendant Marlon Hibbert and approach him to see if he would invest funds for them. He would explain that he traded in the currency exchange market; that he guaranteed a 5 % return per month or 8 ½ % per month if the funds were locked in for 1 year; he and the respective plaintiff would sign a contract for the amount of the investment where it was written that he personally would guarantee the principal amount and the interest payment.

[10] In most cases the plaintiff would invest $10,000.00 to start, get a copy of the contract with the guarantee and would start to receive the monthly interest payment or a monthly investment statement showing the monthly interest amount being added to the principal.

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[11] The plaintiffs, after receiving the interest over a period of time, would then invest further funds, usually without any solicitation by the defendants, with the same written guarantee.

[12] Over time monthly interest payments were missed and phone calls were not returned. The plaintiffs started to demand the return of their funds and the defendant stalled and made excuses. It finally became clear that the investments were lost and a cease trading order was issued by the Ontario Securities Commission as a result of complaints to it by some investors. The defendant alleges these losses were as a result of the recession and volatility of the markets such that the investments lost money. No evidence was produced by him to indicate that any investments were even made never mind whether they ever made a profit.

Analysis:

[13] The plaintiffs claim that the defendants defrauded them in a classic “ponzi scheme”.

[14] The plaintiffs allege fraud on the basis that the investment funds were pooled; that the defendant Marlon Hibbert used the funds to finance the business to pay himself, to purchase vehicles, make donations to charities of his choice and to give himself and his wife loans, and dishonestly misappropriated their funds. All of which is true. As well he has not accounted for the funds, nor provided any documentation to show where they went or how they were lost.

[15] The plaintiffs have clearly proven a breach of contract. The defendant Marlon Hibbert guaranteed the principal the plaintiffs invested and the rate of return, as unrealistic as the amount was.

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[16] The gullibility of the plaintiffs in believing the misrepresentations of the defendant, or lack of care on their part in failing to make an independent investigation, is no defence to an action based on fraud. It does not lie in the mouth of one who makes a statement on which another relies to say that the other was careless in believing him. *Mikealice Management Corp. and Dr. Michael Laiv. De Thomas Financial Corp. et al* 2003 CanLII 43753 (ON SC).

[17] Criminal Fraud requires proof of (a) a dishonest act involving "deceit, falsehood or other fraudulent means" which (b) causes detriment or deprivation to the victim. *R. v. Theroux*, [1993] 2 S.C.R.

[18] In a civil action there need not be a false representation; it is sufficient if there is a fraudulent means. *Harland v. Fancsali*, [1993] O.J. No. 961.

[19] To find "deceit' or "falsehood" the trier of fact must determine whether there was an actual representation that a situation was of a certain character, when, in reality, it was not. *R. v. Theroux*, supra. Para. 18

[20] The issue is determined objectively, by reference to what a reasonable person would consider to be a dishonest act. Courts have found that the concealment of important facts, the unauthorized diversion of funds, the unauthorized use of an investors' funds and the unauthorized taking of funds to be fraudulent. *R. v. Theroux*, supra. Paras16, 17; *R. v. Currie*, [1984] O.J. No. 147 (Ont.C.A.).

[21] Fraud also requires a person to be aware of the risk posed to another's interests. The subjective awareness can be inferred from the evidence. It may also be established by evidence

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showing that the perpetrator was willfully blind or reckless as to the conduct and the truth or falsity of any statements made. *R. v. Theroux*, supra. at paras. 26 and 28.

[22] A sincere belief or hope that no risk or deprivation would ultimately materialize does not establish an absence of fraud:

> "A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this."
>
> *R. v.Théroux*, supra, at para.36)

[23] The defendant testified that he was simply a bad bookkeeper and businessman; that he had sloppy business and accounting practices; and that he was the victim of worldwide financial markets gone awry. I disagree.

[24] The defendant Marlon Hibbert was totally unbelievable as a witness. He failed to produce material that would clearly have been in his possession such as trading records, trading accounts, and bank accounts for the various companies. He consistently had a selective memory about where money went, loans to him and his wife, his church or other charities in which he was involved. Certainly some of the letters sent by him to investors were false and misleading and when questioned on those he had no plausible explanation. He was evasive in much of his

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testimony for example he refused to concede he was investing the plaintiff's money and insisted the companies he controlled were doing the investing. He spoke of some of the accounts being frozen but produced no evidence to show what was in them. The cheque register he produced showed d/m/y being switched back and forth and has obviously been produced after the fact. He was unable to recall how he paid himself or on what basis. He testified he told every investor that he had no assets or investments to back up his guarantee yet none of the plaintiffs recall any such discussion. I accept the evidence of the plaintiffs. I totally reject the evidence of the defendant Marlon Hibbert as unworthy of belief.

[25] I also find as a fact that the plaintiffs did no due diligence regarding the defendants and the investment scheme. It strikes this court as somewhat incredulous that they really felt, as they testified, that there was no risk to their money which was going to generate an annualized 60% return in the mid to late 2000's. They are not credible when they all testify they felt their investment was safe and without risk because of the guarantee and that the defendant Marlon Hibbert was a pastor. However, nothing turns on their lack of credibility on this narrow aspect of the case because the issue is whether they were defrauded regardless of their lack of due diligence and stupidity. *Mikealice Management Corp.*supra.

[26] It had become clear by early 2009 that the defendant Marlon Hibbert had been unable to repay funds as requested by his investors. He had been stalling them and testified that he hoped to recoup the losses. I also find as a fact that he knew he had many very disgruntled clients, that he had lost all their investments and that he had no way of repaying what he owed to them. He

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admitted as much in cross-examination when he acknowledged that he knew he owed millions at that time.

[27] The evidence is uncontroverted, and admitted by the defendant, that he used the investment funds, at least partially, for his own use, the use of his wife, personal loans, lease payments for expensive cars, and donations to charities of which he was closely tied, and in some cases paid by. None of these arrangements were ever communicated to the plaintiffs. Many of these payments occurred and continued long after he had stopped paying those who had invested with him. It is evident that he lied to investors as to his success as an investor in the foreign exchange markets. He lied to them by providing monthly statements that consistently showed a profit when in fact the investments were showing significant losses. He lied to his clients about why funds were not being repaid when requested and provided a litany of excuses that were patently untrue. As a result of his actions the plaintiffs lost all they invested with him.

[28] I have no hesitation in finding that the defendant Marlon Hibbert knew he was acting dishonestly. Any reasonable person looking at these facts would also conclude that he was acting in a dishonest and deceitful manner. As a result of his dishonest actions the plaintiffs suffered significant financial losses. I conclude that the plaintiffs have proven fraud against all of the defendants except the defendant Verna Hibbert.

[29] There is no evidence before me that the defendant Verna Hibbert was anything other than the wife of the defendant Marlon Hibbert. There was nothing presented to me to indicate she played any role in these investments, the investment companies or in dealings with the plaintiffs. She signed none of the contracts with the plaintiffs in any capacity. Indeed counsel for the

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plaintiffs conceded in his closing argument that he was unable to produce any evidence to implicate the defendant Verna Hibbert and the actions against her should be dismissed.

[30] I find that the defendant Marlon Hibbert met with Mr. and Mrs. Morelli, who are not plaintiffs in this action but who had invested with him. They met on April 4, 2009 at the defendant Marlon Hibbert's office.

[31] At this meeting the Morrelli's, in a very forceful way, demanded their money back. The defendant instead offered them his home to hold in trust if he failed to pay them within 2 weeks. He signed a promissory note to that effect. He agreed in cross examination that when he signed the promissory note he could not fulfill it and knew that it was false.

[32] The defendants Marlon and Verna Hibbert went to see a lawyer on April 6, 2009 and on April 7, 2009 their house at 48 Reginald Lamb Cres., Markham, Ontario, which they had held as joint tenants, was transferred, for love and affection, to Verna Hibbert solely. They have continued to live in the home ever since.

[33] Mr. and Mrs. Hibbert testified that the transfer was completely coincidental and had absolutely nothing to do with the potential liabilities of the defendant Marlon Hibbert. They testified over the course of the trial and in earlier sworn affidavits and discoveries to 5 different versions of why they "just happened" to transfer their house out of their joint names. They claimed it was for estate purposes; to save taxes; being threatened by Mr. Morelli; or that the defendant was a counselor to prisoners and worried as to what would happen to the house if he was killed by a prisoner.

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[34] I find none of these explanations, when viewed in the context of the large amounts of money owing to these plaintiffs who had demanded a return of their funds, and the promissory note he signed to Mr. Morelli, to have any credibility whatsoever. Indeed the defendant acknowledged in cross examination that he knew at the time he transferred his interest in the house that he owed millions, and specifically knew that he owed substantial amounts to the plaintiffs. I also find as a fact that he knew he had no way of repaying what he owed.

[35] Intent under the act is made out by various badges of fraud as set out in *Beynon v. Beynon*, [2001] O.J. No. 3653. The defendants in this case, with the transfer of their house, have met almost all of the non exhaustive list set out in the above case.

[36] I find as a fact that the defendants Marlon and Verna Hibbert intentionally planned to defeat these plaintiffs and save their house from these creditors.

[37] I therefore find that the conveyance of 48 Reginald Lamb Cres., Markham, Ontario on April 7, 2009 contravened S. 2 of *The Fraudulent Conveyances Act*. R.S.O. 1990 c. F29 in that the conveyance of their real property was done with the intent to defeat and defraud the plaintiffs, who were creditors, of just and lawful damages and amounts lawfully owing to them and the conveyance is therefore void.

Conclusion:

[38] The plaintiffs already have judgment for their principal amount on consent.

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[39] There will be judgment for the plaintiff Marcia Dixon in action CV-11-631-SR, based on her undisputed affidavit and the defendant Marlon Hibbert agreeing to the amount of principal owing, for the principal amount of $190,000.00 as against all defendants except Verna Hibbert.

[40] There is a finding and a declaration that the judgments against the defendants in favour of the plaintiffs was as a result of the fraud of the defendant Marlon Hibbert and the corporate defendants.

[41] All actions for amounts owing will be dismissed as against the defendant Verna Hibbert.

[42] All plaintiffs will have interest on their judgments up to the date of trial at 5% per month as per the guarantee in the contracts signed personally by the defendant Marlon Hibbert and signed by him on behalf of the various defendant corporations less any interest paid.

[43] The plaintiffs will have post judgment interest fixed pursuant to the Courts of Justice Act.

[44] The transfer of 48 Reginald Lamb Cres., Markham, Ontario on April 7, 2009 is declared null and void and title will revert back to Marlon and Verna Hibbert as joint tenants forthwith.

[45] If the parties are unable to agree on costs they may submit their respective positions on 3 double spaced pages in addition to any offers and draft bills of costs within 30 days.

_____

ARRELL, J.

2012 ONSC 2767 (CanLII)

Released: May 7, 2012

2012 ONSC 2767 (CanLII)

CITATION: Siegel et al v. Hibbert et al, 2012 ONSC 2767
COURT FILE NO.: CV-10-642-SR/CV-10-651-SR/
CV-10-652-SR/CV-11-251-SR/CV-11-631-SR
DATE: 2012/05/07

2012 ONSC 2767 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

SIEGEL et al

Plaintiffs

- and -

HIBBERT et al

Defendants

REASONS FOR JUDGMENT

ARRELL, J.

Released: May 7, 2012

TAB 69

Sorrel 1985 Limited Partnership v. Sorrel Resources Ltd., 2000 ABCA 256

Date: 20000927
Docket: 97-17377

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MR. JUSTICE BRACCO
THE HONOURABLE MADAM JUSTICE PICARD

BETWEEN:

SORREL 1985 LIMITED PARTNERSHIP (Plaintiff)
and SLP RESOURCES INC.

(Third Party)
Appellants

- and -

SORREL RESOURCES LTD., DAVID SPEIRS and LOUIS J.C. MIX

(Defendants)
Respondents

- and -

DOANE RAYMOND CHARTERED ACCOUNTANTS,
formerly known as PANNELL KERR MACGILLIVRAY

(Third Party)
Not Parties to this Appeal

Appeal from the Judgment of
The Honourable Mr. Justice Hawco
Dated the 9th day of September, A.D. 1997
Filed the 10th day of September, A.D. 1997

2000 ABCA 256 (CanLII)

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE PICARD
CONCURRED IN BY THE HONOURABLE CHIEF JUSTICE FRASER
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE BRACCO

COUNSEL:

P. S. Jull
S. Lee
For the Appellants

N. K. Machida
For the Respondent Speirs

R. J. Hall
For the Respondent Mix

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REASONS FOR JUDGMENT OF
THE HONOURABLE MADAM JUSTICE PICARD

2000 ABCA 256 (CanLII)

THE COURT:

[1] This case raises the issue of when a stranger to a trust will be held liable for the breach of that trust.

[2] Mr. David Speirs (Speirs) and Mr. Louis Mix (Mix), the respondents, were found not to be personally liable for a breach by Sorrel Resources Ltd. (Sorrel), of a trust relationship it had with Sorrel 1985 Limited Partnership (the Partnership), the appellant. Sorrel is not a party to this action.

FACTS

[3] Speirs was the president and Mix the treasurer of Sorrel, an oil and gas exploration company. Both were also directors. Speirs has a degree in geophysics while Mix is a chartered accountant. Both had considerable experience in the oil and gas industry.

[4] The Partnership was set up so that Sorrel would have funds to pursue the goal of making money from the acquisition, exploration, development and operation of oil and gas properties to the benefit of both.

[5] The limited partnership agreement (LPA) under which the Partnership operated was largely drafted by Speirs and executed by Speirs and Mix on Sorrel's behalf. Sorrel was the general partner in the Partnership, with the responsibility of managing it on behalf of all partners.

[6] Sorrel then entered into a joint venture agreement (JVA) with the Partnership, under which Sorrel was appointed as the manager or operator of the joint venture. Speirs and Mix executed the JVA on behalf of Sorrel itself and also, in Sorrel's capacity as general partner, on behalf of the Partnership. The JVA allowed them to draw funds from the Partnership, as required, to pay its share of the expenses of the oil and gas exploration.

[7] The JVA provided that the Partnership would be responsible for 80% of the costs incurred under the joint venture while Sorrel would be responsible for 20%. The interest acquired by each was in the same percentages. (At a later date, as a result of another party becoming involved, these figures changed; but this fact does not affect the case.)

[8] In addition to the JVA and LPA, the relationship between Sorrel and the Partnership was also regulated in part by the provisions of the 1981 Canadian Association of Petroleum Landmen Operating Procedure (CAPL). These three documents ("the Agreements") are the basic agreements which governed the relationship between the parties.

[9] A bundle of documents, based around the LPA and the JVA, was presented to investors as a package and some 47 individuals and corporations subscribed for a minimum of $80,000 each. Investors became members of the Partnership.

[10] The system or design for drawing funds from the Partnership was set up by Mix in consultation with Speirs and was straightforward. An "authority for expenditure" (AFE), along with a detailed statement of the costs and expenses it represented was prepared by Sorrel. While it could be signed by any of Speirs, Mix or Mr. Salt, another officer of Sorrel, it was usually signed by Speirs, who testified that he was intimately familiar with what was being put forward for approval and would make sure the AFE was in order. (AB553 and 670). The AFE was provided to an employee hired for the Partnership. She would draw a cheque based on it that was usually signed by Speirs and Mix. (Speirs, Mix and Salt, were authorized to sign cheques on the account of the Partnership. Two signatures were required.) The cheque was then deposited in Sorrel's general account at a bank.

[11] Under the JVA it was clear that Sorrel was not entitled to make cash calls in advance of expenditure except with respect to clearly defined categories of costs: in particular, for costs of drilling, completion and equipping wells.

[12] In the late summer or early fall of 1985, prior to the AFE system being put in place, Mix had concerns about the process. In his testimony he described a concern that there remained a "partnership identity" on the Partnership funds drawn down (AB 766). At Mix's request, Sorrel's lawyer reviewed the relevant agreements and gave the opinion that funds should not be commingled. Mix went on to consult Sorrel's firm of accountants, who told him that commingling of funds was not contrary to accounting practices or the Agreements. It appears that Mix's broad concern that the funds belonged to the Partnership came to be narrowed to the question of whether they could be commingled with Sorrel's funds, after they were drawn down. The responses left open the question of the use to which Sorrel could put Partnership funds once drawn down.

[13] Speirs also had concerns about responsibilities to the Partnership, particularly with respect to its funds. He testified that he put clause 7.11 in the LPA, which prohibited commingling except as authorised, "to ensure the limited partners that their capital contributions [would not be commingled] before they were needed for oil and gas expenditures" (AB 569). Further, he said he put in another term (clause 7.12) "because I was aware that I owed duties to more than one party and that I would be constantly in a conflict of interest position" (AB 570). Under that clause, there is deemed to be no conflict of interest or breach of fiduciary duty if there is compliance by the general partner with the terms of the agreement. He said the JVA between the Partnership and Sorrel was necessary "because the same party was both manager of the program and the general partner of the Partnership." (AB 572) He testified that he did not want the Partnership to have a concern that Sorrel would have access to the Partnership's bank account for "anything other than effectively...the operations of the partnership, so that Sorrel could just not sign cheques willy-nilly on their accounts." (AB 572).

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[14] On December 19, 1985, the joint venture began operation when Sorrel signed a farmout agreement with Shell Canada Resources Ltd. This was a standard type of agreement under which Sorrel would drill and equip two wells. Unfortunately, about that time the price of oil began to drop dramatically, causing a profoundly negative effect on the industry and on Sorrel's operations.

[15] Speirs testified that because of the collapse in oil prices no drilling was undertaken in the latter part of December and throughout January (AB 693). Although drilling was supposed to begin during the third week in January, it did not begin on the first well until February 4, 1986 and ceased by February 25, 1986. On the second well, drilling began on March 10, 1986 and ceased on April 6, 1986. Because Sorrel did not complete its commitments under the farmout agreement with Shell, it did not acquire any interest under that agreement. (This point seems to have been missed by the trial judge. Under the JVA, the CAPL operating procedures, which permit commingling, apply only where an interest has been acquired. However, as will be discussed later, commingling is not determinative of the responsibility of the parties.)

[16] In the eleven days following the signing of the farmout agreement, Sorrel made two cash calls on the Partnership funds, totalling $760,000. There were further cash calls and funds received and deposited in Sorrel's general account: in March 1986, $211,200 and $138,000 in April. Thus between December 1985 and the end of April 1986, Sorrel drew over $1,000,000 out of the Partnership and placed it in its general account.

[17] In the course of evidence it became clear that Sorrel made unrestricted use of the funds transferred from the Partnership to Sorrel for its own expenses. Speirs acknowledged that these funds were used to pay Sorrel's expenses, including staff payroll (AB 694). Mix agreed that the funds were used to pay all manner of expenses including Sorrel's payroll, rent and even revenue owed to joint venture partners and expenses on other wells (AB 839). This evidence was confirmed by Julia Murray, a chartered accountant with Touche Ross who was placed in Sorrel's office as the "resident" trustee in bankruptcy in charge of analysing its books and records.

[18] Mix admitted that there was no "tracing source of receipts to use of funds". While accepting that he did not make any effort to see that the funds drawn from the Partnership were used to pay the costs on the well being drilled for the Partnership, he said he believed that this was consistent with generally accepted accounting practice (AB 840).

[19] Furthermore, there was provision in CAPL for the direct refund to the Partnership of monies not used for costs of the joint venture, or alternatively this could have been done through an updated AFE or a credit on account with adjustment for interest. There is however no indication that any of these occurred.

[20] There was evidence that as of the end of December 1985, Sorrel had received invoices relative to the drilling of the two wells that totalled $2,349.67. During the period February 27 to

April 16, 1986, Sorrel received invoices for the drilling totalling $569,219.22. As Sorrel had a policy of not paying invoices until 60 to 75 days after they were received, monies from the Partnership were not actually required until, at the earliest, sometime in late April. As events turned out, although over $1,000,000 was transferred, only $32,845.44 was used toward payment of costs of the two wells.

[21] Both Speirs and Mix had concerns about Sorrel's financial position in December, 1985. However they differed on how to deal with it. Sorrel had a working capital deficit, which Mix defined as "an excess of current liabilities over current assets". The effect was that Sorrel had problems with its line of credit from the bank and needed money to meet its obligations under the LPA. At a meeting in early December of 1985, Sorrel's directors were advised that there was a projected shortage of $763,000 as of December 31, 1985 and of $1,331,000 as of March 31, 1986. (In April, Mix realized this was underestimated by $560,000 (AB 781-2)). Sorrel took measures to deal with this bleak financial picture including raising funds through a share issue. However, Mix testified that the monies so raised did not address the working capital problem as at March 31, 1986. Sorrel also restructured its line of credit with its bank, Société Générale.

[22] In April 1986, Sorrel's auditors placed a note on its 1985 financial statement, stating that the recent rapid decline in oil prices, together with the company's working capital position, threatened the ability of the company to sustain its operations, realize the value of its assets and discharge its liabilities in the normal course of business (AB 798).

[23] By April 26, 1986 Mix was extremely concerned about Sorrel's financial viability and suggested cutbacks. Speirs did not agree and believed Sorrel could be pulled out of its difficulties. Mix resigned. The documentation for the final draw on the Partnership funds, in April, was not signed by him but by Salt. His liability must be viewed accordingly.

[24] It became clear during Mix's evidence (AB 872) that Sorrel had been unable to meet its loan repayment obligations as of December 1985. Instalments were due of around $50,000 each month, but no payments were made in the five months from December until the receivership. Sorrel was in negotiations with the bank, Société Générale, seeking to extend its line of credit. As part of those negotiations, Speirs and Mix signed an agreement committing Sorrel to payment of a loan installment of $768,333, due on April 15, 1986. Both Speirs and Mix gave evidence that they had not kept a copy of the agreement, and had failed to appreciate that an installment was due. The bank subsequently demanded full payment of the loan, finally putting Sorrel into receivership on May 2, 1986. At trial, Speirs and Mix claimed that Sorrel had access, through its line of credit and its bank balance, to sufficient funds to have made the loan payment. However, the fact remains that they did not use those funds to make that payment. Equally, they had not used these available funds to pay Sorrel's own expenses; nor had they taken steps to obtain other funds to do so. They had been using the $1,000,000 drawn from the Partnership.

[25] In the result, the monies received from the Partnership came under the bankruptcy proceedings. In an action arising out of the receivership, this court affirmed the decision of the

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Court of Queen's Bench that there was a trust relationship between the Partnership and Sorrel, and that funds remaining in the Partnership bank account were held in trust for the partners. See *Bank of Nova Scotia* v. *Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193.

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An Earlier Relevant Decision

[26] The relationship between Sorrel and the Partnership was analysed by this court in the decision already mentioned, *Bank of Nova Scotia* v. *Société Générale (Canada)*. It was found to be a trust relationship. The Court reviewed the terms of CAPL (under which Sorrel was defined as an operator and the Partnership a non-operator) and concluded as follows, at p.198:

> In brief, the agreement reflects confidence of the non-operators in Sorrel as operator and expressly provides that Sorrel keep them informed, account to them and in general act for their benefit.

[27] The Court found that the authorized commingling of Sorrel's funds with those of the Partnership did not negate the finding of a trust and was an aid to the smooth implementation of the overall arrangement. However, the Court made it very clear that Sorrel was not permitted to use the funds for its own purposes (at p.201):

> Sorrel was not permitted to use the funds as its own; its authority over the funds was restricted to the purposes of the agreement and those purposes, in general terms, were to act for the benefit of the non-operators.

[28] Thus, the Court concluded that Sorrel was at all material times in a fiduciary relationship with the Partnership, and the funds were impressed with a trust. It also found that Sorrel had to act for the benefit of the Partnership in the use of its funds and was not permitted to use the funds for itself.

[29] It follows that a use by Sorrel of Partnership funds for its own purposes was a breach of the trust.

The Trial Decision

[30] The trial judge held, as he was bound to do by the previous decision of this court, that a trust existed between Sorrel and the Partnership. However, he found no basis upon which to hold Speirs or Mix liable. That decision is appealed, as is his decision that any judgment should not include an amount that would have been available under a government grant, the Petroleum Incentive Program (PIP), and his decision that the Partnership should pay the costs of a third party, Sorrel's accountants. The trial judgments are reported at (1997) 198 A.R. 55 (as to liability) and (1997) 204 A.R. 7 (as to quantum and third party costs.)

[31] The trial judge found that funds drawn from the Partnership were deposited into Sorrel's operating account and were used by it for purposes other than to pay for the expenses authorized in the JVA and LPA. He found that Sorrel had used funds to pay some of its own overhead and general operating costs and said that by doing so it breached the trust.

[32] He found that commingling after an AFE was acceptable in the industry. (It is to be remembered that this Court said as much in the earlier decision.) He built on that foundation to find that even using Partnership funds to pay Sorrel's own bills was accepted industry practice. At (1997) 198 A.R. 55 at 65 he said:

> An important part of [the Partnership's] claim appears to be that [Sorrel] transferred the funds into its account with the knowledge that they would not be used immediately (or even within the near future) to pay [the Partnership] accounts. Further, that they would be used in the interim to pay, among other things, [Sorrel's] accounts. *I am satisfied that what [Sorrel] was doing was an accepted practice at the time. Given that situation, even if it did constitute a breach of trust, it was not fraudulent and dishonest nor morally reprehensible.*
>
> (Emphasis and party names supplied)

[33] In concluding that Speirs and Mix were liable neither as trustees nor as constructive trustees, the trial judge recognized that the applicable starting point for the analysis is the definitive case of *Air Canada* v. *M & L Travel Ltd.* (1993), 108 D.L.R. (4th) 592 (SCC).

[34] On this appeal, the Partnership alleges that the trial judge erred in failing to properly apply the tests set out by the Supreme Court of Canada in *Air Canada*. While the Partnership did not abandon its argument that Speirs and Mix were liable as trustees, the primary thrust of its appeal was that Speirs and Mix were constructive trustees, liable for "knowingly assisting" in Sorrel's breach of trust. The Partnership also appeals the finding of a reduction for any PIP payment and the decision on third party costs.

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Issues

[35] The Partnership alleges the following errors in the trial decision:

1. An incorrect application of the test for "knowing assistance" established in *Air Canada* and thus failure to find Speirs and Mix liable.

2. The failure to find Speirs and Mix liable as trustees of the Partnership.

3. Deducting PIP grants from the damage assessment.

4. The award of third party costs against the Partnership.

[36] The second issue can be quickly dealt with. I agree with the submissions of Speirs and Mix that there is no basis for finding that they were direct trustees of the Partnership, either in the Agreements or in their actions. The trial judge committed no error in concluding that there was no individual fiduciary relationship between either and the Partnership. The personal liability of Speirs and Mix must be determined on the basis of whether each is a constructive trustee.

THE TRUST

The Law

[37] The determination of whether Speirs and Mix are liable as constructive trustees requires reference to *Air Canada* v. *M & L Travel Ltd., supra,* and particularly the judgment of Justice Iacobucci writing for six members of the Court. (Justice McLachlin (as she then was), the seventh member of the panel, concurred in the result but expressed concern about placing the decision on wider principles than necessary.)

[38] In a later case, *Gold* v. *Rosenberg* (1997), 152 D.L.R. (4th) 385, Justice Iacobucci explained and restated the tests he created in *Air Canada*. The principles he set out were repeated in a later decision of the Supreme Court of Canada, *Citadel General Assurance Co.* v. *Lloyds Bank Canada et al.* (1997), 152 D.L.R. (4th) 411. (Justice McLachlin concurred in this case.)

[39] In *Air Canada*, Justice Iacobucci's judgment outlines the ways that a stranger to a trust may become liable for the breach of trust by another. These are (i) trustee *de son tort,* where the stranger acts as trustee, and which is inapplicable in this case; (ii) "knowing receipt", where the stranger knowingly receives funds in breach of trust, and which is also inapplicable; and (iii) "knowing assistance", where the stranger knowingly assists in a breach of trust. Only the third of these, where the stranger knowingly assists in the breach of trust, is relevant to this case.

[40] The origins of this third basis for liability lie in *Barnes* v. *Addy* (1874), 9 Ch. App. 244, where Lord Selborne LC said (at p.252), that strangers to a trust are not to be liable "unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees." In *Air Canada*, Justice Iacobucci identified two main issues requiring review under this test: the nature of the breach of trust and the degree of knowledge required of the stranger. Using them as his markers, he reviewed the law and its interpretation by English and Canadian courts.

Degree of knowledge of the stranger

[41] The knowledge required is actual knowledge. However, reckless or wilful blindness will also suffice (*Air Canada* at p.608). The knowledge must be of the existence of the trust and of what is being improperly done in breach of it: *Carl-Zeiss-Stiftung* v. *Herbert Smith & Co. (No.2),*[1969] 2 All E.R. 367 (C.A.) at 379. If the trust arises from contract, knowledge depends on the familiarity or involvement of the stranger with the contract (*Air Canada* at pp.608-609). Justice Iacobucci noted that the knowledge requirement will not generally be a difficult hurdle to overcome in cases involving directors of closely held corporations because, if active, they usually have knowledge of the actions of the corporate trustee.

[42] Constructive knowledge, however, is not enough to fix liability for knowing assistance (*Air Canada* at p.609). Constructive knowledge is knowledge of a set of circumstances that would indicate the facts to an honest person, or knowledge of facts that would put an honest person on inquiry. It is insufficient because knowledge of this sort is not sufficient to bind the stranger's conscience in a case of knowing assistance, although it may be sufficient in a case of knowing receipt: *Air Canada* at p.609; *Re Montagu's Settlement Trusts*, [1987] Ch. 264 at 285.

Nature of the breach of trust

[43] Justice Iacobucci found that there are two lines of authority on this topic. One flows from *Barnes* v. *Addy*, and requires participation by the stranger in a dishonest and fraudulent design. The other, arising from Canadian cases and referred to as a 'modified standard', holds that an innocent or negligent breach of trust may be enough if the stranger is the controlling or directing mind of a corporate trustee and knowingly assists in the breach of trust. Proof of fraud or dishonesty has not been required.

[44] Justice Iacobucci explained that the modified standard reflects a difficulty with the application of the strict *Barnes* v. *Addy* standard to cases where the corporate trustee is actually controlled by the stranger to the trust. He recognized the difficulty in analysis that arises when the trustee is a corporation, which can only act through human agents who are strangers to the trust. He pointed out that the inquiry as to the nature of the breach of trust is whether the actual breach of trust was fraudulent and dishonest (in the equitable sense), not whether the stranger's actions should be so characterized. Justice Iacobucci emphasized that *Barnes* v. *Addy* clearly states that a stranger will be liable if he or she knowingly assisted the *trustee* in a fraudulent and

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dishonest breach of trust and therefore it is the trustee's actions which must be examined. He concluded that it is unnecessary to find that the stranger acted in bad faith or dishonestly.

[45] Finally, Justice Iacobucci proposed an approach that he considered was consistent with both lines of authority. He said (at p. 618):

> I would therefore 'take as a relevant description of fraud the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take.' In my opinion this standard best accords with the basic rationale for the imposition of personal liability on a stranger to a trust which was enunciated in *Re Montagu's Settlement Trusts*, *supra*, namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. In that respect, *the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability.* This approach is consistent with both lines of authority previously discussed.
>
> (Emphasis supplied)

[46] In summary, following *Air Canada*, in a case of knowing assistance, the stranger to the trust must have knowledge of the trust and of what is being improperly done. That knowledge should be actual, although recklessness or wilful blindness will suffice. Constructive knowledge will normally not be enough.

[47] In considering the "nature of the breach of the trust", the breach by the trustee must be separated from the actions of the stranger. The breach of trust by the trustee must be "dishonest and fraudulent", in the equitable sense. Justice Iacobucci said that "dishonest and fraudulent" includes the "taking of a knowingly wrongful risk resulting in prejudice to the beneficiary". Thus, the personal liability of a stranger depends on whether the stranger "knowingly assisted" in the "dishonest and fraudulent design" which, to repeat, includes the "taking of a wrongful risk resulting in prejudice to the beneficiary". (As to whether there is a difference in meaning between the terms "dishonest" and "fraudulent", the comments of an English judge are interesting. In *Belmont Finance Corp. Ltd.* v. *William Furniture Ltd. (No.1)*, [1979] 1 All E.R. 118 (CA) at 130, Lord Buckley said he did not see a distinction and opined that using them together does not add to the extent of dishonesty required.)

[48] In *Gold*, Justice Iacobucci reviewed what he had done in *Air Canada*. He said he adopted the definition of "knowing assistance" from *Barnes* v *Addy*, however, he defined a "dishonest and fraudulent design" to include "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary" (at p. 394).

[49] As for the measure to be taken of the knowledge of the stranger of the breach of trust, in *Air Canada*, Justice Iacobucci said he must have "actual knowledge that what is being done is

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improperly in breach of that trust" (at p. 608). In *Gold*, he said, it must be proven that the stranger "participated knowingly" in the breach of trust (at p. 394).

[50] In *Gold*, Justice Iacobucci set out three requirements for the finding of liability. I have changed the names from his list to those appropriate from the facts of this case:

(1) there was a trust;

(2) the named trustee, Sorrel, perpetrated a dishonest and fraudulent breach of trust; and

(3) Speirs or Mix participated in and had actual knowledge of Sorrel's dishonest and fraudulent breach of trust.

[51] The *Air Canada* definition of fraud and the special position of the director of a closely held corporation as regards knowledge, must be kept in mind and imported into the above requirements.

[52] In a very helpful article, "Constructive Thinking? The Supreme Court's Extension of Constructive Trusts to Banks on the Basis of Constructive Notice of a Breach of Trust by a Customer" (1998) 31 Can. Bus. L.J. 1, Bradley Crawford Q.C. reviews *Air Canada*, *Gold, and Citadel* and provides his own summary of the lessons from the cases.

Application of Air Canada *test*

[53] There is no better way to understand these principles than to see how they were applied by Justice Iacobucci. The facts in *Air Canada* were: the trust was between a travel agency and Air Canada, the respondent. Under the terms of the working agreement between them, all monies taken in by the travel agency were held in trust for Air Canada, although they were deposited in a general operating account in the bank. The travel agency had a line of credit with the bank and, when difficulties arose, the bank called in a demand loan and withdrew monies from the general operating account. The appellant, as a director and shareholder of the travel agency, was well aware of its relationship with Air Canada and with the bank. The issue was whether, as a stranger to the trust, he should be held personally liable.

[54] Justice Iacobucci found that the travel agency, as trustee, knew that the ticket monies were held in trust for Air Canada, and were not for the general use of the travel agency. He found that the travel agency knew that any positive balance in its general account was subject to the bank's demands and that by placing monies in that account it took a risk to the prejudice of the rights of the beneficiary, Air Canada, which risk was known to be one it had no right to take. Thus, he held the breach of trust by the travel agency was dishonest and fraudulent from an equitable standpoint.

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[55] Justice Iacobucci found that the appellant had participated or assisted in the breach of trust by virtue of his action in managing the financial affairs of the travel agency. With respect to the knowledge requirement, although the appellant was not involved with the day-to-day operation of the travel agency, he had a general knowledge of the agreements and banking operandi. Most importantly, he knew that trust funds were being deposited in the general bank account which was subject to the demand loan of the bank. Thus, Justice Iacobucci found that even if the appellant could argue he had no subjective knowledge of the breach of trust, given the facts of which he did have subjective knowledge, he was wilfully blind to the breach or reckless in his failure to realize there had been a breach.

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Application of the Law

[56] The first step in the analysis of the possible personal liability of Speirs and Mix is to focus on the trust itself and on the trustee, Sorrel. As mentioned earlier, this Court found that a trust relationship existed between the Partnership and Sorrel and that Sorrel held the Partnership funds in trust. Thus, it follows that Sorrel's use of them for its own benefit was a breach of that trust.

[57] Following the same analysis as Justice Iacobucci, I will deal with the nature of the breach of trust and the degree of knowledge of the stranger.

The Nature of the Breach of Trust

[58] It is the nature of the breach of trust that must be of concern rather than the intent or knowledge of the strangers to the trust. As Justice Iacobucci pointed out, where the trustee is a corporation, the inquiry into breach by the trustee is conceptually difficult because the corporation can only act through human agents, who are technically strangers to the trust. Based on this Court's earlier decision, the breach of trust was Sorrel's use of Partnership funds for its own benefit. Speirs and Mix were the relevant human agency through which Sorrel operated. They set up and monitored all systems for the transfer funds from the Partnership to Sorrel. They designed the system whereby Sorrel could, through their authorisations and signatures, quickly draw down funds from the Partnership, place them in its general account and use them. This action also meant that Partnership funds were in Sorrel's general account and thus vulnerable to creditors.

[59] Does Sorrel's action meet the test set out in *Barnes* v. *Addy*, of "dishonest and fraudulent" design, or to use the words approved by Justice Iacobucci in *Air Canada*, was there the "taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take"? Clearly, in light of the analysis above, it does. The breach of trust by the trustee must be fraudulent, and it is unnecessary to find that the stranger acted in bad faith or dishonestly but only that he "knowingly assisted" in the breach. In other words, it is necessary that Speirs or Mix knowingly assisted the trustee, Sorrel, in taking a known risk, that there was no right to take, to the prejudice of the rights of another.

[60] As set out in the analysis of the evidence, both Speirs and Mix acknowledged that Sorrel used Partnership funds for its own benefit, for all manner of expenses including payroll, rent and even to pay revenue to other joint venture partners and for expenses on other wells. The trial judge made a finding of fact to this effect. There is no issue about the fact that funds not paid out for the benefit of the Partnership (and funds not used by Sorrel for its own benefit) were not refunded to the Partnership. Mix acknowledged that there was no monitoring of the use of these funds. It was some of those funds that were seized by the bank as part of the bankruptcy proceedings and were the subject of the earlier case before this Court. In effect, Sorrel treated the Partnership as a bank during the relevant time frame.

[61] There are two aspects of the way in which Sorrel dealt with Partnership funds that must be discussed at this point with the above test in mind. The first, that of commingling, took up most of the trial; the second is the issue of timing with respect to the draws or cash calls. It was the entire focus on these two features of the actions of Speirs and Mix that caused the trial judge to fall into error by incorrectly applying the *Air Canada* test.

[62] Both the LPA (7.11) and the JVA (13.3) state that funds of the Partnership shall not be commingled with Sorrel's funds. However, this Court, in its earlier decision, accepted the fact that commingling was authorized and found that it did not preclude the creation of a trust. An examination of the record shows that the issue of commingling dominated the trial. In the end, the trial judge found that it was a practice in the industry to commingle and that in doing so neither Speirs nor Mix knowingly participated in any fraudulent or dishonest activity. Thus, although other interpretations may have been possible, it has been found that simply commingling the Partnership funds with those of Sorrel *after* a cash call was not a breach of trust by Sorrel. It follows that the actions of Speirs and Mix in commingling the funds could not be the basis for their personal liability.

[63] The second, the cash calls and their timing, is central to the breach by the trustee and the consequential liability of Speirs and Mix because it was the means by which funds came to be in the general account of the trustee, Sorrel, and therefore available to it for its own benefit and at risk to the actions of creditors, just as in *Air Canada*.

[64] There is provision in the documents for advance cash calls. Under clause 3.3 of the JVA, the Partnership agreed to "advance such Capital Contributions to pay Partnership Costs as and when invoiced by Sorrel." The definition of Partnership Costs included: "80% of Drilling Costs, Completion Costs and Equipping Costs with respect to Earning Wells." Drilling Costs were further defined as: "[T]he amount spent *or to be spent* (exclusive of Completion and Equipping Costs) in respect of drilling. Coring, logging and testing a well for the recovery of Oil and Gas...". Thus, the only categories of costs for which funds could be drawn down in advance were for drilling, completion and equipping. All other costs had to be incurred and all but paid prior to draw-down, and were to be reimbursed separately.

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[65] It was the AFE with back-up documentation that allowed the advance draws. Speirs testified that he was intimately familiar with what was being put forward and made sure each AFE was in order. Mix would then review it and they both would sign it.

[66] A review of Sorrel's situation at the end of December 1985 is rather telling. Drilling had been suspended because of the drop in the price of oil. Sorrel had a serious working capital deficit which Speirs and Mix were well aware of. There were outstanding invoices for drilling of only approximately $2,500. Yet AFE's were used to bring $780,000 from the Partnership into Sorrel. There was evidence, with which Speirs and Mix agreed, that Sorrel used these monies to pay its own operating costs, including rent and payroll.

[67] Drilling did commence in February and more funds were drawn down from the Partnership. Unfortunately the low oil prices and the working capital deficit continued. Sorrel was not only in the position of having used Partnership funds for purposes other than to benefit the Partnership but through its financial situation, taking a risk that the funds it held under the terms of the agreements, and on trust for the Partnership were vulnerable to creditors.

[68] The failure to make a critical payment to a bank, the Société Générale (Canada), crystallised the losses. The consequent receivership precluded any possibility of repayment of the moneys taken in breach of trust. While the explanation that Sorrel kept no copy of the critical documents and therefore the payment was forgotten, is unfortunate, it does not operate to reduce liability in any way.

[69] Applying the test to Speirs and Mix, they did knowingly assist Sorrel in obtaining cash advances and knowingly assisted in the use of those funds for Sorrel's benefit, which was a breach of the trust. Clearly, given Sorrel's financial position, the market and the consequential delay in drilling, Speirs and Mix knowingly assisted Sorrel in risking the loss or attachment by creditors of those funds and this risk was known to them. I find that Sorrel was, through Speirs and Mix, taking a risk it knew it had no right to take, to the prejudice of the rights of the Partnership. The breach of trust was, therefore, dishonest and fraudulent, according to the test in *Air Canada*.

Degree of knowledge of the stranger

[70] There is clear evidence that Speirs and Mix knew of the existence of the trust. It motivated Speirs to draft the documents in a particular way because of duties he knew he owed to more than one party and because of the risk of conflict of interest. Interestingly, Speirs testified that he did not want the Partnership to have a concern that Sorrel would have access to the Partnership's bank account for "anything other than effectively ... the operations of the partnership, so that Sorrel could not just sign cheques willy-nilly on their accounts". Mix described his concern about commingling that flowed from his knowledge that there remained a "partnership identity" on the Partnership funds drawn down.

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[71] This same knowledge supports a conclusion that they knew that when the funds were being used for Sorrel's operational expenses, in circumstances in which they knew that Sorrel did not have funds of its own to otherwise cover those expenses, what was being done was improper. This was actual knowledge.

[72] As for the reality that Partnership funds were, through Sorrel's vulnerability, put at risk of being seized by creditors, even if Speirs and Mix did not have actual knowledge of this situation, they were certainly wilful and reckless. They had subjective knowledge that Sorrel had a serious working overdraft, the market was depressed and they were refinancing. It is relevant here that they were fully informed as to Sorrel's financial weakness and the use of Partnership funds to support Sorrel's operation. Furthermore, the failure to deal with the payment to the bank, that fateful step that finally put Sorrel into bankruptcy, was certainly reckless with a predictable and disastrous result for the Partnership funds.

[73] Going back to the steps set out in *Gold,* with some amplification, and applying them to the facts in this case:

(1) There was a trust between Sorrel and the Partnership.

(2) Sorrel perpetrated a dishonest and fraudulent breach of trust when through a "dishonest and fraudulent design" that is through the "taking of a knowingly wrongful risk resulting in prejudice to the beneficiary", Sorrel used Partnership funds for its own benefit, thereby depriving the Partnership of them, and retained those funds in its own general account when it did not have sufficient funds of its own to pay its own expenses, thereby putting them at risk to action by creditors. The potential risk was realised when Sorrel failed to make a payment on its bank loan.

(3) Speirs and Mix each participated in and had actual knowledge of Sorrel's "dishonest and fraudulent breach of trust", that is, the "taking of a knowingly wrongful risk resulting in prejudice to the beneficiary". Each had actual knowledge that funds from the Partnership were being used for Sorrel's benefit, in breach of the trust. Each had subjective knowledge of Sorrel's vulnerable financial position and the depressed market. Given those known facts, each was reckless and wilfully blind to the risk the situation presented to the Partnership's trust funds in Sorrel's general account.

[74] In the result, Speirs and Mix are personally liable to the Partnership for Sorrel's breach of trust, with the exception, with respect to Mix, of the final cash call, where he was not involved in any way.

[75] Furthermore, although little evidence seems to have been directed to this point at trial and thus there was no finding by the trial judge, Speirs and Mix gained an indirect benefit through

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use of the Partnership funds to meet Sorrel's operating expenses, which was their company and employer, and was in turn obliged to pay, and did pay, their salaries (AB 641). This benefit is not irrelevant to the analysis applied to Speirs and Mix, where equitable principles are implicit in every step. It is interesting that in *Air Canada*, at the end of his analysis of the knowledge of the stranger, Justice Iacobucci noted that it was relevant that the stranger benefited from the breach of trust.

[76] Furthermore, as Justice La Forest said in the *Citadel* case, "knowing assistance" is fault-based liability. That being the case, it is appropriate to take a loss/benefit view of the facts. The loss to the Partnership was significant. Over $1,000,000 was drawn down over a short period of time. While it could be argued that the cash calls were initially properly executed, the funds drawn down were not used in accordance with the stipulated purpose of paying the Partnership's expenses. The reality was that the largest part of the funds was deposited in Sorrel's account in late December, when drilling was on hold and no accounts for drilling costs were even due, much less invoiced. The system allowed Sorrel to obtain Partnership funds quickly and efficiently, so there was no need for Sorrel to have drawn them down early. By contrast, the benefit to Sorrel was significant. The Partnership funds in its general account no doubt made it look more financially robust than it really was, and allowed current expenses to be paid.

[77] The confirming test to be applied to the facts of this case is from *Montagu's Settlement Trusts*: is a stranger's conscience sufficiently affected to justify the imposition of personal liability? The answer, based on the facts of this case and the application of the *Air Canada* test, has to be yes.

The Errors by the Trial Judge

[78] As I have already stated, I find no merit in the appellant's argument that the trial judge erred in not finding that Speirs and Mix were in a direct fiduciary relationship with the Partnership.

[79] The appellant also alleges that the trial judge erred in failing to conclude that Speirs and Mix were liable as constructive trustees, and specifically alleges that the trial judge failed to properly apply the "knowingly assistance" part of the *Air Canada* test.

[80] Further, the appellant says the trial judge erred in accepting the practice of the industry as a defence and finding that it could override specific fiduciary obligations.

[81] The respondents took the position that they did not know of the trust between the Partnership and Sorrel. Their argument was that, if there was such a trust, it was not breached because Sorrel intended to use the funds to pay Partnership debts. The argument is not only not persuasive in light of the circumstances, but irrelevant in view of this Court's previous finding that Sorrel was not entitled to use the Partnership funds for its own purposes, whether before or after a cash call was executed.

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[82] As regards the actions of each, it was their position that since there was no evidence of dishonesty or fraud they could not be held liable.

[83] The trial judge outlined the issues, as he saw them, as follows: (at p. 62)

> The issues in this action, as defined by the plaintiff, are firstly, whether the relationship between [Sorrel] and the [Partnership] was one of trust. If there was a breach of the trust, was it fraudulent and dishonest? Did the individual defendants know of the existence of the trust? Were the individual defendants themselves fiduciaries? If they were, did they breach their duty to the [Partnership]?
>
> Perhaps the issues might be summed up in this way:
>
> Did the individual defendants have a fiduciary duty to the plaintiff? If so, did they breach that duty in transferring funds into [Sorrel's] account and allowing those funds to be used for purposes other than [Partnership] business?

[84] Missing from the statement of the issues is the analysis necessary to assess whether Speirs and Mix were constructive trustees, that is whether either "knowingly assisted" in Sorrel's breach. There is a merging of the analysis for liability as a direct trustee and as a constructive trustee.

[85] However, later in his judgment, the trial judge acknowledges the argument of counsel for the Partnership on "knowingly assisted" and sets out extracts of the *Air Canada* judgment and says he accepts it as the law.

[86] He characterizes the appellant as seeking to attach "blameworthiness" to Speirs and Mix. In applying the *Air Canada* tests he points out that the Agreements allow for advance cash draws and commingling and finds that these practices are accepted by both the oil and gas industry and the auditing and accounting community. He also noted that Sorrel had every intention of paying the bills related to the wells. He found that the actions of the bank, Société Générale, came as a "complete and disastrous surprise".

[87] He concluded his analysis as follows: (p.65)

> An important part of the [Partnership's] claim appears to be that [Sorrel] transferred the funds into its account with the knowledge that they would not be used immediately (or even within the near future) to pay [Partnership] accounts. Further, that they would be used in the interim to pay, among other things, [Sorrel] accounts. *I am satisfied that what* [Sorrel] *was doing was an accepted practice*

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> *at the time. Given that situation, even if it did constitute a breach of trust, it was not fraudulent and dishonest nor morally reprehensible.*
>
> With respect to the individual defendants, they were strangers to the trust and were not constructive trustees. Given their frame of mind at the time–that they believed what [Sorrel] was doing was acceptable and quite proper–*they can hardly be said to have acted in bad faith or dishonestly. They were not taking any risk which they knew they had no right to take.*
>
> (Emphasis supplied)

[88] Although the trial judge did review the conduct of Speirs and Mix on the basis of the appellant's argument that they were liable as constructive trustees using the *Air Canada* test, he made several errors of law and an error of fact.

Errors of Law

[89] Under the *Air Canada* test, it is not necessary that the actions of the strangers, Speirs and Mix, be "dishonest", "blameworthy" or in "bad faith". Indeed Justice Iacobucci said, at pp. 617-18:

> It must be remembered that it is the nature of the breach of trust that is under consideration at this point in the analysis, rather than the intent or knowledge of the stranger to the trust. That is, the issue here is whether the breach of trust was fraudulent and dishonest, not whether the appellant's actions should be so characterized.
>
> ...
>
> It is unnecessary therefore, to find that the appellant himself acted in bad faith or dishonestly.

[90] Thus, the trial judge erred in concluding that Speirs and Mix could not be liable because they did not act in bad faith or dishonestly. The test under *Air Canada* was whether either "knowingly assisted" in the "dishonest and fraudulent" design, that is in Sorrel taking "a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take". The trial judge did not properly apply the *Air Canada* test and thus made an error of law. On a proper analysis Speirs and Mix must be found to have "knowingly assisted" Sorrel in its breach of trust with the Partnership.

[91] Although the trial judge accepted that Sorrel breached its trust with the Partnership by using Partnership funds for its own benefit, he found that it was an accepted practice in the oil

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and gas industry for parties in a trust relationship and that it was therefore not dishonest, fraudulent or morally reprehensible.

[92] The first question raised by this finding is whether it could be said that there is such a practice and, secondly, even if there is, whether it is a defence to a clear breach of trust.

[93] In fact there was expert evidence from the chief financial officer of an oil and gas company that, like Sorrel, acted as a general partner in numerous limited partnerships, such as the Partnership. He stated that limited partnership funds were used only to pay limited partnership costs and not to finance the general operations of the general partner.

[94] An examination of the record of the trial shows that the evidence focused on whether commingling of funds was accepted practice. There is insufficient evidence on the record to warrant a finding that there was an accepted practice of allowing such a breach of fiduciary duties.

[95] In any case, fiduciary duties cannot be overridden or destroyed by an accepted practice. The standard of care is set by the court, with reference to accepted practice, but the court may in certain circumstances find that the practice itself is negligent. (See *Roberge* v. *Bolduc,* [1991] 1 S.C.R. 374 (practice of notaries regarding title searches fell below standard of care); *Waldick* v. *Malcolm*, [1991] 2 S.C.R. 456 (local custom of not salting or sanding ice negligent in face of statutory duties); *ter Neuzen* v. *Korn,* [1995] 3 S.C.R. 674 (standard medical practice found to be negligent).) It is not acceptable for a trustee to use trust funds for its own purposes, even in the expectation that it will be able to repay those funds.

[96] It was an error of law for the trial judge to conclude that the accepted practice in this case (even if it existed), which breached fiduciary duties, shielded either the trustee or the strangers to the trust from liability.

Of fact

[97] The trial judge found that Speirs and Mix “were not taking any risk which they knew they had no right to take”. That finding of fact is not supported by the evidence. I will not review the evidence again but both Speirs and Mix knew that Sorrel was using Partnership funds for its own benefit. They knew that Sorrel was making cash calls when drilling had not even occurred nor invoices rendered, and that Sorrel would not have to pay for the drilling costs for months. They also knew Sorrel was seriously cash starved. Sorrel drew down more than $1,000,000 and placed it into its general account, and Speirs and Mix knew that those funds were being used for Sorrel’s operating expenses, and also that they were vulnerable to creditors. It was an error of fact to find they did not know that Sorrel was taking a risk it had no right to take.

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[98] The standard of review of an error of fact is palpable and overriding error: see *Toneguzzo-Norvell* v. *Burnaby Hospital*, [1994] 2 W.W.R. 609, at para.13, *per* McLachlin J. I consider that there is such an error in the judge's assessment of the facts.

Conclusion on Trust

[99] The trial judge made errors of law and of fact. On a proper application of the law as set out in *Air Canada*, Speirs and Mix must be held liable for the loss suffered by the Partnership from Sorrel's breach of trust. However, as Mix did not participate in the final cash call, his liability must be reduced by the amount of the last cash call.

DAMAGES

[100] In a supplementary judgment, the trial judge held that, had he found a breach of fiduciary duty, he would have set the quantum of damages in the amount of $1,076,000, from which he would have deducted amounts received by Partnership, namely: $250,000 which was received from monies paid into court through the bankruptcy proceedings and the amount of $191,000 received by the Partnership as a Petroleum Incentive Payment (PIP). The Partnership appeals the ruling on the PIP. The argument is that they "are entitled to receive the amount of the funds improperly handled which would include the $191,000".

[101] The starting point, as LaForest J. noted in *Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377 at p. 440, is that "the proper approach to damages for breach of a fiduciary duty is restitutionary", and referred to "the need to put special pressure on those in positions of trust and power" (at p. 452). Although in that judgment he recognised that there is to be some flexibility in remedies in equity and, in particular, that they should not be out of proportion with the defendant's behaviour (at p. 444), Trustees must be held to a high standard of care. Speirs and Mix are *prima facie* liable, together with Sorrel, for the full amount that was misappropriated by Sorrel.

[102] The argument for crediting the PIP is grounded in the nature of the Partnership as an investment. Thus, the funds appropriated by Sorrel would have been spent on the wells, and the PIP was part of the money that would have come back from those wells. According to this argument, the Partnership cannot have its funds *and* the PIP that those funds created.

[103] The problem with this argument is that it contradicts the basic restitutionary approach already outlined. Furthermore, the relevant causal link must be between the *misappropriation* of the joint venture funds and the PIP. The PIP does not amount to a repayment of the misused funds. It was an incentive paid by the government, and qualification for the incentive was based on the activities of the joint venture. While drilling the wells created the circumstances which led to the PIP, it would have been received *whether or not* there was a breach of fiduciary duty. It cannot, from this point of view, be used to reduce liability.

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[104] In the case quoted above, LaForest J. continued: “the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred.” In the present case, had the breach not occurred, the Partnership funds would not have been drawn down or, if they had, they would only have been used to pay the authorized costs. Those costs that were paid have already been deducted. (I leave aside the question of whether the creditors whose debts arose out of the drilling could have made a claim on these funds.) The PIP would still have been received. The trial judge made an error in principle in his assessment of damages. The Partnership is therefore entitled to the full amount of $1,076,000, less the $250,000 paid into court.

COSTS

[105] The trial judge awarded third party costs against the appellant in a separate ruling (*Sorrel 1985 Limited Partnership* v. *Sorrel Resources Ltd.* (1997), 204 A.R. 7). The trial judge was aware that the usual rule is that an unsuccessful plaintiff (here the Partnership) will not be charged with third party costs. However, he found this to be an unusual case as the third party was the firm of accountants upon whose advice Mix and Speirs had relied, and awarded costs on the grounds that the joinder was inevitable.

[106] The judge’s ruling was based on the failure of the plaintiff at trial. In view of my conclusion that Mix and Speirs are constructive trustees and personally liable to the Partnership, that basis for the award of third party costs against the Partnership has disappeared. The award of costs is accordingly overturned. The joinder of the third party may have been inevitable, but the success of the plaintiff on appeal raises the question of the liability of the accountants to Sorrel, Speirs and Mix, which was not ruled upon by the judge.

CONCLUSION

[107] The appeal as to liability and damages is allowed and the respondents, Speirs and Mix are jointly and severally liable to the appellant in the amount of $688,000. Speirs is also liable for an additional $138,000. The appeal of the award of third party costs is also allowed.

[108] With respect to interest, while I recognise that ordinarily there would be an award of pre-judgment interest, I must also recognise that it is appropriate in certain circumstances to grant relief. In my view, in all of the circumstances of this case, it is appropriate to award interest from the date of the trial judge’s decision in this action, that is, March 10, 1997. The rate of interest will be that prescribed in accordance with the *Judgment Interest Act*, S.A. 1984, c. J-0.5.

APPEAL HEARD on March 2nd and 3rd , 2000

MEMORANDUM FILED at CALGARY, Alberta,
this 27th day of September, 2000

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_____
PICARD J.A.

I Concur: _____
As authorized to sign for: FRASER C.J.A.

I Concur:_____
As authorized to sign for: BRACCO J.A.

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TAB 70

In the Court of Appeal of Alberta

Citation: Swanby v Tru-Square Homes Ltd, 2023 ABCA 224

Date: 20230728
Docket: 2201-0099AC
Registry: Calgary

2023 ABCA 224 (CanLII)

Between:

Craig Swanby and Georgina Swanby

Respondents
Plaintiffs/Defendants by Counterclaim

- and -

Tru-Square Homes Ltd.

Not Party to the Appeal
Defendant/Plaintiff by Counterclaim

- and -

James Frederick Metcalfe

Appellant
Defendant/Plaintiff by Counterclaim

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Kevin Feehan
The Honourable Justice Bernette Ho

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Justice M.D. Gates
Dated the 18th day of March, 2022
Filed on the 6th day of April, 2022
(2022 ABQB 215, Docket: 1301 10836)

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Memorandum of Judgment

The Court:

I. Overview

[1] James Metcalfe appeals a judgment finding him jointly and severally liable in tort along with Tru-Square Homes Ltd, in which he owns 99% of the shares. The trial judge found a breach of the standard of care owed to the respondents Craig and Georgina Swanby in the construction of their residence by Tru-Square. The claim advanced is a pure economic loss claim; there is no allegation of personal injury or actual property damage sustained by the Swanbys.

[2] There is no contest over the trial judge's findings that the contracts or the amendment or amendments to the contracts were between Tru-Square and the Swanbys, and that "no contractual remedy is available as against Metcalfe". There is also no contest over the trial judge's findings that Mr Metcalfe's actions throughout the construction project were not "sufficient to constitute fraud", nor whether Mr Metcalfe induced a breach of contract.

[3] The only substantive issue on appeal is whether the trial judge erred in finding Mr Metcalfe jointly and severally liable for the wrongful acts of Tru-Square.

[4] For the reasons below, the appeal is allowed.

II. Facts

[5] The Swanbys purchased land west of Carstairs in 2009 or 2010 for the purpose of constructing a family home. They initially retained a designer of large custom-built homes and an architectural draftsperson. Drawings were complete by mid to late 2010.

[6] The Swanbys had seen Tru-Square signs on homes in the Carstairs area and Mr Metcalfe was the next-door neighbour of Ms Swanby's brother.

[7] The Swanbys contacted Mr Metcalfe to see whether Tru-Square would be interested in acting as general contractor for the construction of the house. Mr Metcalfe initially turned down the prospect of this contract on behalf of Tru-Square, indicating that he was "looking to wind-up his construction business and was not really interested in taking on the project".

[8] In the spring of 2011, the Swanbys contacted Mr Metcalfe again and he indicated Tru-Square was "possibly interested, but only in terms of construction to the lock-up stage", including pouring the foundation, framing, and installation of doors and windows.

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[9] In July and August 2011, Mr Metcalfe provided the Swanbys with several quotes on the project. The initial quote was for $500,000 to complete construction to the lock-up stage. The second quote, dated July 6, 2011, was for $578,875.40, adding interior drywall and exterior stucco to the original lock-up quote. The Swanbys advised that for financing purposes their bank required a quote for the entire cost of building the home, including all interior finishing. So a third quote was provided, dated August 4, 2011, totalling $1,064,348 for the entire construction project. A fourth quote was provided on August 21, 2011, listing a number of items totalling $352,251 with an addition of $659,510 for a total of $1,011,761.

[10] On August 22, 2011 the Swanbys entered into one or more contracts with Tru-Square. The contracts were always only with Tru-Square, not Mr Metcalfe, and Mr Metcalfe signed the contracts only as the principal of Tru-Square, and not in a personal capacity. Despite the signing of multiple contracts, the parties agreed on August 22, 2011 that Tru-Square would build the house "to the lock-up stage only, with framing to start in late September 2011 and completion to lock-up stage by early 2012".

[11] Construction work began in September 2011, with Tru-Square acting as general contractor and all actual work being completed by subcontractors. Mr Metcalfe was not present during construction over significant periods of time from 2011 to 2013.

[12] In May 2013, an issue arose with respect to leaking windows and water leaking through the soffits. Tru-Square took the position that fixing windows was not its responsibility, and shortly thereafter left the construction site and never returned.

[13] On or about July 17, 2013, Ms Swanby served Mr Metcalfe with a letter listing extensive alleged deficiencies. The Swanbys hired a different general contracting firm to begin investigative and demolition work, and a building envelope engineer and structural engineer to identify construction and building code deficiencies. Remediation work began in July or August 2014 and the Swanbys took possession of a fully remediated house in late August or early September 2015, more than two years after the initial occupancy date.

[14] On September 13, 2013, the Swanbys filed a statement of claim against Tru-Square, Mr Metcalfe, and his spouse Joyce Metcalfe. The claim was amended on March 12, 2014. They alleged 49 separate deficiencies which they said were "the result of a deliberate plan to cut corners, deviate from the Building Contract requirements, the Plans, and the Code, and to obtain the Plaintiffs' funds without providing the value or quality that the Plaintiffs paid for". They alleged the house was unsafe and not fit for habitation and pleaded that "Tru-Square is liable to the Plaintiffs for breach of contract".

[15] The Swanbys additionally alleged that both Tru-Square and Mr Metcalfe were "liable to the Plaintiffs in negligence", had "engaged from the outset in a fraudulent scheme", had "committed a fraud on the County and the building approval process", engaged in a "fraudulent

effort to cover up the Deficiencies", and deliberately mispresented the state of the project. They pleaded that Mr Metcalfe was "personally liable for such fraudulent conduct", and asked for aggravated damages, punitive damages, and injunctive relief. They sought a tracing of funds, an accounting, a declaration that they had an interest in a property owned by the Metcalfes, to which they said funds had been diverted, and damages of $1,000,000 for "breach of contract, negligence, conspiracy, unjust enrichment, breach of trust, breach of fiduciary duty, and fraud".

[16] A statement of defence was filed on September 17, 2014, a counterclaim was filed on April 23, 2014, and a trial was conducted over 26 days, commencing April 8 and completed on November 28, 2019.

[17] Reasons for Decision were issued March 18, 2022 (2022 ABQB 215) and the notice of appeal was filed April 14, 2022.

III. Trial Judge's Decision

[18] In his 772-paragraph decision, the trial judge comprehensively reviewed the facts and the allegations of deficiencies in the Swanby home. He concluded that the initial agreement reached between Tru-Square and the Swanbys on August 22, 2011 was to complete the house only to lock-up. He said Mr Metcalfe was "on site only occasionally during the framing process" and the "project did not proceed as rapidly as expected". He found that Tru-Square and Mr Metcalfe left the construction site in May or June 2013 and never returned. As a result, the Swanbys hired other parties to find and repair deficiencies and complete construction of the house.

[19] As to the Swanbys' allegation that Tru-Square and Mr Metcalfe should be held concurrently liable in contract and tort, he said it "makes no practical difference whether a case is assessed as a tort claim or a contract claim" as the "measure of damages is the same", but that contractual liability is limited to the specific contracting parties, except in cases of lifting the corporate veil.

[20] On this point he concluded:

> . . . Tru-Square breached its contract with the Plaintiffs. Contrary to their agreement, numerous aspects of the construction failed to meet Code standards, let alone the higher standard advocated by the Plaintiffs and their experts. Further, Tru-Square failed to provide proper supervision of the subcontractors.

However, as noted, he found that whatever its terms, the contract "was with Tru-Square only, not with Metcalfe", and that "no contractual remedy is available as against Metcalfe".

[21] As to liability in tort, the trial judge repeated three times that Mr Metcalfe acted in a negligent manner. He said Mr Metcalfe "was certainly negligent in his oversight of the project and

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in his dealings with the Plaintiffs" and he and Tru-Square together were "careless, even negligent" in billing for work not completed. He concluded by finding "the Defendants jointly and severally liable in tort for breach of the duty of care owed to the Plaintiffs in the construction of the Plaintiffs' residence". What he meant, of course, was that assuming a duty of care, they were in breach of the established standard of care. However, all three references involve Mr Metcalfe, sometimes collectively with Tru-Square, acting in his corporate capacity in the contractual relationship between Tru-Square and the Swanbys. None of those instances point to individual, independent liability on the part of Mr Metcalfe.

[22] The trial judge said the Swanbys sought to establish liability for Mr Metcalfe's "negligent performance of [his] contractual obligations", "via a number of different routes": inherently dangerous work, fraud, piercing the corporate veil, or inducing breach of contract. He did not say they sought to prove concurrent liability in tort as a separate route to liability, a claim different than piercing the corporate veil or these other allegations.

[23] In first addressing inherently dangerous work, he found the as-built condition of the deck "posed a significant risk to users of the deck and the outdoor space accessed from the basement directly beneath the deck", such that the "deck construction was inherently dangerous". He found "the as-built condition of the Bonus Room staircase posed a significant risk to the various trades who may have had occasion to use it during the course of construction" and to others who may have used the staircase in the future had it not been repaired.

[24] The trial judge said that in considering inherently dangerous work as one possible means to liability, he was "satisfied that [his] findings do not require proof of actual injury to persons or of actual collapse", relying upon ***Vargo v Hughes***, 2013 ABCA 96, paras 26, 27, 43, 544 AR 99. However, he acknowledged it was "not clear . . . that ***Vargo*** permits the Plaintiffs to recover from Metcalfe personally, as opposed to from Tru-Square". It appears the trial judge did not find inherently dangerous work by itself as a means of finding liability in negligence for Mr Metcalfe. The Swanbys agree that the trial judge "left open Metcalfe's personal liability for dangerous defects".

[25] On the question of fraud, as indicated, the trial judge was "not satisfied that Metcalfe's failure to disclose the construction deficiencies is sufficient to constitute fraud", and he was "not prepared to find that his conduct [in his oversight of the project and dealings with the Swanbys] amounted to fraud". He also found the Swanbys had not established fraud with respect to invoices alleged to be "for work not completed" and "goods and services that were not provided". He concluded: "I am not prepared to find that Metcalfe's conduct was fraudulent, though I will say that I consider this case very close to the line".

[26] The trial judge reviewed numerous cases on piercing the corporate veil, although he blurred this analysis with that for concurrent liability in tort. He found that "Tru-Square was not a mere shell incorporated for the purpose of carrying out a wrongful act" and that it had operated as a

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successful, legitimate home-building business for some time prior to the events in question. On the other hand, he found that "Metcalfe treated himself and Tru-Square interchangeably and intermingled the corporation's affairs with his own" including mingling his and his wife's "personal money with Tru-Square's", thereby treating Tru-Square as his "alter ego". He concluded:

> . . . the combination of the sheer number of construction deficiencies, their pervasive nature affecting many aspects of the residence, the physical danger posed by some of these deficiencies, [and] Metcalfe's ultimate abandonment of the project rises to a level that warrants looking through the corporate shield.

[27] As a result, he found that "personal liability should attach to Metcalfe in these circumstances". This was reinforced by a finding that Mr Metcalfe had cancelled a general commercial insurance policy in the name of "Tru-Square Homes, o/b Jim Metcalfe", "as soon as the windows leaked and a substantial amount of water leaked into the interior of the residence" and also cancelled his Workers' Compensation Board coverage, such that "Metcalfe's failure to maintain insurance coverage should be visited upon him rather than the Plaintiffs".

[28] Finally, the trial judge rejected the Swanbys' claim against Mr Metcalfe for inducing breach of contract.

[29] In sum, the trial judge's decision rested on piercing the corporate veil, along with an apparent determination, without substantive analysis, that Mr Metcalfe and Tru-Square were jointly liable in tort.

IV. Grounds of Appeal

[30] Mr Metcalfe submits the trial judge erred in law in determining that the corporate veil should be pierced, and made errors of fact in accepting the evidence of the Swanbys and their witnesses over his evidence and that of his witnesses.

V. Standard of Review

[31] The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: ***Housen v Nikolaisen***, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235.

VI. Analysis

[32] The concept of separate legal personality was established in ***Salomon v Salomon & Co***, [1897] AC 22, 22-32, 51-54 (HL), in which the court said: "either the limited company [is] a legal

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entity or it [is] not. If it [is], the business belong[s] to it and not to Mr. Salomon"; and further, "the company is at law a different person altogether from subscribers to the memorandum". That distinction is the "corporate veil" between the company and its owner.

[33] The Alberta *Business Corporations Act*, RSA 2000, c B-9, ss 16(1), 46(1), provides for a corporation establishing a separate corporate personality from its shareholders, with no exception for single shareholder corporations. Additionally, the *Interpretation Act*, RSA 2000, c I-8, s 16, provides that the establishment of a corporation vests in the corporation the right to contract and be contracted with in its corporate name, makes the corporation liable to be sued in its corporate name, and exempts from personal liability individual members of the corporation.

[34] Courts are generally unwilling to lift or pierce the corporate veil unless required to do so by statute or in the face of extraordinary circumstances: Kevin P McGuinness, *Canadian Business Corporations Law*, 3rd ed (Toronto: LexisNexis, 2017), vol 1, 7.47. It requires a court to disregard the fundamental principle of separate identity and view the corporation as an "agent" or "puppet" of its controlling shareholder.

[35] However, this is not truly a case of piercing the corporate veil. It is a case of alleged concurrent liability in tort. The analysis is completely different. The fundamental flaw in the trial judge's reasoning is his failure to distinguish between these two distinct doctrines, an error in principle.

[36] The two separate concepts are discussed in ***Driving Force Inc v I Spy-Eagle Eyes Safety Inc***, 2022 ABCA 25, paras 48-49, 466 DLR (4th) 292:

> Liability in tort is primarily personal; a tort arises when the tortfeasor breaches a duty imposed on him or her by the law of tort. Corporations are considered to be separate legal persons, with their own rights and obligations; their shareholders and directors are not personally liable for the corporation's obligations. Corporations, however, can only act through human agents, and any corporate tort generally involves concurrent human actions. There is thus a conflict between these two basic principles: personal liability in tort, and the separate legal personality of corporations.
>
> This engages two separate but overlapping concepts. There are some occasions where the law will "lift the corporate veil", and find the directing minds behind the corporation responsible for the liabilities and obligations of the corporation. These situations are, however, an exception to the general rule that there is no personal liability for corporate obligations. The related concept is when the corporation and its human agents are concurrently liable in tort. When an individual is found to be concurrently liable for a tort committed in the name of a corporation, this is not truly an instance of "lifting the corporate veil". The liability of the individual is

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based on his or her breach of an individual duty owed in tort, not by lifting the corporate veil to impose the corporation's duty or liability on the individual.

[37] As set out in ***Hogarth v Rocky Mountain Slate Inc***, 2013 ABCA 57, para 110, 542 AR 289 and ***Hall v Stewart***, 2019 ABCA 98, para 18, 82 Alta LR (6th) 233, there are a number of factors to be considered in determining whether concurrent personal liability should be imposed for corporate torts:

(a) Whether the negligent act was committed while engaged in the business of the corporation, and whether the negligence of the employee was contemporaneous with that of the corporation;

(b) Whether the individual was pursuing any personal interest beyond the corporate interest;

(c) Whether the director or corporate representative owed a separate and distinct duty of care towards the injured party;

(d) Whether the conduct was "in the best interests of the company";

(e) Whether the plaintiff voluntarily dealt with the limited liability corporation, or had the corporate relationship "imposed" on it;

(f) The expectations of the parties;

(g) Whether the tort was "independent";

(h) The exception in ***Said v Butt***, [1920] 3 KB 497 [where the director or servant actually takes part in or authorizes such torts as assault, trespass to property, nuisance, or inducing breach of contract];

(i) The nature of the tort, and particularly whether it was an intentional tort;

(j) Whether the damage was physical or economic.

See also ***Driving Force***, paras 64-66; ***Parks v McAvoy***, 2023 ABCA 211, paras 45, 51; and ***Blacklaws v Morrow***, 2000 ABCA 175, paras 48, 50, 51, 66, 81, 187 DLR (4th) 614, leave ref'd [2001] 1 SCR vii.

[38] The trial judge found that Mr Metcalfe acted in a negligent manner in his oversight of the project and dealings with the plaintiffs, and acted with carelessness in billing for work not properly completed. The finding of "negligence" means that the standard of care was breached. Personal liability on Mr Metcalf, however, depends on him owing a separate, personal duty of care in tort.

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[39] Applying the criteria in ***Hogarth***, ***Hall***, and ***Driving Force***, any negligent act committed was while Mr Metcalfe was engaged in the business of the corporation, and contemporaneous with that of the corporation. There was no finding by the trial judge that Mr Metcalfe was pursuing any personal interest beyond the corporate interest, despite the allegations of fraud. There was no finding by the trial judge that Mr Metcalfe owed a separate and distinct duty of care towards the Swanbys, separate and apart from that owed by Tru-Square. Mr Metcalfe acted in the interests of Tru-Square, and not for some individual and distinct interest of his own. The Swanbys voluntarily dealt with Tru-Square; they did not have the corporate relationship imposed on them. The expectations of the parties were that Tru-Square would act as a general contractor supervising subcontractors in the construction of the Swanbys' home. Mr Metcalfe was personally out of the country for much of that contract period, and the Swanbys were aware for the most part of his proposed extended absences.

[40] There is no evidence that any allegations of tort against Mr Metcalfe were independent from allegations of tort or breach of contract against Tru-Square. The alleged torts against Mr Metcalfe were in pure economic loss, a non-intentional tort, not the type of tort in which concurrent liability has been employed: assault, trespass, nuisance, or personal injury.

[41] All of these factors point to the conclusion that there is no independent tort liability on the part of Mr Metcalfe, separate and apart from the liability found in Tru-Square. The only available remedy for the Swanbys is against Tru-Square. Personal liability cannot be imposed on human agents of the corporation just based on "the circumstances of the case", as the trial judge implied.

[42] The trial judge erred in specifically determining not to follow binding precedent, ***Hall*** and ***Hogarth***, when he said he found those cases "difficult to reconcile" with earlier cases, and that "each case will be specific to its own context and circumstances". The trial judge was bound by those decisions. The reason the trial judge found these cases "difficult to reconcile" is because he conflated the concepts of concurrent liability in tort and piercing the corporate veil. ***Hall*** and ***Hogarth*** address concurrent liability in tort; the trial judge dismissed these cases in the context of piercing the corporate veil.

[43] Additionally, the trial judge placed too much reliance on this Court's decision in ***Aubin v Petrone***, 2020 ABCA 13, paras 21-24, 33-36, 40, 59, 68, 100 Alta LR (6th) 10. ***Aubin*** is a post-judgment decision about how a family property judgment can be executed when family wealth is tied up in a corporation, and one spouse, the directing will and mind of the corporation, is purposely blocking payment. ***Aubin*** is not a case of piercing the corporate veil in order to make the shareholder liable for the obligations of the corporation. If anything, it is the opposite: an attempt to make the corporation liable for the family law obligation of the shareholder. Nor is it a case of concurrent liability by the shareholder and the corporation in tort. It involves a *sui generis* situation, and has little application outside family law. However, before judgment is obtained, the principles of piercing the corporate veil and the concurrent liability in tort apply equally in family

law. As indicated in ***Driving Force***, para 54, ***Aubin*** has "little to offer outside that context", as it was coloured by considerations of corporate oppression.

[44] As a result, the trial judge's conclusion that "personal liability should attach to Metcalfe in these circumstances" was unprincipled and unjustified, as the route to that conclusion was in error.

VII. Conclusion

[45] The appeal is allowed. Mr Metcalfe is not jointly liable for the negligence of Tru-Square.

Appeal heard on May 5, 2023

Memorandum filed at Calgary, Alberta
this 28th day of July, 2023

Slatter J.A.

Feehan J.A.

Authorized to sign for: Ho J.A.

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Appearances:

C.C. Babiuk/B. Frenken
for the Respondents

Appellant J.F. Metcalfe

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TAB 71

CITATION: Wekerle v. Arbour 2025 ONSC 1456
COURT FILE NO.: CV-22-00689774-00A1
DATE: 20250307

SUPERIOR COURT OF JUSTICE - ONTARIO

2025 ONSC 1456 (CanLII)

RE: MICHAEL WEKERLE, WEKERLOO DEVELOPMENTS INC., WATERLOO INNOVATION NETWORK INC., WATERLOO INNOVATION NETWORK 1 INC., WATERLOO INNOVATION NETWORK 2 INC., WATERLOO INNOVATION NETWORK 3 INC., WATERLOO INNOVATION NETWORK 385 INC., WATERLOO INNOVATION NETWORK 405 INC., WATERLOO INNOVATION NETWORK 450 INC. and WATERLOO INNOVATION NETWORK 460 INC.

Plaintiffs

AND:

MARK ALLAN ARBOUR, WATERLOO INNOVATION NETWORK PM INC., JEFF MCQUITTY, 2427204 ONTARIO LTD., TAMMY MARIE ARBOUR AKA TAMMY MONA LISA ARBOUR, TYSON JAMES COMTOIS-ARBOUR AKA TYSON ARBOUR, AVRIL MARIE LAVALLEE, MCCARTER GRESPAN BEYNON WEIR PC, CHRIS KOTSEFF, CBRE LIMITED, JONES LANG LASALLE REAL ESTATE SERVICES, INC., COREY JOHN DELANEY, JOHN DOE, JANE DOE, ABC CORPORATION, and XYZ CORPORATION

Defendants

AND:

PRICEWATERHOUSECOOPERS LLP and COREY POECHMAN

Third Parties

BEFORE: L. Brownstone J.

COUNSEL: *Paul H. Starkman and Calvin Zhang*, for the Defendants Mark Allen Arbour, Waterloo Innovation Network PM Inc., Tammy Marie Arbour, Tyson James Comtois-Arbour, 2427204 Ontario Ltd.) (responding parties)

Lucas E. Lung and Maya Kotob, for the Third Party PricewaterhouseCoopers LLP (moving party)

Jason Woycheshyn and Manon Landry, for the Third Party Corey Poechman

HEARD: February 13, 2025

ENDORSEMENT

[1] This motion to strike arises in the context of four proceedings that I am case managing. The action bearing court file number CV-22-00689774 is commonly referred to by the parties as "the main action" or "the fraud action". Several of the defendants in that action[1], referred to collectively here as "the Arbour defendants", recently issued a third-party claim against PricewaterhouseCoopers and Mr. Poechman. The Arbour defendants' third-party claim seeks contribution and indemnity from the third parties for any amounts for which the Arbour defendants are found liable to the plaintiffs in the main action. I refer to the plaintiffs as the plaintiffs or the Wekerle group.

[2] The third parties, PwC and Mr. Poechman, move to strike the claim against them on the basis that it discloses no reasonable cause of action. The third parties also argue that the claim is so devoid of material facts that it is fatally deficient and ought to be struck. They argue that the claim's deficiencies are fundamental and cannot be cured by amendments. Therefore, leave to amend should not be granted.

[3] The Arbour defendants argue that amendments are not required, but, in the alternative, they should be granted leave to amend if the pleadings are struck.

[4] To understand the arguments, the underlying action must be reviewed.

The Main Action

The amended statement of claim

[5] The statement of claim was issued on November 4, 2022, and amended on May 17, 2024. The amended claim is extensive. What follows is a bare overview of its contents, particularly as they relate to the Arbour defendants.

[6] The allegations in the claim arise from a business relationship between Mr. Wekerle and Mr. Arbour. In brief, in about 2014, Mr. Wekerle began to purchase some of BlackBerry's real estate in Waterloo, Ontario. Mr. Wekerle incorporated separate holding companies for the purchase of each property (the various Waterloo Innovation Network Inc. (or WIN) plaintiffs, referred to as the WIN Holdcos). Wekerloo Developments Inc. is an investment holding company and the parent company of the WIN Holdcos.

[7] Mr. Wekerle also incorporated the defendant WIN PM as the property management entity for the properties purchased by each WIN Holdco.

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[1] Mark Allen Arbour, Waterloo Innovation Network PM Inc., Tammy Marie Arbour, Tyson James Comtois-Arbour, and 2427204 Ontario Ltd.

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[8] Mr. Wekerle met Mr. Arbour and hired him initially as a property manager for the Holdcos's properties. Over time, Mr. Arbour's responsibilities increased. Mr. Wekerle made Mr. Arbour a signing officer for the WIN Holdcos and WIN PM, and Chief Operating Officer of Wekerloo.

[9] In 2019, Mr. Wekerle transferred the shares of WIN PM to Mr. Arbour. Mr. Wekerle claims that the transfer was temporary, and that he remained the beneficial owner of WIN PM. Mr. Arbour disagrees.

[10] The claim alleges that several years after the WIN PM share transfer, Mr. Wekerle hired Deloitte to obtain some financial information from Mr. Arbour about WIN PM and the WIN Holdcos. Mr. Arbour, according to the claim, was not very responsive and resigned abruptly shortly thereafter. The claim alleges that Mr. Wekerle then discovered that the Arbour defendants had perpetrated a significant fraud against the Wekerle group. The claim alleges, among other things, that Mr. Arbour unlawfully sold assets, misappropriated funds, received secret commissions, and gave himself and others unauthorized bonuses, diverting millions of dollars from the Wekerle group for the personal benefit of the Arbour defendants.

[11] The amended claim seeks damages in the amount of $15 million and other relief for fraud, conspiracy, conversion, breach of trust, breach of contract and unjust enrichment. In addition to the Arbour defendants, the plaintiffs claim against some legal and real estate professionals.

[12] Additionally, one of the defendants in the main action is Corey Delaney. Mr. Delaney is a chartered professional accountant. The claim alleges Mr. Delaney was engaged to provide financial and accounting advice to WIN PM and the WIN Holdcos. The claim alleges that "Delaney's failure to identify and investigate various badges of fraud resulted in the issuance of materially misleading financial statements." The plaintiffs sue Mr. Delaney for breach of contract, negligent misrepresentation, and negligence. The plaintiffs allege Mr. Delaney breached his duty of care to the Wekerle Group, and that "he knew or ought to have known it was reasonably foreseeable that a breach of Delaney's duties of care would result in injury to the Wekerle Group."

[13] The claim alleges that "[y]et more [of Arbour's frauds] were carried out in coordination with the McCarter Grespan Defendants, the Broker Defendants, and Delaney."

The crossclaims

[14] Mr. Delaney defended the action in a statement of defence and crossclaim dated November 21, 2022. That pleading states that Mr. Delaney "assisted WIN PM on a part-time basis in maintaining rent rolls, providing revenue forecasting and financial reporting, and assisted in carrying out due diligence for possible new properties. He was not responsible for any bookkeeping duties." Mr. Delaney identifies Mr. Poechman as the controller of WIN PM and the WIN Holdcos from 2019 to June 30, 2022. Mr. Delaney pleads that he relied on the accuracy of the bookkeeping and financial records prepared by others, and on the accuracy of the financial statements provided by PwC.

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[15] Mr. Delaney crossclaims against Mr. Arbour and WIN PM for contribution and indemnity for any amounts for which he is found liable to the plaintiffs. He does not assert third-party claims against PwC, Mr. Poechman, or anyone else he identifies in his pleading as assisting with the bookkeeping and financial records.

[16] The Arbour defendants, in a pleading dated January 19, 2023, defended the claim and crossclaimed against Mr. Delaney (and the other non-Arbour defendants) for contribution and indemnity with respect to any relief obtained by the plaintiffs against them.

The third-party claim

[17] On October 30, 2024, the Arbour defendants issued a third-party claim against PwC and Mr. Poechman. The claim seeks contribution and indemnity for any amounts for which the Arbour defendants may be found to be responsible to the plaintiff in the main action.

[18] The third-party claim is not lengthy. For ease of reference, I set out its salient paragraphs here:

> 3. The Third Party Plaintiffs repeat and rely on the facts stated in their Statement of Defence and Counterclaim. The Third Party Plaintiffs also rely upon the facts set out in paragraphs 176 to 183 of the Statement of Claim against Delaney to the extent necessary for this Third Party Claim.
>
> *Third Parties*
>
> 4. From 2014 to 2022, Delaney and PwC were responsible for preparing financial statements, rent rolls, financial forecasts and financial estimations for Wekerloo, WINPM and Wekerloo's subsidiary corporations in addition to Wekerle's personal tax returns. PwC also prepared and generated invoices for WINPM in relation to work performed for Wekereloo and its subsidiary corporations which invoices were paid by WINPM.
>
> 5. Poechman replaced Deanna Guitard and was the controller of WINPM from March 2019 to June 2022. As controller, Poechman prepared QuickBooks accounts for PwC to review and provided tax advice with respect to preparation of WINPM and Wekerloo Financial Statements and Tax Returns, which has a direct impact on the financials and tax obligations of Arbour and WINPM.
>
> 6. The administrator login credentials for WINPM's QuickBooks Online Account, were in the power, control and possession of Delaney and Poechman. Poechman was also responsible for HST filings, and monthly payroll source deductions of WINPM, Wekerloo and its subsidiary corporations.
>
> 7. From 2014 to January 1, 2019, Wekerloo, WINPM and Wekerloo subsidiary corporations were related corporations and allocations of shareholder loans and other payments were made by the Third Party Defendants. PwC, Poechman and

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Delaney acknowledged that after January 1, 2019, WINPM, Wekerloo, Wekerloo subsidiary corporations and Wekerle were no longer related parties from a tax point of view. Notwithstanding this knowledge, the Third Party Defendants continued to treat WINPM as a related party and thus continued to make entries in the books and accounts on the basis of related party status for the transfer of funds to and from Wekerle's Shareholders Account, which should not have been made in view of the end of the related party status among the above corporations and persons as of January 1, 2019, when Arbour became the Sole Shareholder and Director of WINPM.

8. After January 1, 2019, Wekerloo, including its subsidiary corporations, Wekerle and WINPM were no longer “related” parties for tax purposes, yet the Third Party Defendants negligently continued to prepare WINPM's Financial Statements and Tax Returns along with the Financial Statements and Tax Returns for Wekerloo and other subsidiary corporations.

9. The Third Party Defendants owed a duty of care to Arbour and WINPM in relation to the preparation of tax returns and financial statements in accordance with tax law and to provide their services in accordance with the standard of care of a reasonably competent tax professional providing such advice and services. The Third Party Defendants breached their duty and standard of care as set out above.

10. In addition, PwC, Delaney and Poechman had an obligation to advise Arbour and WINPM of a conflict of interest which existed in the circumstances when they represented WINPM and Arbour on the one hand and Wekerloo and Wekerloo's subsidiary corporations and Wekerle on the other hand with respect to the same issues. Arbour and WINPM were adverse in interest to Wekerloo, Wekerloo subsidiary corporations, Wekerle and other corporations owned by Wekerle. PwC, Delaney and Poechman owed fiduciary duties with respect to the provision of tax advice to Arbour and WINPM and had conflicting interests by continuing to represent Wekerloo, Wekerloo subsidiary corporations and Wekerle after Arbour purchased the shares on WINPM on or about January 1, 2019. The Third Party Defendants breached their duties by failing to perform their services in accordance with tax law and reasonably competent tax professionals and failing to advise of a conflict of interest that existed at that time.

11. The Third Party Plaintiffs claim contribution and indemnity in respect of the claims made against Arbour and WINPM in relation to provision of tax advice, preparation of financial statements and tax returns, and inaccurate and incomplete entries made in the Books of WINPM and failed to properly address payments made to and from WINPM and Wekerloo in relation to the Parties' Shareholders Account which were the responsibility of Delaney, Poechman and PwC.

Liability of Third Parties

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> 12. In the event the Plaintiffs are successful in the main Action, which claims are denied by the Third Party Plaintiffs, such damages were caused and/or contributed to by the negligence and/or breach of contract by the Third Party Defendants as set out above.

[19] That is, the third-party claim alleges the third parties provided the Arbour defendants with negligent advice and services regarding tax and HST filings, source deductions, treatment of shareholder accounts, tax returns, and financial statements not being prepared in accordance with tax law. In addition, the claim alleges that the third parties breached their fiduciary duties to the Arbour defendants by failing to advise the Arbour defendants that there was a conflict of interest since they worked for both the Arbour defendants and the Wekerle group after Arbour's share purchase of WIN PM in January 2019.

Striking a pleading as disclosing no cause of action

[20] To strike a pleading under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.). 1990, Reg. 194, the moving parties must show that it is plain and obvious that a claim cannot succeed; it must have no reasonable prospect of success: *R. v. Imperial Tobacco*, 2011 SCC 42, [2011] 3 SCR 45, at para. 17.

[21] The facts alleged in the pleading are to be accepted as true unless they are patently ridiculous or incapable of proof: *Imperial Tobacco*, at para. 22; r. 21.01(1)(b).

[22] The bar for the party moving to strike a claim is high. The pleading must be read generously in favour of the claimant.

[23] At the same time, motions to strike are a useful tool in weeding out hopeless claims and promoting litigation efficiency: *Imperial Tobacco*, at paras. 19-20.

[24] Claimants must clearly plead the facts. The facts as pleaded are the basis on which the court evaluates the possibility of the claim's success: *Imperial Tobacco* at para. 22.

[25] Here, the claim is only for contribution and indemnity. Presumably, this is because the case was brought within two years of the service of the statement of claim, but not within two years of the underlying actions complained of. The claim does not seek damages for alleged breach of contract, breach of fiduciary duty, or negligence on the part of the third parties to the Arbour defendants. The third-party claim must be analyzed as what it is on its face – a claim for contribution and indemnity.

The claim for contribution

Governing principles

[26] The law governing contribution among joint tortfeasors was recently reviewed by Centa J. in *Mulchan v. Evans*, 2022 ONSC 5354, at paras. 23-28.

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[27] Justice Centa reviewed the three categories of tortfeasors: joint tortfeasors who act together to cause the same damage, several tortfeasors whose separate acts combine to cause the same damage, and several tortfeasors whose acts combine to cause different damage. The first two categories of tortfeasors, whose conduct causes the same damage, are concurrent tortfeasors.

[28] Under the common law, joint tortfeasors (the first category) were jointly and severally liable to a plaintiff who had been harmed, while several concurrent tortfeasors (the second category) were severally liable. There was no right of contribution between several tortfeasors (the second and third categories).

[29] The *Negligence Act*, (now R.S.O. 1990, c. N.1) changed the common law, with the result that all concurrent tortfeasors (the first two categories) are jointly and severally liable to the injured party. Further, the *Negligence Act* provides for a statutory right of contribution and indemnity for concurrent tortfeasors. There remains no right of contribution among several tortfeasors whose acts caused different damages (the third category).

[30] While the Arbour defendants do not plead the *Negligence Act* in their third-party claim, their counsel made it clear in submissions that they intend to rely upon the Act in advancing their claim. The relevant provisions of the *Negligence Act* are the following:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.
>
> 2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.
>
> …
>
> 5. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.

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Positions of the parties

The third parties

[31] The third parties argue the Arbour defendants' claim for contribution cannot possibly succeed against them. In order for a claim for contribution to succeed, the person from whom contribution is sought must owe a duty to the plaintiff: *Imperial Tobacco* at para. 29; *Becker v McMurter*, 2015 ONSC 4207, 51 C.L.R. (4th) 161, at para. 33. The third-party claim alleges no such duty. Rather, it alleges that the third parties owed a duty of care to the Arbour defendants, not the plaintiffs. This cannot ground a claim for contribution.

The Arbour defendants

[32] The Arbour defendants disagree that in order to sustain a claim for contribution, the third parties must owe a duty to the plaintiff. They rely on case law which I will discuss below and on rule 29.01(a) which provides:

> 29.01 A defendant may commence a third party claim against any person who is not a party to the action and who,
>
> (a) is or may be liable to the defendant for all or part of the plaintiff's claim;

Analysis

Rule 29.01(a)

[33] Rule 29.01(a) cannot, in my view, supplant the substantive law concerning when a claim for contribution and/or indemnity may be available. That is, if there is a possible claim for contribution and/or indemnity against the third parties, the third-party claim is properly brought under rule 29.01(a). Rule 29.01(a) confers the ability to bring a claim but still requires that there be a viable legal basis for the defendant's claim. Rule 29.01(a) works in concert with the right to claim contribution and indemnity in order to bring efficiency to proceedings and avoid a multiplicity of proceedings. It provides the appropriate procedure for a properly founded claim.

The *Negligence Act* and the case law

[34] As noted, the Arbour defendants do not plead the *Negligence Act*, but raise it in their factum. The Arbour defendants do not plead that they are joint tortfeasors with the third parties, nor did they suggest such a theory of the case in their factum or in oral argument. Rather, they claim that the third parties are joint tortfeasors with Mr. Delaney and that they, the Arbour defendants, are the aggrieved party. They do not plead that the third parties breached any obligations to the plaintiffs. The breaches are all claimed to be towards the Arbour defendants.

[35] Under the *Negligence Act*, however, the Arbour defendants can only claim contribution and indemnity from joint tortfeasors. They do not allege that the third parties are joint tortfeasors

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with the Arbour defendants towards the plaintiffs. Rather, they allege that the third parties are joint tortfeasors with Mr. Delaney towards the Arbour defendants.

[36] The Supreme Court of Canada has held that in order for a claim for contribution to succeed, the person from whom contribution is sought must owe a duty to the plaintiff: *Imperial Tobacco* at para. 29.

[37] The Arbour defendants rely on *Tuffnail v. Meekes*, 2020 ONCA 340; 449 D.L.R. (4th) 478. There, Mr. Tuffnail had attended a wedding reception, after which he was seriously injured as a passenger in a car accident. Mr. Tuffnail and his family sued the driver of the car, the groom who had hosted the reception, and State Farm, his own automobile insurer from whom he had purchased underinsured motorist coverage. State Farm brought a third-party claim against the bartender for contribution and indemnity. State Farm alleged the bartender was negligent and/or breached the *Liquor License Act*, thereby causing or contributing to the accident. Because State Farm had not caused or contributed to Mr. Tuffnail's damages, it could not assert a right of contribution and indemnity against the bartender under s. 1 of the *Negligence Act*. Rather, it sought contribution and indemnity through its subrogated third-party claim.

[38] The court noted that in exercising its right of subrogation, an insurer advances only the cause of action that the insured would otherwise have against the tortfeasor. The court had to determine whether State Farm could proceed by way of a third-party claim in its own name. The third-party claim alleged negligence on the part of the third party vis-à-vis the plaintiff. The court stated at para. 50:

> I would add that even if an insurer's objective in bringing a third party claim is only to protect its right to subrogate in relation to amounts it is called upon to pay the insured plaintiff, and the insurer accordingly restricts its third party claim to a claim in contribution for amounts it is required to pay the insured plaintiff, such a claim is necessarily founded on the third party's potential responsibility for causing the insured's damages.

[39] I do not agree with the Arbour defendants' submission that in *Tuffnail*, the court "confirmed that direct liability to the plaintiff is not a prerequisite for the valid contribution claim and it is sufficient that the third party is potentially liable for the defendant's damages." Indeed, the court specifically noted that the claim was predicated on the third party's potential responsibility for causing the insured, that is, the plaintiff's, damages. The case considers the position of an insurer who proceeds by way of subrogated claim. The insurer stands in the place of the insured (in *Tuffnail*, the insured was the plaintiff). The insurer is advancing the claim the plaintiff would have had against the third party. Liability of the third party to the plaintiff was certainly required.

[40] The Arbour defendants also rely on *Ottawa Carleton Standard Corporation No. 838 v. Redevelopment Group*, 2019 ONSC 7005, 8 C.L.R. (5th) 346, at para. 19 for the proposition that third parties need not owe a duty to the plaintiffs to ground a claim for contribution and indemnity. That case does not support that proposition. Quite the opposite. That case provides that a

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defendant does not need an independent cause of action to make a third-party claim – it is sufficient that the third party owe a duty of care to the plaintiff.

[41] The question is not, as the Arbour defendants argue in their factum, whether a claim is available against parties not named by the plaintiffs in the original lawsuit. I agree with the Arbour defendants that of course it is. That is the nature of a third-party claim and specifically adverted to in section 5 of the *Negligence Act*. But that does not answer the question of whether a third-party claim for contribution must allege a duty owed to the plaintiff.

[42] I find, in accordance with *Imperial Tobacco* and the case law that follows it, that in order to claim contribution from the third parties, the Arbour defendants would have to allege the third parties owed duties to the plaintiff. The third-party claim makes no such allegation, nor was such an alternative position put forward in argument. In essence, the third-party claim as currently drafted is a claim for damages disguised as a claim for contribution. The claim for contribution cannot stand, given there is no alleged duty owing from the third parties to the plaintiff, and no basis on which the third parties and the Arbour defendants are said to be, or could be found to be, concurrent tortfeasors.

The claim for indemnity

Governing principles

[43] A right to indemnity may only arise by express or implied contract, or by implication if the circumstances demand a legal or equitable right to indemnify. *Addison & Leyen Ltd. v. Fraser Milner Casgrain LL*P, 2014 ABCA 230, 1 Alta. L.R. (6th) 166, at para. 22.

[44] A right to indemnity under an implied contract is different from a right to damages: *Addison* at para. 23.

[45] I will summarize the principles below, but I believe that excerpts from the case law are instructive on the genesis and scope of indemnification.

[46] In *McFee v. Joss*, (1925), 56 O.L.R. 578 (C.A.), [1925] 2 D.L.R. 105, the Court of Appeal explained where an implied indemnity may exist. There, the driver of the car had been negligent. The car's owner had been ordered to pay damages as the result of the negligent driver's accident. The court considered whether the negligent driver should have to indemnify the owner of the car for the damages that resulted from his conduct, which the owner had been required to pay. The court reasoned as follows.

> …[A]n implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tortfeasors in such a sense as to prevent recovery; that is, where the act done is not clearly illegal it itself. This right of indemnity is based upon the principle that every one is responsible for his own negligence, and if another is, by a judgment of a

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> Court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer.

[47] The Alberta Court of Appeal in *Addison* explained the roots of implied indemnity as being found in the principles of unjust enrichment. The court explained as follows:

> [34]… First, the common law of implied indemnity is rooted in the principles of restitution and unjust enrichment. An indemnity permits the reimbursement of damages paid by an innocent party to a third party on behalf of the true wrongdoer, where that wrongdoer should otherwise have been liable to pay. A right to reimbursement through an implied indemnity does not arise in every situation in which A becomes liable to C in connection with the negligence of B. That connection must be supported by a theory of legal or equitable liability between the third party and the party against whom the indemnity is sought (*Ryan v Dew Enterprises Ltd* at para 54).
>
> [35] A simple statement of this requirement is provided by Professor Charles Mitchell in his text, *The Law of Contribution and Reimbursement* (New York: Oxford University Press, 2003) at 5: "Claims for contribution and reimbursement lie between two parties who *both* initially owe legal liabilities to a third party" (emphasis added). Put another way, the circumstances must be such that the putative party against whom the indemnity was sought could have been liable to the third party for all or part of the claim against the party seeking the indemnity.
>
> …
>
> [40] An implied indemnity may arise where the wrongdoer's negligence causes damage to a third party for which the party seeking the indemnity is held liable. However, there must be a connection between the wrongdoer, the third party, and the damage.

[48] I note that the references to "third parties" in these excerpts equate to plaintiffs in the case before me.

[49] As stated by the Newfoundland Court of Appeal and cited by the Alberta Court of Appeal in *Addison*, "An example of a claim to indemnity arising from implication of law is where an act is done at the request of another, the act turns out to be injurious to a third party and in consequence of doing the act the doer incurs liability to the third party": *Ryan v Dew Enterprises Ltd*, 2014 NLCA 11, 347 Nfld. & P.E.I.R. 274, at para. 54.

[50] Equitable indemnity is a narrow doctrine: *Imperial Tobacco* at para. 147; *Addison* at paras. 29-30.

[51] To summarize, the right to indemnification may arise by express contract or by implication. A right to be indemnified is different than a right to damages. The implied right to be indemnified may arise in two ways. First, there may be an implied contract between the party seeking

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indemnification and the indemnifier. Second, where one person is compelled to pay damages that ought to have been paid by the "real" wrongdoer, those damages may be recovered from the wrongdoer. A party will be entitled to claim indemnification where the party is an innocent party who has been compelled to pay damages that were caused by another party in whole or in part. A party may claim indemnity from a party who could have been liable directly to a third party for all or part of the claim against the party seeking the indemnity.

Position of the parties

The third parties

[52] The third parties argue that there can be no claim for indemnity against them. As there is no express contract for indemnification, the Arbour defendants must be relying upon an implied indemnity. The third parties argue that, in order for there to be a right to indemnity, there must be a causal connection between the alleged wrongdoing of the party seeking indemnity, and the alleged wrongdoing of the proposed indemnifier. Here, they argue, there is no possible causal connection between the claim against the Arbour defendants and the Arbour defendants' claim against the third parties.

[53] That is, the statement of claim alleges the Arbour defendants engaged in various intentional wrongdoing, including wrongly taking control of WIN PM, misappropriating funds, taking secret commissions, and failing to repay a personal loan. The third-party claim alleges that the third parties breached their duty of care owed to the Arbour defendants in relation to the preparation of tax returns and financial statements, failed to advise the Arbour defendants of a conflict of interest in that the third parties provided services to both the Arbour defendants and the Wekerle group, and wrongly treated WINPM as a related party and thus continued to make entries in the books and accounts on the basis of related-party status when they should not have done so.

[54] The third parties argue there is no way to connect the claims of intentional misfeasance made in the amended statement of claim against the Arbour defendants with the claims that the third parties failed to give proper tax advice, failed to prepare proper financial statements, and caused inaccurate entries in WIN PM's books. Further, the third parties argue that indemnification is sought for liability that is wholly attributable to the Arbour defendants' own fraudulent or oppressive conduct. As stated by this court: "A defendant is not liable for any injuries for which the defendant's negligence is not a cause. Where a Plaintiff limits its claim to the damages that can be attributed to the fault of the Defendant, a third-party action for contribution and indemnity is properly struck out": *Becker* at para. 25.

The Arbour defendants

The Arbour defendants argue that they are entitled to seek contribution and indemnification even if the allegations against them are characterized as allegations of fraud. They argue that *Tzaras v. Tzaras*, 2016 ONSC 4717, 132 O.R. (3d) 471, stands for the proposition that contribution and indemnity can be sought even in cases of fraud.

Analysis

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[55] I return to the pleadings to ground the analysis.

[56] The third-party pleading seeks contribution and indemnity in respect of the claims made against Arbour and WINPM related to the provision of tax advice, preparation of financial statements and tax returns, inaccurate and incomplete entries in WINPM's books, and failure to properly address payments made to and from WINPM and Wekerloo in relation to the parties' shareholders accounts.

[57] The amended statement of claim does not claim against the Arbour defendants or Delaney for anything to do with tax advice. Therefore, there can be no claim for contribution and indemnity for amounts owing by the Arbour defendants to the plaintiffs for such claims.

[58] With respect to the remainder of the allegations the Arbour defendants make, the amended statement of claim alleges:

- Arbour would direct the controller, Lisa Biefer, on how to record transactions and enter bookkeeping, including inter-company journal entries that were later used by Delaney to construct financial records (at para. 105)

- Arbour directed tenants to pay rent to WIN PM instead of the WIN Holdcos. Arbour would direct Biefer to record the rent payments through WIN PM, not Wekerloo. As a consequence, WIN PM owes the WIN Holdcos. about $2,400,000 in rent (at paras. 109-111)

- Arbour misappropriated and transferred a large tax refund received by WIN 2 to WIN PM (at paras. 114-115)

- Arbour directed Delaney and McCarter Grespan to refuse Wekerle's access to financial documentation, and to release such documentation only to Arbour (at para. 127)

[59] The allegations in the amended statement of claim against Mr. Delaney, relied on by the Arbour defendants in the third-party claim, are that Mr. Delaney should have identified and investigated various badges of fraud, and that his failure to do so resulted in the issuance of materially misleading financial statements. Mr. Delaney was required to ensure that the financial statements did not contain false or misleading information. He should have made reasonable inquiries to determine whether reported information was accurate. His failure to inform himself that the Arbour Group was engaging in misfeasance resulted in the issuance of materially misleading financial statements.

[60] The plaintiffs allege that the Arbour defendants engaged in intentional acts to perpetrate a fraud and misappropriate funds. They allege that part of this was carried out by Mr. Arbour instructing Ms. Biefer about how she was to record transactions in the company's books, on which Mr. Delaney later relied.

[61] The third-party claim pleads no connection between the third parties and the plaintiffs' claimed damages. There is no allegation in the third-party claim that the third parties owed duties

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to the plaintiffs or caused the plaintiffs' damages. Nor is it alleged that the third parties directed the Arbour defendants or anyone else to participate in the Arbour defendants' alleged misdeeds, or that the third parties participated in those alleged misdeeds, or that they were required to and failed to identify or investigate the Arbour defendants' misdeeds.

[62] There is no allegation of an express or implied contract for indemnity. There is no suggestion that the third parties are the "real" wrongdoers *vis-à-vis* the plaintiffs' claims, and that it would be inequitable for damages to be paid by the Arbour defendants when they were caused by the third parties. There is no suggestion that the third parties could have been liable directly to the plaintiffs for all or part of the claim against the party seeking the indemnity.

[63] I do not find that the *Tzaras* case assists the Arbour defendants. That case considered whether the doctrine of *ex turpi causa* (that a party should not be able to pursue damages in connection with its own wrongful act) applies to prevent a third-party claim for contribution and indemnity. The third parties were alleged to have perpetrated a fraud. It is not a case where someone alleged to have perpetrated a fraud brought a third-party claim based on negligence for indemnification of the fraud.

[64] In my view, *Tzaras* is best understood if considered in the context of the proposition that an implied indemnity will arise where the party from whom the indemnity is sought could have been liable in whole or in part to the party who received the damages award. In *Tzaras*, the third parties were alleged to be part of the fraud.

[65] This case is the opposite. The Arbour defendants seek indemnification for their allegedly fraudulent acts, but do not allege the third parties were part of those acts. They allege the third parties engaged in torts against them, not in any wrongdoing they may have committed against the plaintiffs.

[66] I agree with the third parties that there is no connection pleaded between the damages the plaintiffs claim to have sustained and the purported actions of the third parties. The pleading does not allege a situation in which the Arbour defendants may have to pay the plaintiffs for actions caused by or contributed to by the third parties.

[67] Whether the pleading could sustain a claim for damages from the third parties to the Arbour defendants is not the issue. The issue is whether it can sustain a claim for indemnity. I find that it cannot, as drafted, for the reasons above.

Disposition on striking of the claim

[68] In summary, the claim is struck as disclosing no reasonable cause of action because the third-party claim:

- alleges no duties owing to the plaintiffs;
- does not allege that the third parties are joint tortfeasors with the Arbour defendants toward the plaintiffs;

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- does not allege the third parties could have been liable to the plaintiffs for all or part of the claim;

- does not suggest or identify any unjust enrichment or other equitable unfairness that would result from the Arbour defendants not being able to seek indemnity from the third parties; and

- does not demonstrate any connection between the wrongdoing alleged by the plaintiffs against the Arbour defendants, the damages the plaintiffs claim to have suffered, and the actions pleaded in the third-party claim to have been engaged in by the third parties.

Leave to Amend

[69] The third parties state the cause of action is fatally flawed and cannot be cured by an amendment. They argue that the defects are not a matter of drafting that could be cured with an amendment. The only cure would be to change the pleading fundamentally, to plead a different theory of the case. The third parties argue that amendments are not intended to allege whole new theories of liability, but to cure defective drafting in support of the theories that are alleged.

[70] The Arbour defendants state that they should be granted leave to amend if there are deficiencies in the claim.

[71] I accept the Arbour defendants' submission that a claim "should be read generously to accommodate drafting deficiencies", and that "pleadings should be struck out without leave to amend only in the clearest of cases, especially if the deficiencies in pleadings can be fixed by amendment and there is no prejudice to the responding party in granting leave to amend": *Lorion v 1163957799 Quebec Inc*., 2015 ONSC 2417 at paras. 14-16.

[72] The courts have explained when leave to amend should not be granted as follows:

> Leave to amend the claim should not be granted where there is no reason to suppose that the party can improve their case by amendment, or if an entirely new cause of action would have to be set up by way of amendments that prejudiced the defendants: *Miguna v. Ontario (Attorney General)*, 2005 CanLII 46385 (Ont. C.A.).: *Dean v. ICCRC*, 2020 ONSC 2486, at para. 35.

[73] In accordance with my reasons above, the new claim will have to look very different from the claim as currently drafted in order to survive further attack. However, the third parties did not allege any prejudice that would flow from granting leave to amend, even if the amendments significantly change the foundation of the claim. In these circumstances, heeding the words of *Dean v. ICCRC* set out above, I find that the Arbour defendants should be granted leave to amend the third-party claim. The amended claim must meet the legal tests described above to sustain a claim for contribution and/or indemnity. It must plead the material facts, in more detail than was contained in the original third-party claim, in support of the allegations. It must not be a claim for damages disguised as a claim for contribution and indemnity.

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Disposition

[74] The third-party claim is struck with leave to amend within the parameters set out above. A fresh as amended third-party claim shall be served by March 21, 2025.

[75] The parties are encouraged to agree upon costs. If they are unable to agree, the third parties may make costs submissions of no more than three double-spaced pages within seven days. The Arbour defendants may respond with the same page limits within seven days thereafter. There shall be no reply submissions without leave. Submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Date: March 7, 2025

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TAB 72

The rules set out in the *Bills of Exchange Act* have required supple mentation by the courts to take account of other means of giving notice, especially through the clearing system. Notice may be given by telegram,[53] and presumably also now by telex or fax. Whether notice by any means other than by receipt of the dishonoured bills is notice of dishonour is a question of fact, so that a telephone communication might in the circumstances only be a warning about dishonoured bills sent but not yet received.[54] The onus of proving dishonour is on the person alleging it.[55]

Where a cheque is presented for payment through the clearing system, it is presumed that it will be dishonoured through the system[56] so that the collecting bank will not learn of the dishonour until the cheque is returned to it, as is required by the clearing rules within one day following its receipt.[57]

Once a cheque has been dishonoured, the collecting bank is entitled to reverse the provisional credit[58] in its customer's account. Today, provision for reversal of a provisional credit is normally made in the banker and customer contract; this common law right has been long established in England[59] although, quite remarkably, less well so in Canada where it has only been clearly accepted since the mid-1970s.[60] Normally, the bank will have recourse to reversal of a provisional credit where the account of the customer has sufficient funds, but

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[53] *Fielding & Co.* v. *Corry*, [1898] 1 Q.B. 268 (C.A.). *Cf. Godwin* v. *Francis* (1870), L.R. 5 C.P. 295.

[54] *Lombard Banking Ltd.* v. *Central Garage and Engineering Co. Ltd.*, [1962] 2 All E.R. 949 (Q.B.). See also: *Hamilton Finance Co. Ltd.* v. *Coverley; Westray; Waldbaum & Tosetti Ltd., supra*, n. 18.

[55] *Rear* v. *Imp. Bank of Canada* (1908), 7 W.L.R. 408 (B.C.S.C.); affd (1908), 42 S.C.R. 222.

[56] *Lajambe* v. *St.-Hilaire, supra*, n. 12. *Cf. Caisse Populaire (St. Jean-Baptiste) Belle Rivière Ltée* v. *Prov. Bank of Can.* (1979), 97 D.L.R. (3d) 527 (Ont. Co. Ct.).

[57] *Nat. Slag* v. *C.I.B.C., supra*, n. 33.

[58] The practice of provisional credits is well established: *Prideaux* v. *Criddle, supra*, n. 12; *Owens* v. *Que. Bank* (1870), 30 U.C.R. 382 (C.A.); *Conn* v. *Merchants Bank* (1879), 30 C.P. 380; *Bank of N.S.* v. *Sharp* (1975), 57 D.L.R. (3d) 260 (B.C.C.A.).

[59] *Re Mills; Bawtree & Co., Ex p. Stannard* (1893), 10 Morr. 193 (Ch. D.), *per* Vaughan Williams J. at 212 and *Capital & Counties Bank Ltd.* v. *Gordon*, [1903] A.C. 240 (H.L.), *per* Lord Lindley at 248.

[60] *Jones* v. *Bank of Montreal* (1869), 29 U.C.Q.B. 448 (Q.B.); *Owens* v. *Que. Bank* (1870), 30 U.C.R. 382 (C.A.); *R.* v. *Bank of Montreal* (1886), 1 Ex. C.R. 154; *Huron & Erie Mortgage Corp.* v. *Rumig* (1969), 10 D.L.R. (3d) 309 (Ont. C.A.); *Royal Bank* v. *Wild* (1974), 51 D.L.R. (3d) 188 (Ont. C.A.); *Bank of N.S.* v. *Sharp, supra*, n. 58; *Bank of N.S.* v. *Taylor* (1979), 27 N.B.R. (2d) 14 (Co. Ct.).

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where the account is in overdraft or reversal of the provisional credit does not yield the full amount of the dishonoured cheque, the bank still has enforceable rights in relation to the cheque.[61] The bank may either enforce such rights against the drawer of the cheque or other parties liable on it,[62] or against its own customer.[63] The precise legal status of a bank and the nature of its rights flowing from the dishonoured cheque and the failed reversal of the provisional credit are unclear.[64] It could not be a holder in due course since it would have had notice of dishonour, nor are there any obvious continuing rights in the cheque left from before sending it for collection, so that the rights must be of a restitutionary nature. The bank may be a holder for value.[65] Any surplus recovered by the bank should be given to the customer.[66]

It remains to note that a bank cannot exclude responsibility entirely for liability in collection.[67]

3. The "Owner's" Causes of Action Against a Collecting Bank

Although a collecting bank is under a duty at common law to collect cheques and instruments on behalf of its customer, in so doing it risks dealing with the instrument or its proceeds in violation of the interests of some person having title or prior possessory rights in it. A bank which collects a cheque for a person without title in it or with a defective title might be subject to actions in conversion, restitution or waiver of tort. Before examining the "owner's" causes of action against a bank, it is necessary to establish the legal status enjoyed by a bank when it collects a cheque, both at common law and pursuant to section 165(3) of the *Bills of Exchange Act* and the origins of a bank's authority to collect cheques. It should be noted at the outset that the common law prevails for the

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[61] *Goodall* v. *Exchange Bank* (1887), M.L.R. 3 Q.B. 430.

[62] *Caisse Populaire (St. Jean-Baptiste) Belle Rivière Ltée.* v. *A. & L. Auto Wreckers Ltd.* (1978), 82 D.L.R. (3d) 766 (Ont. Div. Ct.); *Huron & Erie Mtge. Corp.* v. *Rumig, supra*, n. 60; *Royal Bank* v. *Wild, supra*, n. 60.

[63] *Bank of N.S.* v. *Taylor, supra*, n. 60 and *Bank of Montreal* v. *Vaillancourt* (1983), 149 D.L.R. (3d) 560 (Ont. C.A.).

[64] *Westminster Bank Ltd.* v. *Zang, supra*, n. 43.

[65] *Royal Bank of Scotland* v. *Tottenham*, [1894] 2 Q.B. 715 (C.A.).

[66] *Bank of B.N.A.* v. *Warren & Co.* (1909), 19 O.L.R. 257 (C.A.).

[67] *Browne* v. *Commercial Bank* (1853), 10 U.C.Q.B. 129 (C.A.), and *Bank of Montreal* v. *Dom. Bank* (1921), 60 D.L.R. 403 (Ont. Co. Ct.).